

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).

2014 IL App (4th) 121150-U

NO. 4-12-1150

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 24, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JARED MICHAEL SMITH,)	No. 09CF570
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court. Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly summarily dismissed defendant's postconviction petition, which alleged his trial counsel was ineffective for failing to call a witness whose testimony, according to defendant, would have changed the outcome of the trial. Because defendant's claim was not supported by affidavit and was contradicted by the record, defendant could not demonstrate prejudice to support a claim of ineffective assistance.

¶ 2 Defendant, Jared Michael Smith, filed a postconviction petition in the circuit court of Vermilion County. The circuit court summarily dismissed defendant's petition at the first stage of the proceedings. However, defendant claims the court relied upon the wrong standard in analyzing his petition and, rather than finding the petition frivolous or patently without merit, the court engaged in a substantive analysis of the merits. We find the court properly summarily dismissed the petition and therefore, we affirm the court's judgment.

¶ 3

I. BACKGROUND

¶ 4 In May 2010, a jury found defendant guilty of armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The testimony presented at trial demonstrated that at approximately 12 p.m. on a Friday in November 2009, the East Side Tap tavern in Danville was busy with patrons eating lunch and cashing their paychecks from nearby businesses. The robber, who was wearing a dark ski mask and dark clothing, entered the tavern, went behind the bar, and held a gun to the bartender's head while stuffing cash into his pockets. He fled through the back door. Several officers responded to the scene. One officer spotted an individual in the area matching the suspect's description. When the suspect spotted the officer, he began running. The officer caught the suspect, later identified as defendant, and arrested him.

¶ 5 Cynthia Esworthy was working in the tavern's kitchen at the time of the robbery. She heard the suspect yelling at the bartender about getting all of the money into his pockets. She recognized his voice as a customer who had been in the tavern the night before. A friend of hers, Bobby Bailey, had introduced this man to Esworthy the night before the robbery. This customer sat at the bar for several hours that night. Esworthy identified defendant as the customer she had been introduced to by Bailey and the suspect in the armed robbery.

¶ 6 After the jury found defendant guilty of armed robbery and unlawful possession of a weapon by a felon, the trial court sentenced defendant to concurrent prison terms of 27 years and 12 years, respectively. Defendant appealed, claiming the trial court had erred by (1) granting the State's pretrial motion to extend the speedy-trial term by 45 days, (2) allowing the police officers to testify about immediately recognizing defendant, and (3) allowing the jury to learn that defendant had been previously convicted of aggravated discharge of a firearm to establish

his status as a felon. This court affirmed defendant's convictions, concluding (1) the court did not err in granting the extension, (2) the admission of the officers' identification testimony did not rise to the level of plain error, and (3) it was not error for the jury to learn of the precise nature of defendant's prior felony. *People v. Smith*, 2012 IL App (4th) 100648-U, ¶¶ 34, 45, 54.

¶ 7 On September 5, 2012, defendant filed a *pro se* postconviction petition, alleging his trial counsel was ineffective for not (1) contesting the fact that defendant did not receive a "Neils-Biggers" hearing (see *Neil v. Biggers*, 409 U.S. 188, 199 (1972)); (2) calling witnesses Bailey and "the scientist who developed the DNA analysis" at trial; (3) challenging witness Cynthia Esworthy's identification of defendant's voice; and (4) filing a motion to suppress Esworthy's testimony. Defendant attached to his petition his own affidavit, stating that "[e]verything in contentions 1-4 is correct and true to the best of [his] knowledge." He also attached copies of excerpts from trial transcripts.

¶ 8 On November 27, 2012, the circuit court, the Honorable Michael D. Clary presiding, the same judge who presided over defendant's jury trial and sentencing, entered a written order denying defendant's petition. The court summarized defendant's claims as follows:

"He first asserts that his lawyer should have requested a suppression hearing to challenge the show-up ID of defendant by the bar patron, as the process was unnecessarily suggestive and there was a substantial likelihood of misidentification. At trial, the witnesses were examined and cross-examined regarding that ID. The transcript of the testimony does not support defendant's claim on this issue.

The next allegation is that [two] witnesses should have been called to testify and the failure of counsel to call them was ineffective assistance. Bobby Bailey was said to have introduced the defendant to the waitress the night before the robbery, presumably when the defendant was at the concert. No one called him to testify. The waitress testified that he was very sick suffering with pancreatic and bone cancer at the time of the trial. His testimony could have been more harmful to the defense than helpful, but it is uncontested that he was not available to testify.

The other witness was a crime lab DNA technician who performed part of the analysis. During the trial, counsel moved to bar the DNA evidence for failure of that witness to testify. Post-trial motions were filed on this issue but it was not raised on appeal.

The next claim is that counsel should have requested a *Frye* hearing on the issue of the waitress's ability to identify the masked man by his voice. She was not called as an expert making an analysis for purposes of rendering an expert opinion. She was called as an occurrence witness and testified regarding her observation of actual events. Defense counsel not only cross examined the waitress, but he called both the waitress and a police investigator to testify in his case-in-chief to challenge her ability to identify the defendant. It was for the jury to judge her credibility.

