2011 IL App (1st) 103312-U

SIXTH DIVISION
February 3, 2012

No. 1-10-3312

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 02 CR 14089
	)	
TONY FOUNTAIN,	)	Honorable
	)	John P. Kirby,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Lampkin and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it summarily dismissed defendant's first postconviction petition which claimed that defendant's due process rights were violated by the allegedly false testimony of a detective, where the record before us does not support defendant's claim of a falsehood and any alleged error was harmless.

¶ 2 Defendant Tony Fountain was convicted by a jury of the first-degree murder of Chavana Prather and the intentional homicide of her unborn child. Prather, who was 17 years old and approximately three to four months pregnant, worked at a McDonald's restaurant. Defendant was in a relationship with the victim and he was her manager at the restaurant. The trial court sentenced defendant to consecutive terms of 60 years for the murder and 35 years for the homicide of the unborn child. Defendant's conviction was subsequently affirmed by this court on direct appeal. *People v. Fountain*, No. 1-06-0900 (Apr. 28, 2008).

¶ 3 Now defendant appeals the summary first-stage dismissal of his first *pro se* postconviction petition. Defendant raises only one claim on this appeal. He claims that the State violated his right to due process and deprived him of a fair suppression hearing, because Detective Robert McVicker, the sole witness at the hearing, allegedly lied when he testified that he had "noticed what appeared to be dried bloodstains on the back seat of the vehicle" and when the State failed to correct this allegedly false testimony.

¶ 4 For the reasons discussed below, we affirm the trial court 's summary dismissal.

¶ 5 BACKGROUND

¶ 6 Since there is no allegation of either insufficient evidence or actual innocence, we provide only a summary of the facts needed to understand the claims before us.

¶ 7 The evidence at trial established that defendant and the victim were in a relationship and that defendant was the manager of the McDonald's restaurant where the victim worked as an employee. The victim's body was found in a marshy area near 117th Street and Torrence Avenue in Chicago, in the afternoon of April 26, 2002. She was lying face down in a pond. She had suffered multiple stab wounds to her neck and face, blunt force injuries to her face, and bruising to her neck indicative of choking. The medical examiner testified that the victim received these injuries while alive and that she died after receiving a single, close-range shotgun blast that went through her right hand and into her chest.

¶ 8 Defendant was arrested in his vehicle around midnight on the night of April 26, 2002. At that time, he was taken into custody and his vehicle was impounded. Shortly before 10 a.m. on April 27, 2002, the police obtained search warrants for both defendant's house and vehicle.

¶ 9 Prior to trial, defendant filed two motions to quash: (1) a motion to

quash his arrest and suppress evidence; and (2) a motion to quash the two search warrants.

¶ 10 On August 30, 2004, a suppression hearing was held on the motion to quash arrest. Detective Robert McVicker, the arresting officer, was the sole witness. McVicker testified that, after learning of a death investigation, he and his partner, Detective Donald Buis, went to a marshy area near 117th Street and Torrence Avenue at approximately 4:30 p.m. in the afternoon of April 26, 2002, where they observed the body of a woman lying face down in a pond. The victim was in a McDonald's uniform and a McDonald's time slip with her name was in her pocket.

¶ 11 During interviews with employees at the McDonald's restaurant, McVicker learned that Prather had been in a relationship with defendant, that she had recently become pregnant, that Prather and defendant had a dispute when Prather asked defendant for money for an abortion, and that defendant owned a shotgun that he kept in the trunk of his vehicle. The security guard informed the detective that on the night of April 19, 2002, which was the last time that the victim had been seen alive, other employees had reported to the guard that they had observed the victim entering defendant's vehicle.

¶ 12 Prather's mother, who was also present at the McDonald's, also told the detective that defendant had been dating the victim and had made the victim pregnant.

¶ 13 Detective McVicker testified that he and his partner then parked near defendant's home, which was approximately eleven blocks north of where the body was found. Defendant exited his home shortly before midnight with his cousin, Earl Wilson. Both entered defendant's vehicle, a 1992 Lumina, which was parked nearby. After defendant's vehicle pulled out of its parking spot, the detective then activated his lights and pulled his squad vehicle in front of defendant's vehicle. After approaching the vehicle on foot, the detective testified that he shined a flashlight inside and that he "noticed what appeared to be dried bloodstains on the back seat of the vehicle." It is this statement that is at issue on this appeal.

¶ 14 The detective testified that, while defendant's vehicle was still near defendant's home and prior to the issuance of the search warrants, he inspected the vehicle's interior and used defendant's keys to open the trunk. However, no evidence was recovered at that time.

