

2014 IL App (1st) 121135-U
No. 1-12-1135
Order Filed July 25, 2014

SIXTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	No. 06 CR 673
v.)	
)	
CORNELIUS BROWN,)	
)	Honorable
Defendant-Appellant,)	Charles P. Burns,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Summary dismissal of the defendant's postconviction petition was reversed. The defendant's claim of ineffective assistance of defense counsel had an arguable basis in law and fact.

¶ 2 Following a jury trial, the defendant, Cornelius Brown, was convicted of first degree murder in connection with the death of Jonathan Davis and sentenced to 50 years' imprisonment. Following the affirmance of his conviction and sentence on direct appeal and denial of his petition for leave to appeal to the supreme court, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The circuit court of Cook County summarily dismissed his petition.

¶ 3 The defendant appeals. He contends that his petition stated the gist of a constitutional claim of ineffective assistance of counsel. Therefore, summary dismissal of his petition was error. We agree and reverse and remand the case for further proceedings

¶ 4 BACKGROUND

¶ 5 I. Pretrial Proceedings

¶ 6 The defendant was charged by indictment with the death of Mr. Davis. On August 15, 2007, defense counsel informed the trial court that he was not prepared to file his answer to discovery. The defendant was claiming self-defense, and defense counsel was trying to locate an additional witness.

¶ 7 On September 12, 2007, defense counsel filed the defendant's answer to discovery asserting self-defense and listing unidentified witnesses as "A-, B-." In addition, defense counsel filed a document entitled "Affirmation by Defendant." In the document, the defendant acknowledged that defense counsel advised him that a trial would not be in his best interest and that a self-defense strategy did not demonstrate the likelihood of success and was not supported by the testimonial or physical evidence in the case.

¶ 8

II. Jury Trial

¶ 9

The testimony and evidence set forth below are taken from the Rule 23 Order disposing of the defendant's direct appeal. See *People v. Brown*, No. 1-08-0475 (2009) (unpublished order under Supreme Court Rule 23).

¶ 10

On December 12, 2005, Percy Spearman and Mr. Davis had drinks at the Marquis Room, located on Madison Street in Chicago. The two men left to purchase cigarettes at the gas station next door. As they stood outside, the defendant and Michael Hall arrived in Mr. Hall's blue Chevy Caprice and approached them. The four men knew each other and initially engaged in friendly conversation.

¶ 11

Mr. Spearman testified that Mr. Davis became angry when Mr. Hall "started 'grabbing on' him." *Brown*, slip order at 2. Messrs. Davis and Hall began to argue, and the defendant joined in the argument; the argument was not physical. The defendant told Mr. Davis " 'don't be right here when I come back' and drove off" in the Chevy Caprice with Mr. Hall. *Brown*, slip order at 2.

¶ 12

Messrs. Davis and Spearman were standing in front of the Marquis Room talking with friends when Mr. Hall and the defendant returned. Messrs. Hall and Davis began arguing. When the defendant asked what was going on, Mr. Spearman stated that he did not want to get involved. After urging Mr. Davis to leave, Mr. Spearman started walking toward a local restaurant. Turning back to the scene, Mr. Spearman saw the defendant pointing a gun at Mr. Davis. Mr. Davis had his hands in the air and was yelling " 'aha, aha, aha.' " *Brown*, slip order at 3. The next morning, the police took Mr. Spearman to the police station, where he identified the defendant as the person who shot Mr. Davis. *Brown*, slip order at 3.

¶ 13 Mr. Hall testified that, after the initial argument with Mr. Davis, the defendant and he drove to the defendant's residence to obtain more alcohol and then returned to the Marquis Room. While Mr. Hall remained in the Chevy Caprice pouring a drink, the defendant and Mr. Davis got into a heated argument and began pointing fingers in each other's faces. As Mr. Hall got out of the Chevy Caprice to break up the argument, he heard a gunshot and ran. As he ran from the scene, he saw Mr. Davis on the ground and the defendant still standing there. *Brown*, slip order at 3.

¶ 14 Mr. Hall acknowledged that on December 14, 2005, he made a statement to an assistant State's Attorney and a detective that was written out in front of him. According to the statement, Mr. Hall heard the defendant say "F- -k this s- -t," and saw the defendant pull out a gun and point it at Mr. Davis. Mr. Hall then heard a "bang." *Brown*, slip order at 4. Before the grand jury, Mr. Hall testified that when he attempted to break up the argument between Mr. Davis and the defendant, the defendant pulled out a gun and shot Mr. Davis. Although at the defendant's trial, Mr. Hall claimed he could not remember if that was what happened, his statement and his testimony before the grand jury were confirmed by testimony given by the assistant State's Attorneys. *Brown*, slip order at 4.

