

No. 1-12-1888

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 8598
)	
WILLIAM KENLOW,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition reversed where trial counsel was arguably ineffective for failing to call co-defendant to testify; reversed and remanded.

¶ 2 Defendant William Kenlow appeals from an order of the circuit court of Cook County, which summarily dismissed his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends his petition made an arguable claim that his counsel was ineffective for failing to call his co-defendant to testify. We reverse and remand for further proceedings under the Act.

¶ 3 The record reveals that on or about March 17, 2005, Dorwin Davis, Latrice Burns, and defendant were alleged to have shot and robbed Lionell Reed in the area of 95th Street and the

Dan Ryan Expressway in Chicago. Reed, whom defendant knew, sold shoes out of the back of a car and died of a single gunshot wound. Burns was tried separately and Davis and defendant were tried simultaneously before separate juries. The State's theory at trial was that Davis shot and robbed Reed and defendant was accountable for Davis' actions because he helped Davis plan and execute the robbery. The State's key evidence against defendant included two inculpatory statements he made, which the defense challenged as coerced and false.

¶ 4 On June 13, 2006, a hearing was held on defendant's motion to suppress the inculpatory statements. Defendant testified that his statements were not true, and he made them because a detective threatened that he would be charged with murder and his children would be taken by the Department of Children and Family Services. Defendant further testified that he was told he could go home if he confessed in a certain way. The detective denied making such threats or promises. The trial court found that defendant was not credible, and denied defendant's motion.

¶ 5 Prior to trial, defense counsel filed a motion to sever defendant's trial from Davis' trial on the grounds that defendant and Davis both made statements to prosecuting authorities that implicated themselves and each other. The motion stated it was possible that the State would wish to introduce Davis' statement against defendant at trial, which would directly incriminate defendant.

¶ 6 Ultimately, defendant and Davis were tried simultaneously before separate juries. Per defense counsels' request, the court decided to exclude the opposite jury for all cross-examinations. Additionally, defendant's jury was excluded from testimony about Davis'

statements to prosecuting authorities. Likewise, Davis' jury was excluded from testimony about defendant's statements to prosecuting authorities.

¶ 7 At trial, Officer Delroy Taylor testified that on March 17, 2005, at approximately 7 p.m., he was in the area of 95th Street and the Dan Ryan Expressway when he noticed a white Grand Am stop in an alley and turn off its lights. Officer Taylor then observed two men, later identified as defendant and Davis, exit the vehicle and walk past him. Officer Taylor lost sight of them, but then heard a gunshot fired in the vicinity. Davis and defendant, who was carrying a shoe box, ran past him and entered the Grand Am. After the vehicle drove off, Officer Taylor provided a description over the police radio.

¶ 8 Officer James Nichols and his partner responded to Officer Taylor's description and stopped the vehicle. Burns was the driver, Davis was in the front passenger seat, and defendant was in the back passenger seat. The police officers discovered a .45-caliber handgun and a shoe box inside the car. Burns, Davis, and defendant were transported separately to the police station.

¶ 9 Detective Danny Stover testified about an inculpatory statement that defendant made to him and another detective at the police station around 12:30 a.m. on March 18. Defendant stated that Davis had visited defendant the previous day and told defendant he wanted to commit a robbery because he needed money. Defendant and Davis discussed robbing Reed, referred to as "the shoe man," who sold shoes from a car and whom defendant thought would be an easy target. Davis showed defendant a .45-caliber gun, which defendant determined had a live bullet in the chamber. Davis and defendant discussed using the gun for the robbery and decided they

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would call Reed to set up a meeting place. Later in the day, Burns and Davis picked up defendant in a Grand Am driven by Burns. Once in the car, Davis and defendant discussed how they would commit the robbery. The plan was once they met Reed at the specified location, Davis would call defendant and ask him to bring \$10 to complete the purchase of shoes, whereupon defendant would create a diversion and Davis would point the gun at Reed.

¶ 10 Defendant and Burns waited in the car while Davis went to meet Reed. When defendant received the call from Davis to bring \$10, defendant left the car and approached Davis, handed him \$10, had a short conversation with Reed, and then turned around and walked away.

Defendant looked back and saw Davis pointing the gun at Reed. Reed grabbed for the gun and a shot was fired. Davis then ran from Reed's car and Reed drove away, hitting a series of cars before crashing. After defendant and Davis re-entered the Grand Am, Davis passed the gun to defendant to put in the trunk through a compartment in the back seat.

