

2014 IL App (2d) 121310-U
No. 2-12-1310
Order filed June 19, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 01-CF-2720
)	
PATRICK I. BROWN,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition where the record positively rebutted his claim that trial counsel forced him to refrain from testifying.

¶ 2 Defendant, Patrick I. Brown, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2000)). He now appeals the dismissal of his postconviction petition (See 725 ILCS 5/122-1 *et seq.* (West 2012)) during the second stage of postconviction proceedings. Defendant contends that defense counsel prevented him from testifying on his own behalf. For the reasons that follow, we affirm.

¶ 3 As this case comes to us following a dismissal during the second stage of postconviction proceedings, review is *de novo*.¹ *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). All well pleaded facts not positively rebutted by the record are taken as true. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). A postconviction petition is a collateral attack and is limited to constitutional issues that could not have been previously raised. *People v. Rissley*, 206 Ill. 2d 403, 411-12 (2003).

¶ 4 Here, defendant contends that his right to choose whether to testify was violated. Our supreme court has explained that “[a] defendant’s right to testify at trial is a fundamental constitutional right, as is his or her right to choose not to testify.” *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997). Thus, this issue is cognizable in a postconviction petition. See *People v. Lester*, 261 Ill. App. 3d 1075, 1079 (1994).

¶ 5 Defendant alleges that he “repeatedly told both his appointed counsel that he wanted to testify.” He further alleges:

“On November 20, 2003, I, and counsel met to prepare for the upcoming testimony. Mr. Perri was putting questions to me relevant to admission from the signed statement and verbal statement given to the police. At a point in the process, I interjected saying, ‘I can’t remember what had happened, I’ve lost it.’ Mr. Morrison asked, ‘what’s going on with you?’ I told counsel, ‘my head is messed up, things happening in my head are confusing me, I hear things, I’m scared to testify, I can’t remember events, it started while that Pathologist was testifying, my head started hurting, I wanted to bolt from the

¹ In the course of his argument, defendant attacks the trial court’s reasoning; however, given that our review is *de novo*, such attacks are immaterial.

courtroom body naked because I felt I would come out of my skin.’ ‘I’ve a problem with the jury, I see things in their faces, I can’t testify.’ ”

Counsel then failed to pursue other options (such as a continuance) that might have allowed defendant to exercise his right to testify. Instead, counsel informed defendant that he would not be testifying and that they would abandon defendant’s claim of self defense and pursue a second-degree murder conviction instead. Defendant further avers that he suffers from a brain injury.

¶ 6 However, when counsel informed the trial court that defendant would not testify, the following colloquy took place between defendant and the trial judge:

“THE COURT: Mind if I *voir dire* him on that?

MR. PERRI: Please do.

THE COURT: Mr. Brown, you understand you have a right to testify?

MR. BROWN: I understand that.

THE COURT: Your attorney talked to you about that?

MR. BROWN: Correct.

THE COURT: Now, no one can tell you you can’t testify; understand?

MR. BROWN: I understand that.

THE COURT: So your attorneys have discussed with you the pros and cons of you getting on the witness stand; is that right?

MR. BROWN: They did.

THE COURT: And it is your decision not to testify?

MR. BROWN: I don’t want to testify.

THE COURT: Fair enough. You don't have to. That's your constitutional right. I just wanted to make sure that you understand that you have the right; no one can take that right away from you, no one can make that decision for you, understand that?

MR. BROWN: I understand that.

THE COURT: You want to persist in your decision not to testify?

MR. BROWN: That's right."

Based on these admonishments, we conclude that defendant's claim is positively rebutted by the record.

¶ 7 Quite simply, the trial judge carefully and directly explained to defendant his rights regarding choosing whether to testify. He explained that the decision belonged solely to defendant and no one could make it for him. He asked several times whether defendant understood his rights, and defendant answered affirmatively. Defendant did not ask any questions or express any hesitation. Instead, after the trial judge's painstaking explanation, defendant indicated that he wished to "persist in his decision not to testify." Thus, any suggestion that his attorney somehow coerced him into refraining from testifying is not well founded. See *People v. Fern*, 240 Ill. App. 3d 1031, 1042 (1993) ("The admonitions given by the trial court before and after the plea cannot simply be disregarded. To accept defendant's claim would require us to characterize the court's lengthy and exhaustive admonitions as merely a perfunctory or ritualistic formality—a characterization we are unwilling to make.").

¶ 8 Moreover, we note the allegations in defendant's postconviction petition do not support his position. Defendant alleged, *inter alia*, that he was "scared to testify" and that he "can't testify." Such allegations are consistent with defendant telling the trial court, "I don't want to testify."

¶ 9 Defendant contends that his attorney coached him as to how to respond to the trial court's admonitions. Defendant avers that his attorneys "reminded [him] about agreeing if the Judge inquired as the day progressed, that it happened as counsel had told [him]" and "[t]he Judge did question [him] about testifying." However, the trial judge did not simply question defendant about testifying, he first explicitly informed defendant that the decision regarding whether to testify was his alone and that no one could make it for him. Thus, it is immaterial what defendant's attorneys may have told him at a prior time. Defendant does not suggest that he did not believe the judge was in charge of the proceedings or that he believed his attorneys were somehow entitled to more credence than the judge.

¶ 10 Defendant does contend that he "was not in a conscious mental state of mind to protest, or to understand what was going on." However, whether defendant was fit to stand trial is a separate question; indeed, one which defendant raised in a different count in his postconviction petition. However, defendant does not advance this claim on appeal. We note that defendant's trial occurred in November 2003, and defendant was evaluated by a clinical psychologist on May 27, 2003. A report generated in the course of that evaluation is appended to defendant's postconviction petition. The report documents a brain injury. The psychologist's impressions state that defendant was "fully oriented;" had verbal intellectual abilities in the high-average range and visual intellectual abilities in the average range; and had verbal abstract reasoning and judgment in the average range. It noted defendant's cognitive strengths included "attention, concentration and mental processing, intellectual abilities, academic abilities, language abilities, auditory and visual memory, some visual skills ***, verbal judgment/reasoning/problem solving, and mental flexibility." Weaknesses included "better auditory than visual memory, although visual memory is in the average range;" impaired visual perception and visual-motor integration;

processing speed relative to this “strong verbal intellectual functioning,” and lack of “impulse control.” It further stated that defendant’s weaknesses were consistent with his brain injury. There is no indication in this report that defendant was not fit to stand trial. In turn, there is no reason not to accept defendant’s responses to the trial court’s admonitions at face value.

¶ 11 Accordingly, we hold that the record positively rebuts defendant’s claim that he did not properly give up his right to testify. We therefore affirm the judgment of the trial court.

¶ 12 Affirmed.