¶ 15 According to the testimony of police officers, DiPinto and Bunyon, they were alerted to the scene by a gunshot and saw the defendant standing over Mr. Davis. Officer DiPinto saw a gun in the defendant's hand. Both the defendant and Mr. Hall fled the scene. Officer DiPinto followed the defendant and saw him discard the gun. The defendant was then apprehended. *Brown*, slip order at 4.

¶ 16 Testifying on his own behalf, the defendant stated when Mr. Hall and he returned to the Marquis Room, Messrs. Davis and Hall resumed arguing. When the defendant tried to calm

them down, Mr. Davis and the defendant began to argue. The defendant had no previous problems with Mr. Davis, and he was not afraid to approach him or argue with him. *Brown*, slip order at 5. Eventually, the argument escalated from words to gestures in the form of raising their hands back and forth to each other. The defendant knew that Mr. Davis could be violent; he had once hit a friend of the defendant's. When Mr. Davis kept telling him that " 'I better get out of his face,' and 'when he reached back up again, I just pulled the gun.' " *Brown*, slip order at 5. The defendant believed his life was in danger but acknowledged that Mr. Davis did not touch him, except when the two were finger-pointing at each other. The defendant did not see Mr. Davis with a weapon. While the defendant claimed Mr. Davis lunged at him, the movement he demonstrated to the trial court showed unclenched hands at his waistline and pointed down; the court described the movement as a " 'slight feint' " rather than a lunge. *Brown*, slip order at 6.

¶ 17 The defendant admitted he told police that " 'a short dude with a gray hoodie on' " shot Mr. Davis. *Brown*, slip order at 6. The defendant admitted he lied to police when he denied speaking to Mr. Davis, possessing a gun or shooting Mr. Davis, but he did so because he was afraid.

¶ 18 The trial court rejected defense counsel's request for self-defense and second-degree murder instructions. The court found that the defendant was the aggressor and used excessive force. The court concluded that nothing in the testimony of any of the witnesses could cause the jury to reasonably conclude that the defendant was acting in self-defense or had any belief, reasonable or unreasonable, that deadly force was justified in this case. *Brown*, slip order at 7.

¶ 19 The jury found the defendant guilty of first degree murder, and the trial court sentenced him to 50 years' imprisonment. This court affirmed his conviction and sentence on direct appeal. The supreme court denied his petition for leave to appeal.

¶ 20 III. Postconviction Proceedings

¶ 21 The defendant filed a *pro se* postconviction petition, alleging, *inter alia*, the ineffective assistance of counsel. The defendant claimed that defense counsel failed to contact and interview two witnesses, Rudolph Griffin and Charles Starnes, whose testimony, together with that of the defendant, would have provided the evidence necessary for jury instructions on self-defense and second degree murder. The defendant supported his petition with the affidavits of Messrs. Griffin and Starnes and his own affidavit.

¶ 22 In his affidavit, Mr. Griffin averred, that if called as a witness, he would testify as follows. On the first Monday in December 2005, Mr. Griffin was standing in front of the Marquis Room when Mr. Davis approached him, and the two began to argue. The defendant, whom Mr. Griffin referred to as "Ghost" pulled up in his van and motioned for Mr. Griffin to get into the van. As he drove around the block, the defendant asked what the argument was about and told Mr. Griffin to "[c]ool [o]ff." At the corner of Madison Street and Leclair Avenue, Mr. Griffin was exiting the van when Mr. Davis began shooting at them, blowing out the back passenger window. The defendant and Mr. Griffin ducked down, and the defendant drove away. Mr. Griffin and the defendant were aware of Mr. Davis's reputation for shooting at people and carrying a gun most of the time.

¶ 23 In his affidavit, Mr. Starnes averred, that if called as a witness, he would testify as follows. Around 3 p.m. on December 5, 2005, Mr. Starnes was walking in the vicinity of Madison Street and Leclair Avenue when he saw the defendant driving down Madison

Street in his van. When the defendant reached the intersection of Madison Street and Leclaire Avenue, Mr. Davis emerged from a gangway and began shooting at the van, knocking out the back passenger window. On December 10, 2005, Mr. Starnes and the defendant discussed what Mr. Davis did to the defendant's van. The defendant told Mr. Starnes he was going to try to talk to Mr. Davis. Mr. Starnes told the defendant to "be careful."