¶ 11 On cross-examination, Detective Stover stated that he believed defendant's statement was not truthful, and that defendant may have minimized his involvement. Detective Stover admitted that defendant's description of the incident differed from the testimony of Officer Taylor, who observed two men leaving the Grand Am at the same time. Detective Stover also acknowledged that his conversation with defendant was not memorialized or recorded.

¶ 12 Assistant State's Attorney Jennifer Bagby testified that she met with defendant on the morning of March 18 and, after she spoke with him for about 45 minutes, defendant indicated he wanted to make a videotaped statement. In the statement, which was transcribed and shown to the jury, defendant stated that in the early afternoon on March 17, Davis came to defendant's

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house and told him he wanted to commit a robbery because he needed money. Davis told defendant he wanted to rob "the shoe man," also known as Reed, and showed defendant his .45-caliber handgun, which defendant examined and determined had one bullet in the chamber. Davis wanted defendant to call Reed, but defendant declined to do so and Davis placed the call instead. Davis returned to defendant's house later in the day in a car driven by Burns. As Burns drove, Davis asked defendant how to approach Reed, but defendant told Davis to make the plans because defendant did not need the money. The plan was that defendant would create a diversion by approaching Davis and Reed while they conversed, and then "take [Reed's] car, go through his pockets and that's about it" while Davis held the gun to Reed.

¶ 13 When they arrived at an agreed-upon location to meet Reed, Burns and defendant stayed in the car. Burns asked defendant what his purpose was if he was not getting out of the car. Defendant interpreted that to mean that she was asking whether defendant was going to go help Davis with the robbery, to which defendant replied "no." Burns had proposed that defendant run up and rob Reed while Davis was buying shoes, to which defendant responded, "[N]o, I'm not going at like that. I'm not going that route."

¶ 14 Defendant then received a telephone call from Davis asking for \$10 to buy shoes, which defendant took to mean that he was to create a diversion. Defendant went to meet Davis, gave him \$10, had a quick conversation with Reed, and turned around and walked away. Defendant then turned back around and saw "a little tussling in the car" and that as Davis tried to get out, "he's pulling and then he fires the gun." Davis ran toward defendant carrying the gun and a shoe box. When they reached Burns' car, defendant put the shoe box in the back of the car and put the gun in the trunk through a compartment in the back seat, per Davis's instructions.

¶ 15 The State presented evidence that Reed died of a gunshot wound to the chest. Additionally, defendant tested negative for gunshot residue while Davis tested positive.

¶ 16 During closing arguments, the State contended that defendant aided and abetted Davis through his actions in checking Davis's gun, becoming a "sounding board" for Davis in Burns' car, and creating a diversion. Defense counsel contended that defendant knew what Davis was going to do and did not stop him, but was not accountable for Davis' actions. Defense counsel noted that during the videotaped interview, defendant stated that he refused to call Reed when Davis asked him to do so and told Davis and Burns he was not participating. Defense counsel also asserted that Detective Stover essentially testified that the State's best evidence--defendant's statement--was a lie. Defense counsel further stated that there was no physical evidence that linked defendant to the incident.

¶ 17 Following deliberations, the jury found defendant guilty of armed robbery and first-degree murder. The jury also found that during the commission of the offense of first-degree murder, defendant or one for whose conduct he was legally responsible was armed with a firearm. Defendant was sentenced to 25 years in prison for murder, with an additional 15 years because his accomplice had a firearm, and a concurrent term of 20 years in prison for armed robbery.

¶ 18 On direct appeal, defendant argued that he was denied his right to effective assistance of counsel because his counsel: (1) failed to request a specific jury instruction on withdrawal; (2) did not submit separate jury verdict forms for each theory of murder; and (3) failed to review defendant's telephone records before agreeing to a stipulation admitting them into evidence.

Defendant further argued he was denied a fair trial because the prosecution: (1) made repeated, inflammatory comments about him and his counsel; (2) violated the rules of discovery; and (3) misled his defense counsel regarding telephone records so that counsel would stipulate to them. On June 28, 2011, this court affirmed defendant's conviction, but vacated defendant's sentences and remanded the case to the trial court so that defendant could receive consecutive sentences for first-degree murder and armed robbery. *People v. Kenlow*, No. 1-09-0891 (2011) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 112936 (November 30, 2011).

