2019 IL App (2d) 170261-U
No. 2-17-0261
Order filed June 17, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-2677
GORDON L. VANDERARK,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant failed to raise a meritorious claim of ineffective assistance of counsel in his postconviction petition and summary dismissal of his petition was thus proper.

¶ 2 The defendant, Gordon Vanderark, appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). On appeal, the defendant argues that he raised an arguably meritorious claim of ineffective assistance of trial counsel. We affirm.

¶ 3 BACKGROUND

¶ 4 In 2010, Judge Blanche Hill Fawell sentenced the defendant to 22 years' imprisonment for aggravated driving while his license was revoked (DWLR) (625 ILCS 5/6-303(a), (d-5) (West 2008)) and aggravated driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (d)(2)(E) (West 2008)). In September 2011, Centralia Correctional Center inmate Harold Meyers, Jr., sent a letter to Judge Fawell indicating that his fellow inmate, the defendant, had a "hit list" of people he wanted killed. The list included Judge Fawell; Audrey Anderson, the assistant State's attorney who prosecuted his DUI case; the defendant's ex-wife, Tina Wiggens; Wiggens's new boyfriend; and the man who held the defendant's power of attorney, Richard Temes.

¶ 5 Judge Fawell turned Meyers' letter over to the sheriff's department, which opened an investigation in conjunction with the Du Page County State's Attorney's office. Pursuant to an overhear authorized by Judge Kathryn Creswell, Meyers wore a wire on October 19, 2011, and recorded his conversations with the defendant about the murder-for-hire scheme. In the recorded conversations, the defendant described in detail how he wanted Meyers to kill the people on the list. He also wanted Meyers to kill anyone else present at the time of the murders, including Judge Fawell's husband and children. The defendant repeatedly told Meyers that he was serious. On November 15, 2011, Meyers wore a wire a second time and recorded more discussions with the defendant about the murder-for-hire plot.

¶ 6 On November 16, 2011, the defendant was brought to the Du Page County courthouse to be interviewed. He was confronted with the recording of his conversations with Meyers and various documents, including a "hit list" and a promissory note to Meyers, dated February 28, 2011. The promissory note indicated that $70,000 was to be paid by Temes from the defendant's account, with $2,000 being paid as a down payment. The defendant acknowledged that he had made the documents, but he stated that the $2,000 was for 24 watercolor paintings that he had

purchased from Meyers and that the $70,000 was to be paid to Meyers for his services in collecting money from Temes. Following the interview, the defendant was charged with multiple counts of solicitation of murder for hire, with the intended victims alleged to be Judge Fawell, Anderson, Wiggens, and Temes.

¶ 7 Prior to trial, the defendant made an oral motion *in limine* to exclude a letter, dated December 26, 2012, that Meyers wrote to the State. In that letter, according to defense counsel, Meyers thanked the State for its help in getting him transferred to a different prison and also included some disparaging comments about the defendant. The defendant argued that the letter was not relevant to the proceedings and should be excluded. The State did not object and the trial court stated that the letter would be excluded by agreement. The letter was never made part of the record and the defendant never filed a written motion *in limine*.

¶ 8 On May 8, 2013, the trial court conducted a jury trial. Meyers testified that he and the defendant spoke frequently while in Centralia. The defendant was upset with Temes, who was taking care of his finances. He was upset with Wiggens, who was a "gold digger" and was taking his money while having an affair with another man. He was also upset with Judge Fawell and with Anderson. He hated both of them and would get red-faced when he talked about them.

¶ 9 According to Meyers, the defendant asked him if he had ever killed anyone. Meyers replied that, if he had, he would not tell the defendant. The defendant told him that "he had some jobs that he needed to get done," which Meyers understood to mean that the defendant wanted him to "eliminate" or "threaten" someone. The defendant then showed him a "hit list," which included Judge Fawell and her husband, Wiggens and her boyfriend, and Wiggens's brother and his daughters. The defendant explained that he wanted Meyers to kill the people on the list after Meyers was released from prison.

¶ 10 Meyers testified that he was to be paid $70,000 for the murders, with $2,000 paid as a down payment to show good faith. The defendant had Temes transfer $2,100 into Meyers' prison trust account. The remainder was to be paid after the murders. Meyers explained that, because he wanted a receipt for the money, he and the defendant came up with the idea that the receipt would show that the money had been for watercolors that Meyers had painted. Although he received a receipt, Meyers did not give any watercolors to the defendant or Temes.