¶ 24 In his affidavit, the defendant averred as follows. In discussing what defense to present, the defendant informed defense counsel about the incident in which Mr. Davis fired gunshots at Mr. Griffin and the defendant and that the incident was witnessed by Mr. Starnes. The defendant told defense counsel to talk to both men and call them as witnesses at his trial. The defendant acknowledged that he could not deny shooting Mr. Davis. These witnesses would support the defendant's claim that he was in fear for his life by testifying to Mr. Davis's previous actions and the fact that he usually carried a gun.

¶ 25 The circuit court summarily dismissed the defendant's petition. In addressing the defendant's claim that defense counsel was ineffective when he failed to contact or interview the witnesses, the circuit court determined that the defendant failed to show that the testimony of Messrs. Hall, Griffin and Starnes would have changed the outcome of the trial.¹

¶ 26 This court granted the defendant's late notice of appeal.

¶ 27 ANALYSIS

¶ 28 On appeal, the defendant contends that his petition stated the gist of a meritorious claim that defense counsel rendered ineffective assistance at trial. Specifically, the defendant asserts that defense counsel's failure to contact, interview and present the testimony of

¹ The defendant also included the affidavit of Mr. Hall, who testified at the defendant's trial for the State. On appeal, he raises only defense counsel's failure to present the testimony of Messrs. Griffin and Starnes.

Messrs. Griffin and Starnes resulted in the denial of the defendant's request for jury instructions on self-defense and second degree murder. The State responds that the defendant cannot satisfy the *Strickland* test for determining whether a defendant was denied his right to effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Therefore, the State asserts that summary dismissal of the defendant's petition was correct.

¶ 29 I. Standard of Review

¶ 30 Review of the circuit court's order summarily dismissing a postconviction petition is reviewed *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 31 II. Discussion

¶ 32 The defendant's petition was dismissed at the first of the three stages of postconviction proceedings. At the first stage, the circuit court conducts an independent review of the petition and determines whether the petition is frivolous or is patently without merit. Where the petition is determined to be either frivolous or patently without merit, the court must dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (citing 725 ILCS 5/122-2.1(a)(2) (West 2006)). A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis in fact or law. *Hodges*, 234 Ill. 2d at 11-12. In other words, the petition was based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 17.

¶ 33 In addressing the sufficiency of the defendant's petition, we are guided by the two-pronged test set forth in *Strickland*: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17; *Strickland*, 466 U.S. at 687-88. A defendant must make a showing

as to both prongs of the test. *Strickland*, 466 U.S. at 687. At the first stage of postconviction proceedings, a petition alleging the 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.

¶ 34

A. Factual Basis

¶ 35

In his petition, the plaintiff alleged that, prior to trial, he informed defense counsel of an incident in which Mr. Davis fired a gun at Mr. Griffin and the defendant and broke the rear passenger window of the defendant's van. The incident occurred a week prior to the defendant's shooting of Mr. Davis, and had been witnessed by Mr. Starnes. As a result, the defendant feared a similar attack from Mr. Davis the next week in front of the Marquis Room and fired his gun in self-defense. Neither Mr. Griffin nor Mr. Starnes was called to testify. While at trial, the defendant testified that he acted in self-defense in shooting Mr. Davis, the trial court denied his request that the jury be instructed on self-defense and second degree murder. The defendant's allegations were supported by the affidavits of Messrs. Griffin and Starnes and the defendant.

¶ 36

Hodges is instructive. In that case, Mr. Hodges testified that his shooting of the victim was in self-defense. The State argued that the victim was unarmed and that the physical evidence established that the only shots fired came from Mr. Hodges' and his codefendants' weapons. The jury was instructed on self-defense and second degree murder. Mr. Hodges was convicted of first degree murder, and his conviction was upheld on appeal. *Hodges*, 234 Ill. 2d at 5-6.

¶ 37 In his *pro se* postconviction petition, Mr. Hodges alleged that his defense counsel was ineffective for failing to investigate or interview three potential witnesses whose testimony would have corroborated his claim of self-defense. *Hodges*, 234 Ill. 2d at 6. The witnesses would have testified that the victim was armed and that a bystander was seen removing a gun from the scene. *Hodges*, 234 Ill. 2d at 8, 18. The supreme court concluded that none of Mr. Hodges' allegations as to what the witnesses would have testified to could be described as delusional or fantastic. Therefore, Mr. Hodges' petition had an arguable basis in fact. *Hodges*, 234 Ill. 2d at 18-19.