¶ 15 On August 30, 2004, at the conclusion of the suppression hearing, the

trial court denied the motion to quash arrest, finding probable cause. On September 24, 2004, the trial court heard argument on defendant's second motion, which was to quash the two search warrants. No witneses were called. During argument, defense counsel pointed out that, at the prior hearing, the detective had testified to observing apparent bloodstains. Then counsel noted "[t]hat is not in either one of the search warrants." Defense counsel stated that defendant was challenging not only the subsequent search, but also the original seizure of the vehicle that occurred at the same time as the arrest.

¶ 16 Denying the motion to quash the warrants, the trial court stated that "there is no doubt, as the defense argued, that there were certain facts not put into the search warrant." However, looking at only the facts listed in the complaints for the search warrants, the trial court found that there was probable cause to search both the home and the vehicle. The trial court did not address separately defendant's claim that he was also challenging the initial seizure of the vehicle.

¶ 17 The State also filed motions *in limine* including one concerning the State's own DNA expert. Specifically, the State sought to bar evidence of: (1) the indictment of Amy Rehnstrom, the DNA analyst, for falsifying her time records with the Illinois State Police crime laboratory; and (2) her guilty plea on October

8, 2004, to the charge of misdemeanor theft. On September 9, 2005, the trial court granted the State's motion.

¶ 18 At trial, the State's evidence included the testimony of April Winsley, with whom defendant had a romantic relationship from February through April 2002, and Earl Wilson, defendant's cousin. Both testified that defendant had admitted to them, on separate occasions, that he had murdered the victim. Specifically, April Winsley testified that: on April 19, 2002, defendant told her during a telephone conversation that he was going to kill Chavana; and on April 26, 2002, defendant called her and stated, "April, I killed Chavana." Earl Wilson testified that, at approximately 2:30 a.m. on April 20, defendant had called Wilson and stated "[t]hat bitch won't die." Approximately 20 minutes later, defendant arrived at Wilson's house without a shirt and with his forearms covered in blood and he stated, "I shot that bitch. She wouldn't die." Defendant informed Wilson, "I got that bitch in the trunk," and that he had to find some place to dump the body.

¶ 19 The State's evidence also included the testimony of Amy Rehnstrom, a former DNA analyst with the Illinois State Police, who conducted DNA analysis on several swabs collected from locations in defendant's trunk. She concluded

that the blood from the rubber trunk seal, the tail light lining, the underside rear window deck and the trunk hinge matched the victim's DNA profile.

¶ 20 The State's evidence also included the testimony of Officer Milton Owens, who questioned defendant following his arrest. After being advised of his Miranda rights, defendant informed Owens that he met the victim at the McDonald's where they both worked, that they became involved in a sexual relationship, that they had sexual intercourse on February 14, 2002, that the victim had told him that she was pregnant with his child, that she demanded money for an abortion, and that defendant refused and broke off the relationship. Defendant denied having anything to do with the victim's murder.

¶ 21 The parties stipulated that if Megan Clemons, an expert in DNA paternity analysis, was called to testify, she would testify that defendant was excluded as the father of the victim's fetus.

¶ 22 On October 20, 2005, at the conclusion of the trial, the jury found defendant guilty of the first-degree murder of Chavana Prather and the intentional homicide of her unborn child. The jury also found that, during the commission of the first degree murder, defendant personally discharged a firearm.

¶ 23 On November 17, 2005, defendant filed a posttrial motion for a new

trial and, on January 13, 2006, he filed a more extensive amended posttrial motion. Both motions claimed, among other things, that the trial court erred in denying defendant's motion to quash both the arrest and the search warrants. The amended motion added, among other things, that the trial court erred in granting the State's motion *in limine* with respect to the DNA analyst.

¶ 24 On January 27, 2006, the trial court denied defendant's posttrial motion and sentenced defendant to consecutive terms of 60 years for the murder and 35 years for the homicide of the unborn child. This court subsequently affirmed defendant's conviction on direct appeal. Defendant filed this postconviction petition on January 6, 2009. After its summary dismissal on January 29, 2009, this appeal followed.

¶ 25 ANALYSIS

¶ 26 On this appeal, defendant contests the summary first-stage dismissal of his first *pro se* postconviction petition. Defendant raises only one claim on this appeal. He claims that the State violated his right to due process and deprived him of a fair suppression hearing, when it failed to correct the allegedly false testimony of Detective Robert McVicker, the sole witness at the hearing. *People v. Lucas*, 203 Ill. 2d 410, 422 (2002) ("A conviction obtained through the use of false

testimony implicates due process concerns and is subject to reversal.") Defendant claims that the detective testified falsely when he stated that he had "noticed what appeared to be dried bloodstains on the back seat of the vehicle." For the reasons discussed below, we affirm the trial court 's summary dismissal.