¶ 19 On February 8, 2011, defendant filed the instant *pro se* post-conviction petition. Defendant alleged, among other issues, that his trial counsel was ineffective for failing to call Davis to testify. Defendant alleged that Davis wanted to testify that defendant did not help plan the robbery, refused to help Davis rob Reed, and gave Davis \$10 to buy shoes. Davis wanted to further testify that defendant walked away before Davis pulled out the gun, and defendant never had any items from the robbery. Defendant asserted that based on an attached affidavit from Davis, defendant had nothing to do with the planning of the armed robbery.

¶ 20 In his sworn affidavit, Davis averred that he asked defendant to help plan the robbery, but defendant refused. Davis further stated that defendant called Davis before the robbery occurred to tell Davis not to rob Reed, and defendant also said he would give Davis \$10 to buy shoes instead of helping plan the robbery. Additionally, defendant refused to help by walking away when he received a telephone call at the time Davis pulled out the gun. Davis further averred that defendant touched "neither of these items that pertained to the [r]obbery." Davis stated he wanted to testify on defendant's behalf, but defense counsel did not want to call Davis as a witness.

¶ 21 On April 30, 2012, the circuit court dismissed defendant's petition as frivolous and patently without merit because the claim was refuted by the record. The court further stated that it was unlikely that Davis' counsel would have allowed him to testify because it would have been strongly against Davis' interests to admit he was the sole perpetrator of the crime.

¶ 22 On appeal, defendant contends his petition makes an arguable claim that his counsel was ineffective for failing to call Davis to testify on his behalf. Defendant argues that Davis' affidavit was exculpatory and Davis' proposed testimony was corroborated to a degree by parts of defendant's videotaped statement, including his statements that he refused to call Reed, did not help plan the offense, and did not follow Davis' plan and instead gave him \$10 and walked away. Defendant further contends that in light of his counsel's argument that defendant's statements to the prosecuting authorities were untrue, Davis's potential testimony denying defendant's involvement could have created a reasonable doubt of his accountability for Davis' actions.

¶ 23 The Act provides a three-step process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2012). Proceedings begin when the defendant files a petition in the court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2012). At the first stage, the petition need only present the gist of a constitutional claim, which requires only a limited amount of detail. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). All well-pleaded facts are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). If the court determines the petition is frivolous and patently without merit, the petition is dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous and patently without merit only if the petition has no arguable basis either in law or fact, meaning that it is based on an indisputably meritless legal theory or a

fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009). An example of an indisputably meritless legal theory is one which is completely contradicted by the record and fanciful factual allegations include those which are fantastic or delusional. *Id.* at 16-17. We review the dismissal of a post-conviction petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 24 Generally, to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense, meaning that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). In first-stage post-conviction proceedings, where a lower pleading standard applies, a petition alleging ineffective assistance may not be summarily dismissed if: (1) it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and (2) it is *arguable* that the defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 25 We find that it is arguable that defendant's counsel was ineffective for failing to call Davis to testify. At trial, the State's primary evidence consisted of two statements defendant gave, one to a detective and one to an assistant State's Attorney. Defendant challenged the veracity of these statements and contended that while he knew of Davis' plan, he refused to participate. Davis' proposed testimony would have strengthened defendant's case. Davis' affidavit described how defendant refused to help at different points, including calling Davis to tell him not to rob Reed and walking away when he received a telephone call at the time Davis pulled out the gun. Davis' testimony could have been significant because, in addition to being exculpatory, Davis was the primary actor and the only person present for all of the alleged

planning and execution of the incident. Under these circumstances, it is arguable that defendant was prejudiced by the failure to secure Davis' testimony. If that is true, then his counsel's performance fell below an objective standard of reasonableness. Although we express no opinion on the ultimate outcome of defendant's petition, we find that it was sufficient to withstand summary dismissal at this stage of the proceedings.

¶ 26 We are not persuaded by the State's contention that defendant's claim should fail because Davis could have asserted his Fifth Amendment right against self-incrimination. In making this argument, the State relies on testimony about Davis' statements to prosecuting authorities that were only admitted before Davis' jury. We will not consider these statements. See 725 ILCS 5/122-2.1(c) (West 2012) (the court may examine the proceeding in which *the petitioner* was convicted) (emphasis added). Additionally, because all well-pleaded facts must be accepted as true at this stage of the proceedings (*Coleman*, 183 Ill. 2d at 380-81), we therefore accept Davis' assertion that he wanted to testify in a manner that would have bolstered defendant's defense. Further, as the State certainly knows, a belief that allegations are unlikely, without more, is insufficient to justify summarily dismissing a petition. *Hodges*, 234 Ill. 2d at 19.

¶ 27 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further post-conviction proceedings.

¶ 28 Reversed and remanded.