¶ 38 Likewise, in the present case, none of the facts in the affidavits of Messrs. Griffin and Starnes could be deemed fantastic or delusional. The defendant's averment in his affidavit that he informed defense counsel of the existence of these witnesses is supported by defense counsel's statement to the trial court that he was searching for a witness and the defendant's answer to discovery in which defense counsel listed two unknown witnesses. Therefore, the defendant's petition had an arguable basis in fact.

¶ 39 B. Legal Basis

¶ 40 In order to determine if the defendant's legal theory that defense counsel was ineffective for failing to interview and present the testimony of Messrs. Griffin and Starnes has merit, we focus on the defendant's claim of self-defense and whether their testimony would have supported that defense. If their testimony was insufficient for a jury instruction on self-defense, we then focus on whether that same testimony would have supported the defendant's request for a second-degree-murder instruction.

¶ 41 1. *Self-Defense*

¶ 42 Had Messrs. Griffin and Starnes been called to testify, their testimony, evidenced by their affidavits, would not have supported the theory that the defendant acted in self-defense. "In order to instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed that a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). If the State negates one of those elements, the defendant's claim of self-defense fails. *Jeffries*, 164 Ill. 2d at 128.

¶ 43 While the defendant claimed that he feared for his life because Mr. Davis was sometimes a violent person, the defendant was not afraid to approach Mr. Davis and engage in an argument with him. It was the defendant who upon leaving the scene with Mr. Hall, who warned Mr. Davis not to be there when he (the defendant) returned. There was also evidence that the defendant stated "F - -k this s - -t," just before shooting Mr. Davis.

¶ 44 Messrs. Griffin's and Starnes' testimony concerned the December 5, 2005, incident with Mr. Davis shooting at Mr. Griffin and the defendant but added nothing to the circumstances of the December 12, 2005, confrontation between the defendant and Mr. Davis. Even if the jury had heard their testimony, the evidence demonstrated that the defendant was the aggressor in the confrontation with Mr. Davis and did not act in self-defense. The defendant's legal theory that defense counsel was ineffective for failing to interview Messrs. Griffin and Starnes and call them as witnesses in support of the defendant's claim of self-defense was completely contradicted by the record. See *Hodges*, 234 Ill. 2d at 20.

¶ 45

2. Second Degree Murder

¶ 46 A person commits second degree murder when he commits the offense of first degree murder and at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing, but his belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2006). A defendant is entitled to instructions on those defenses which the evidence supports, even in instances where the evidence is " 'slight.' " *People v. Everette*, 141 Ill. 2d 147, 156 (1990).

¶ 47 On direct appeal, we rejected the defendant's claim that he was entitled to a second-degree- murder instruction based on unreasonable belief. *Brown*, slip order at 12. When asked by defense counsel what happened to put him in fear of his life, the defendant responded that he knew what type of person Mr. Davis was and that Mr. Davis kept yelling at him to "get out of" his face. Mr. Davis was in the course of putting his hand back up, when the defendant pulled out his gun. We found the defendant's testimony vague as to why or what caused him to believe his life was in danger.

¶ 48 Mr. Griffin's testimony, that Mr. Davis usually carried a gun, and Messrs. Griffin's and Starnes' testimony, that the week prior to his confrontation with the defendant Mr. Davis had shot at Mr. Griffin and the defendant, would have provided a basis for the defendant's fear, even if unreasonable, that Mr. Davis was armed and prone to use deadly force. In light of this court's comments that the defendant's testimony as to his fear of Mr. Davis was vague, the value of Messrs. Griffin and Starnes testimony to the defendant's request for a second-degree-murder instruction is clear.

¶ 49 Had defense counsel interviewed Messrs. Griffin and Starnes, their testimony could have provided the evidence necessary to entitle the defendant to an unreasonable belief second-degree-murder instruction. It is at least arguable that by failing to investigate and present the

testimony of Messrs. Griffin and Starnes, defense counsel's representation fell below an objective standard of reasonableness and prejudiced the defendant. The defendant's legal theory of ineffective assistance of counsel was not indisputably meritless. *Hodges*, 234 Ill. 2d at 22.

¶ 50

CONCLUSION

¶ 51

Since the defendant's claim of ineffective assistance of counsel does not lack an arguable basis in fact or law, his petition is neither frivolous nor patently without merit. Therefore, the circuit court erred in dismissing it summarily. We reverse the order of the circuit court dismissing the petition and remand with instructions to proceed to the second stage of postconviction proceedings.

¶ 52

Reversed and remanded with directions.