The final claim is that trial counsel was ineffective for failing to file a motion to suppress the testimony of witness Esworthy (the waitress) regarding the identification of the defendant. Defense counsel introduced ticket stubs and called Antonio Luster at trial who testified that he was with the defendant at a concert in Champaign County the night before the robbery so that he could not have been introduced to Esworthy that night. The jury considered this evidence in reaching a verdict.

There was no basis for the court to suppress or limit the identification testimony of Esworthy simply because there was another witness whose testimony conflicted with hers. It was not ineffective for counsel to fail to file a motion to suppress her identification or a motion *in limine* to limit her testimony.

The trial transcript does not support the claims that defense counsel's performance fell below an objective standard of reasonableness resulting in a violation of the defendant's constitutional right to counsel. For these reasons, the petition for post-conviction relief is denied."

This appeal followed.

¶ 9

II. ANALYSIS

¶ 10

Defendant contends the circuit court utilized the wrong standard when ruling on his postconviction petition. He insists the court clearly applied a "third-stage merits determination," rather than a "first-stage frivolous and patently without merit analysis."

Defendant pointed to the following facts in support of his claim: the court (1) used the term "denying," rather than "dismissing"; (2) referred to the *Strickland* standard, rather than the "more lenient *Hodges* 'arguable' standard"; (3) seemed to analyze the merits of defendant's claims; and (4) did not find defendant's allegations frivolous or patently without merit. Defendant argues the court's use of an improper standard led the court to deny his petition despite the existence of "at least one arguable claim."

¶ 11 Defendant claims his ineffective-assistance-of-counsel claim regarding trial counsel's error in failing to call Bailey as a witness was sufficient to survive first-stage dismissal. Defendant alleged Bailey would have testified, if called as a witness, that he did not know defendant and thus, he could not have introduced Esworthy to defendant the night before the armed robbery. According to defendant, had Bailey so testified, Esworthy's credibility as to her identification testimony (that she recognized the robber's voice as the same voice of the person she had been introduced to by Bailey the night before) would have been "destroyed." It follows that if defendant was not introduced to Esworthy the night before, then it was not his voice she identified. Defendant argues Bailey's testimony would have raised reasonable doubt as to his guilt.

¶ 12 Defendant acknowledges he did not attach an affidavit from Bailey to his postconviction petition; but, he suggests, an affidavit is not necessary when, as here, the record "amply demonstrates" his claim is capable of objective corroboration. Defendant argues he could himself testify that he and Bailey did not know each other, and thus, Bailey could not have introduced him to Esworthy. Further, defendant insists a review of Detective Bruce Stark's trial testimony provides objective corroboration as well. Detective Stark testified he had prepared a photo array, which included defendant's picture, in preparation of an anticipated interview with

Bailey. Defendant claims if Bailey knew defendant, a photo array would not have been necessary. Thus, he contends, the fact that Detective Stark needed a photo array to speak with Bailey corroborates defendant's position that he and Bailey did not know each other.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a three-step process for a convicted criminal to challenge his conviction in a collateral proceeding if the individual believes his conviction was the result of a denial of his constitutional rights. *People v. Tate*, 2012 IL 112214, ¶¶ 8, 9. If an issue was raised and decided on direct appeal, it is barred by the doctrine of *res judicata*. If it was not raised on direct appeal, but could have been, it is considered forfeited. *Tate*, 2012 IL 112214, ¶ 8.

¶ 14 In the first stage of postconviction proceedings, the circuit court must review the petition within 90 days. 725 ILCS 5/122-2.1(a) (West 2010). If the court finds the petition is frivolous or patently without merit, the court shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. 725 ILCS 5/122-2.1(a)(2) (West 2010). At this stage, the court may examine the court file, any decision by the appellate court, and any available transcripts. 725 ILCS 5/122-2.1(c) (West 2010).

"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. [Citation.] This first stage in the proceeding allows the circuit court 'to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' [Citation.] Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. At

this initial stage of the proceeding, there is no involvement by the State." *Tate*, 2012 IL 112214, ¶ 9 (quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001)).

¶ 15 If the circuit court does not dismiss the petition, it moves to the second stage, at which time the State must answer or move to dismiss. 725 ILCS 5/122-5 (West 2010). At this stage, upon the State's motion to dismiss, the court determines whether the allegations make a substantial showing of a constitutional violation. *Tate*, 2012 IL 112214, ¶ 10. If the petition survives second-stage dismissal, the court shall consider the merits of the petition at a third-stage evidentiary hearing. 725 ILCS 5/122-6 (West 2010).

¶ 16 This court reviews a first-stage summary dismissal *de novo*. *Tate*, 2012 IL 112214, ¶ 10. As we stated above, a dismissal at the first stage means the circuit court found the allegations frivolous and patently without merit. As our supreme court noted in *Hodges*, which quoted *Anders* for the definition of frivolous, " 'legal points arguable on their merits' are 'not frivolous.' " *People v. Hodges*, 234 Ill. 2d 1, 11 (2009) (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). Thus, in *Hodges*, the court held "that a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12.