¶ 27 Normally, this is the type of issue that must be raised on direct appeal, and the State has argued forfeiture, and they may be correct. However, the record before us does not contain the briefs from the direct appeal, which are normally found for issues of forfeiture. *E.g. People v. Blair*, 215 Ill. 2d 427, 455 (2005) (discussing in detail the contents of briefs filed on direct appeal before deciding the issue of forfeiture for a postconviction petition). As a result, we have decided this case on its merits, without considering the forfeiture issue. *People v. Vernon*, 396 Ill. App. 3d 145, 151 (2009) (appellee has the burden of supplementing the appellate record to support its appellate claims).

¶ 28 At the first stage of a postconviction proceeding, the trial court must determine whether the petition is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). For a petition to survive dismissal at this early stage, "we have required only that a *pro se* defendant allege enough facts to make out a claim that is arguably constitutional." *Hodges*, 234 Ill. 2d at 9. In past

decisions, we have referred to this as a " 'gist' " of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. Our supreme court has explained that, "in our past decisions, when we have spoken of a 'gist,' we meant only that the section 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9.

¶ 29 A trial court's first-stage dismissal is reviewed by us *de novo*. *Hodges*, 234 Ill. 2d at 9. When reviewing the petition *de novo*, we will find that it is frivolous or patently without merit only if it has no arguable basis in law or fact, which means that it is based either on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16.

¶ 30 "[O]ur recognition of a low threshhold at this stage does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Hodges*, 234 Ill. 2d at 10. Section 122-2 provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10.

" 'Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' " *Hodges*, 234 Ill. 2d at 10 (quoting *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008).

¶ 31 Defendant points to the following three facts in support of his claim that the detective lied. First, defendant points to the fact that he alleges in his petition that "the prosecutor knowing and allowing [sic] Detective Robert McVicker to testify falsely that he seen blood on the back seat of Petitioner's vehicle." This is a bald-face legal allegation, completely unsupported by factual detail, which was readily available to defendant if he chose to provide it. Defendant does not contend, for example, that he examined the back seat of his own vehicle prior to its seizure and that he observed that it contained no stains. He does not even swear that there was no blood on the seat. He claims merely that the detective was lying when the detective claimed to have observed what appeared to be blood on the back seat. While we do not expect a *pro se* defendant to draft expert legal arguments or cite cases, we do expect him to provide the facts at his disposal, particularly the facts which he himself observed. *Blair*, 215 Ill. 2d

at 454 (finding that defendant failed to meet the affidavit requirement of the postconviction statute where he failed to provide facts that "would be within his own recall").

¶ 32 Second, defendant claims in his brief to this court that McVicker's partner's "trial testimony indicated he had no knowledge of a bloodstain in the car," and then defendant cites to certain pages in the trial transcript. These pages show that McVicker's partner was not asked, one way or the other, about the presence of bloodstains in the vehicle.

¶ 33 Third, defendant quotes in his brief the following testimony of Mary Cosgrove, the forensic investigator who conducted the forensic inspection of defendant's vehicle:

¶ 34 DEFENSE COUNSEL: You also collected a seat cushion [from defendant's vehicle]?

¶ 35 COSGROVE: Yes.

¶ 36 DEFENSE COUNSEL: Was that in the trunk or the interior of the car?

¶ 37 COSGROVE: No, it was in the backseat, the backseat.

¶ 38 DEFENSE COUNSEL: Where in the back seat?

¶ 39 COSGROVE: I think it was the driver's side rear seat.

¶ 40 DEFENSE COUNSEL: Did you not identify any stains there?

¶ 41 COSGROVE: We collected it and inventoried it and send [sic] it to the lab for analysis.

¶ 42 DEFENSE COUNSEL: Did you not identify any stains there?

¶ 43 COSGROVE: No, I didn't.

¶ 44 Presumably, there was a reason that the forensic investigator thought that this particular seat cushion was worthy of being sent to a laboratory for analysis. However, even assuming that she randomly chose this seat cushion to be sent to a laboratory for testing, she provides no testimony at all about the other half of the back seat. In the above exchange, her testimony is limited to the seat cushion located behind the driver's seat. There is no testimony at all about the seat cushion located behind the passenger's seat or the back cushions, and whether or not they contained a stain that could have "appeared" to be a dried bloodstain. She also provides no testimony about the results of the laboratory analysis of the seat. There is simply no contradiction here between her testimony and the detective's

testimony that, when he shined his flashlight around midnight into the interior of defendant's vehicle, he observed what "appeared" to be a dried bloodstain.