¶ 11 Meyers testified that, at first, he thought the defendant was just talking tough, and he thought that the defendant was a "sucker" and that he would take the defendant "for his money." However, he later realized that the defendant was not joking. Meyers testified that he then wrote a letter to Judge Fawell letting her know that the defendant wanted her killed. After being approached by the Du Page County State's Attorney's office, he agreed to wear a recording device and tape some of his discussions with the defendant. The court admitted these recordings into evidence. Meyers testified that he received no money or sentence reduction for his help with the prosecution.

¶ 12 Temes testified that he first met the defendant when they were both inmates in the Du Page County jail. The defendant asked him to help him with his finances and added his name as power of attorney to his Chase bank account. Temes transferred $2,100 from the defendant's account to Meyers' account. Temes did not receive any watercolor paintings.

¶ 13 Michael Gardner testified that he was the defendant's cellmate at Centralia for seven or eight months. The defendant would talk many times a day about Wiggens and her boyfriend stealing his money. He wanted his money back. The defendant would get red in the face and raise his voice when he talked about Wiggens. Toward the end of their time as cellmates, the defendant began telling Gardner a couple of times a week that he wanted Wiggens to be killed

painfully. He also wanted Anderson and Judge Fawell to be killed. Gardner believed that the defendant was serious, and he therefore wrote a letter to the State's Attorney.

¶ 14 After the close of the evidence, the jury found the defendant guilty of soliciting the murders of Judge Fawell, Anderson, and Wiggens. The trial court sentenced him to 40 years' imprisonment for solicitation as to Judge Fawell, 35 years for solicitation as to Anderson, and 20 years for solicitation as to Wiggens. The trial court ordered that all of the sentences be served concurrently with each other but consecutively to his existing sentence for DUI and DWLR. The defendant filed a timely notice of appeal.

¶ 15 On direct appeal, we affirmed the defendant's conviction and sentence. See *People v. Vanderark*, 2015 IL App (2d) 130790, ¶ 46. In so ruling, we noted that the evidence against the defendant was overwhelming:

> "The State's evidence included: (1) Meyers' detailed testimony about the solicitation-of-murder scheme; (2) the recordings in which the defendant himself talked about the scheme; (3) the "hit list" that the defendant wrote about whom he wanted killed; (4) the written receipt and promissory note for the scheme; (5) Temes' testimony about the financial transactions between the defendant and Meyers; and (6) Gardner's testimony that the defendant told him that he wanted Judge Fawell, Anderson, and Wiggens killed." *Id.* ¶ 35.

¶ 16 On August 1, 2016, the defendant mailed to the court a *pro se* postconviction petition. In that petition, the defendant argued, in relevant part, that trial counsel was ineffective in failing to introduce into evidence Meyers' December 2012 letter to the State thanking it for transferring him to a different prison. The defendant noted that Meyers testified at trial that he did not receive anything in exchange for his testimony. The defendant argued that trial counsel should have introduced the letter to impeach that testimony and "present the jury with why Myers [*sic*]

became an informant." The defendant asserted that such impeachment would have bolstered (1) the defense theory that the defendant's recorded statements were simple tough talk; and (2) Meyers' initial testimony that the defendant was a sucker, that he intended to take the defendant "for his money," and that he did not take the defendant's statements seriously.

¶ 17 On September 27, 2016, the trial court summarily dismissed the defendant's postconviction petition. As to impeaching Meyers' testimony with his December 2012 letter, the trial court noted that during Meyers' testimony, defense counsel did question Meyers about being transferred out of Centralia and the benefits he received for being an informant. The trial court noted that the defendant's trial strategy was to convince the jurors that the conversations with Meyers were merely "tough talk" and that the defendant did not seriously want anybody killed. Accordingly, the trial court stated that it would not have made sense, with that particular trial strategy, to impeach Meyers with the December 2012 letter to establish that Meyers was a liar, especially since there were recordings of the conversations between Meyers and the defendant. The trial court thus found the defendant's petition to be frivolous and patently without merit. The defendant filed a timely notice of appeal from that order.