¶ 17 The problem here, according to defendant, is the circuit court did not use the standard terminology for a first-stage dismissal, which, according to defendant, demonstrates the court "clearly failed to apply the correct standard." By not applying the applicable frivolous-and-patently-without-merit standard, the court mistakenly held defendant's allegations to a higher standard, even though his allegations, in particular his allegation regarding calling Bailey as a

witness, were sufficient to survive the low-threshold standard of a first-stage review. We disagree.

¶ 18 To support his claim, defendant cites *Tate* for the proposition that applying a second-stage standard is inappropriate at the first stage. *Tate*, 2012 IL 112214, ¶ 12. More specifically, the *Tate* court noted that, according to *Hodges*, a circuit court should apply a more lenient standard to an ineffective-assistance-of-counsel claim, rather than the traditional *Strickland* standard, when evaluating the claim at the first stage. *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17, quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). According to *Hodges*, "[a]t the first stage of postconviction proceedings under the Act, 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." (Emphases added.) *Hodges*, 234 Ill. 2d 1 at 17.

¶ 19 The Second District has considered an argument similar to defendant's here, and the reviewing court found the circuit court's utilization of the wrong standard was not a basis for reversing the dismissal. *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006); but *cf. People v. Newbolds*, 364 Ill. App. 3d 672, 679 (2006) (finding the court's use of the improper standard at the first stage was a basis for reversing its dismissal of the postconviction petition). Our court has recently aligned itself with the analysis in *Dominguez*. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17.

¶ 20 The *Dominguez* court explained that, since a reviewing court may affirm on any proper ground, a procedurally proper summary dismissal based on an improper ground may still be affirmed. *Dominguez*, 366 Ill. App. 3d at 473. Thus, if the reviewing court applies the proper standard, regardless of the standard used by the circuit court, and finds summary dismissal is

proper, then it should affirm. *Dominguez*, 366 Ill. App. 3d at 473. Applying the *Dominguez* rationale to a questionable second-stage standard, we held: "Thus, we conclude the use of an improper standard in analyzing a postconviction petition at the second stage does not itself serve as a basis for reversal, and we need not address whether the trial court used the wrong standard." *Snow*, 2012 IL App (4th) 110415, ¶ 17.

¶ 21 In line with *Snow*, we perform a similar analysis under the applicable *de novo* standard of review for dismissals of postconviction petitions and utilize the proper frivolous-and-patently-without-merit standard of first-stage summary dismissals, without concern for the standard utilized by the circuit court. Doing so, we conclude the court did not err in dismissing defendant's petition at the first stage.

¶ 22 Defendant did not attach to his petition an affidavit from Bailey. Therefore, in order to evaluate defendant's claim that he had never met Bailey, we have defendant's own affidavit, which, in essence, makes this conclusory and self-serving claim, versus the trial testimony of Esworthy, which positively rebuts it. Defendant also insists his claim can be objectively corroborated by the record with a review of Detective Bruce Stark's testimony. However, we fail to see how Detective Stark's trial testimony provides sufficient independent objective corroboration for defendant's claim that he and Bailey had never met. Presenting Bailey with a photo array including defendant's photo could serve to bolster Esworthy's testimony if Bailey identified defendant by name.

¶ 23 We disagree with defendant that he had alleged the gist of a meritorious claim sufficient to survive first-stage dismissal when he alleged counsel was ineffective for failing to call Bailey as a witness. First, we find it is not arguable that counsel's performance fell below an objective standard of reasonableness on this ground, as such a decision is generally considered

strategic and left to counsel's discretion. See *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Second, and perhaps more convincingly, we find it is not arguable that defendant was prejudiced by counsel's failure. The evidence presented at trial overwhelmingly demonstrated defendant's guilt. One witness identified defendant as the robber at a show-up within a few minutes of the robbery. Defendant's build and clothing matched the witnesses' descriptions of the suspect. Two other witnesses watched defendant, who had a gun in his hand, run from police. Another witness found defendant, who had money in his hands and pockets, in his yard trying to hide himself and money from police. The bank bag from the tavern was recovered on the ground near defendant. Gloves with defendant's DNA were also found on the ground nearby.

¶ 24 Based on the strength of the evidence presented at trial, defendant cannot demonstrate he was arguably prejudiced by counsel's failure to call Bailey as a witness. Without an affidavit from Bailey, we are left only with defendant's self-serving assertion that he and Bailey had never met. In light of Esworthy's testimony that Bailey introduced her to defendant the night before the robbery, defendant has failed to satisfy even the low threshold of a first-stage analysis. Therefore, we conclude defendant's assertion "has no arguable basis either in law or in fact" (*Hodges*, 234 Ill. 2d at 16), and we find the court properly dismissed defendant's petition.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the circuit court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.