¶ 45 Thus, the three points cited by defendant in the record do not offer any factual support for his claim that the detective lied at the suppression hearing.

¶ 46 In addition, any error caused by the detective's claimed falsehood, even if known by the State, was harmless. If the State's case had included perjured testimony and the State knew it, a strict standard of materiality would apply, and a reviewing court would be required to overturn the conviction if there was any reasonable liklihood that the false testimony could have affected the jury verdict. *Lucas*, 203 Ill. 2d at 422. " 'This standard is equivalent to the harmless error standard.' " *Lucas*, 203 Ill. 2d at 422 (*quoting People v. Olinger*, 176 Ill. 2d 326, 349 (1997).

¶ 47 In the case at bar, we find that any claimed error was harmless for the following reasons. First, the claimed falsehood was not part of the complaints for the search warrants, and the physical evidence from the vehicle was seized only as part of the execution of the search warrants.

¶ 48 Second, even if the detective was found to have lied, the only acts affected were defendant's post-arrest statement and the impoundment of the

vehicle. Defendant's post-arrest statement, which was introduced at trial, did not contain a confession to the crime. In fact, in his statement, defendant denied having anything to do with the murder. His statement merely corroborated information that had substantially been provided by other trial witnesses, namely, that he had been involved in a relationship with the victim, that she claimed that she was pregnant with his child, and that he refused to provide her money for an abortion.

¶ 49 Third, as for the original impoundment of the vehicle, that was done as a result of defendant's arrest, and there was probable cause for the arrest, even without the detective's statement about the apparent dried blood. The trial court did, in fact, find probable cause for the search of the vehicle, even without the statement, and we agree.

¶ 50 In determining whether probable cause existed for a defendant's warrantless arrest, a court must find that the police had knowledge of facts which would lead a reasonable person to find that a crime had occurred and that it had been committed by defendant. *People v. Bramlett*, 341 Ill. App. 3d 638, 649 (2003).

¶ 51 In the case at bar, prior to defendant's warrantless arrest, the police

had already found a dead body, lying face down in a pond. Detective McVicker testified that, prior to arresting defendant, he observed that the victim's body had been stabbed multiple times and shot in the chest by a shotgun blast. Thus, there is no question that the police had knowledge of facts which would lead a reasonable person to conclude that a crime had occurred.

¶ 52 In the case at bar, the police also had knowledge of facts, prior to the arrest, which would lead a reasonable person to conclude that defendant was complicit in the victim's murder. Our supreme court has defined the term 'probable cause' as "more than a bare suspicion" and as an "assessment of probabilities." *People v. Jones*, 215 Ill. 2d 261, 273-74 (2005). It is "a practical, nontechnical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent persons – not legal technicians – act." *Jones*, 215 Ill. 2d at 274. Although many factors may contribute to a finding of probable cause, "[i]t has long been the law in Illinois that where the defendant is among the last to see the victim alive, this is a significant factor in determining whether probable cause exists." *People v. Hardaway*, 307 Ill. App. 3d 592, 604 (1999). See also *People v. Buss*, 187 Ill. 2d 144, 206 (1999) ("factors relevant to establishing probable cause" include "whether defendant was among the last to see

the victim alive").

¶ 53 In the case at bar, Detective McVicker testified that, prior to the warrantless arrest, he observed that the victim was in a McDonald's uniform, that a McDonald's time slip with her name was in her pocket, and that she had been shot with a shotgun. During interviews with employees at the McDonald's restaurant, McVicker learned that Prather had been in a relationship with defendant, that she had recently become pregnant, that Prather and defendant had a dispute when Prather asked defendant for money for an abortion, and that defendant owned a shotgun that he kept in the trunk of his vehicle. Prather's mother, who was also present at the McDonald's, also told the detective that defendant had been dating the victim and had made the victim pregnant. The security guard informed the detective that, on the night of April 19, 2002, which was the last time that the victim had been seen alive, other employees had reported to the guard that they had observed the victim entering defendant's vehicle. We find that "an assessment of the probabilities" based on this information would have led a reasonable person in the officer's position to conclude that defendant was complicit in the victim's disappearance and murder. Thus, we find that the police had probable cause for defendant's warrantless arrest, even without the detective's

statement about apparent dried blood in defendant's vehicle.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, we affirm the trial court's summary dismissal of defendant's postconviction petition. First, we find no factual support for defendant's allegation that the State failed to correct claimed false testimony. We also find that, even assuming *arguendo* that the detective's testimony was false and the State knew it, any error was harmless.

¶ 56 Affirmed.