¶ 18 ANALYSIS

¶ 19 On appeal, the defendant contends that the trial court erred by dismissing his petition at the first stage of postconviction proceedings because his claim of ineffective assistance of counsel was not indisputably meritless. The defendant argues that, once Meyers testified at trial that he had not received any benefit in exchange for his testimony and cooperation with the State, his prior inconsistent statement (the December 2012 letter) became relevant and defense counsel should have used the letter to impeach Meyers' testimony. The defendant contends that counsel's failure to impeach Meyers was arguably deficient and that it was arguably prejudicial

because absent counsel's failure to impeach Meyers, whose credibility was at issue, the jury might not have convicted him.

¶ 20 The Act (725 ILCS 5/122-1 *et seq*. (West 2016)) provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. Under the Act, a postconviction proceeding not involving the death penalty contains three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the trial court must independently review the postconviction petition and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); *Edwards*, 197 Ill. 2d at 244. If the petition is frivolous or patently without merit, the court must dismiss the petition in a written order. *Id.*

¶ 21 "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. Tate*, 2012 IL 112214, ¶ 9. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). An indisputably meritless legal theory is one which is completely contradicted by the record and fanciful factual allegations include those that are fantastic or delusional. *Id.* At the first-stage, the threshold for survival is low because most petitions are drafted by *pro se* defendants, who generally have little legal knowledge or training. *Tate*, 2012 IL 112214 at ¶ 9. We review *de novo* the first-stage dismissal of a postconviction petition. *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010).

¶ 22 A defendant has a constitutional right to effective assistance of counsel. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). We review claims of ineffective assistance according to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984)). Under that

standard, to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for this failure, there is a reasonable probability that the outcome of the proceeding would have been different. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). However, at the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel 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 the defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19. "This 'arguable' *Strickland* test demonstrates that first-stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of the proceeding." *Id.* at ¶ 20.

¶ 23 Although a claim of ineffective assistance of trial counsel can generally be defeated by a showing that a particular action or inaction by counsel amounted to trial strategy, any arguments that relate to trial strategy are more appropriate to the second stage of postconviction proceedings. *Id.* at ¶ 22. Thus, we limit our analysis to whether the defendant was arguably prejudiced. Our inquiry is whether it is arguable that a reasonable probability exists that the result of the defendant's trial would have been different had Meyers been impeached with his December 2012 letter. *Richardson*, 189 Ill. 2d at 411.

¶ 24 In the present case, taking all of the defendant's well-pleaded allegations as true, the defendant has not established any arguable prejudice. The record indicates that defense counsel cross-examined Meyers about being transferred out of Centralia:

> "Q. [Defense attorney]: Informants, they're not—other inmates, they don't like you. Other inmates don't like informants.
>
> A. No, they don't.
>
> Q. In fact, they don't call them informants, do they?

A. They call them snitches.

Q. Snitches, yes. And, as you've told the jury, if someone found out that you were wearing a wire, basically being a snitch, you might get stabbed or killed.

A. Correct.

***

Q. And the reason that people inform is to get, as in your case—

A. Benefits.

Q. (continuing)—money or some kind of a benefit.

A. Right.

***

Q. Yes. Now, in prison—Well, if you get found to be an informant, you might have to be transferred to a different prison.

A. True.

Q. In fact, you got transferred out of Centralia.

A. Yes, I did."

Based on this testimony, the jury was aware that the defendant was transferred to another prison as a matter of protection because he was an informant. Accordingly, impeaching Meyers' testimony that he received no benefit in exchange for his testimony with the December 2012 letter would not have changed the outcome as the jury was already aware that the defendant received the benefit of a prison transfer.

¶ 25 The defendant argues that the impeachment was critical because the case turned on the credibility of Meyers' assertions of Vanderark's intent, *i.e.*, was it merely tough talk between inmates or was it an actual solicitation for murder. However, even if Meyers' was impeached and his testimony discounted, the outcome would not have changed. We noted in the

defendant's direct appeal that the evidence against the defendant was overwhelming. That evidence included audio recordings of the defendant's conversations soliciting Meyers to commit the murders, a written "hit-list", Temes' testimony about the financial transactions between the defendant and Meyers, and Gardner's testimony that the defendant told him he wanted Judge Fawell, Anderson, and Wiggens killed. Moreover, in closing argument, defense counsel aggressively attacked Meyers' credibility, arguing that he was not credible because he had multiple convictions, had been in and out of jail for 30 years, and was an admitted liar. Accordingly, the defendant has failed to establish any arguable prejudice and his claim for postconviction relief was properly dismissed.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 28 Affirmed.