SECOND DIVISION
MAY 17, 2011

1-09-1251

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. 04 CR 1493
	)	
VINCENT BUCKNER,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held: Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to establish the gist of a meritorious claim that the State knowingly presented perjured testimony.

Defendant, Vincent Buckner, appeals the summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act). (725 ILCS 5/122-1 *et seq*. (West 2008)). He contends that the circuit court of Cook County erred in dismissing his petition at the first stage of proceedings because he had set forth the gist of a meritorious claim that the State knowingly used perjured testimony at trial.

Following a jury trial, where he proceeded *pro se*, defendant was found guilty of predatory criminal sexual assault and aggravated criminal sexual assault and was subsequently sentenced to 30 years' imprisonment. This court affirmed the judgment of the circuit court on direct appeal. *People v. Buckner*, 376 Ill. App. 3d 251 (2007). Defendant then filed the instant post-conviction

petition.

During defendant's trial, the 12-year-old victim, L.D., cried and resisted entering the courtroom as she was about to take the stand. The trial judge removed the jury from the courtroom and L.D.'s aunt had to carry her to the stand. Defendant moved for a mistrial claiming that he was prejudiced by the State's attempts to "drag the victim" into court crying; the State countered that L.D. was testifying of her own free will. The trial court denied defendant's motion and allowed L.D. to testify.

L.D. testified that in the summer of 2001, when she was 11 years old, she and her brothers spent the night at defendant's house. That night, defendant touched L.D. on her chest and "private area." Several weeks later, defendant took L.D. to a party. Later that evening, defendant had sexual intercourse with L.D. at his house. In November 2001 and February 2002, defendant and L.D. had sexual intercourse. In August 2002, at the age of 12, L.D. gave birth to a son. A forensic analyst testified that a DNA test confirmed that defendant was the father of L.D.'s son.

Defendant testified that late in 2001, L.D.'s mother invited him to dinner, where they ate fried fish and spaghetti. He had too much to drink that night and slept on the couch. The next morning, L.D. told defendant "I got me some from you last night." Defendant denied that any of the other sexual encounters occurred.

The jury found defendant guilty of predatory criminal sexual assault and aggravated criminal sexual assault and he was sentenced to 30 years' imprisonment. This court affirmed that judgment on direct appeal. *Buckner*, 376 Ill. App. 3d at 259.

Defendant subsequently filed a *pro se* post-conviction petition alleging, *inter alia*, that the State knowingly presented the perjured testimony of L.D. Defendant attached to his petition a signed and notarized affidavit from L.D., in which she averred that the State "scared" and "confused" her and threatened to take away her son if she did not testify as the State wanted her to. She also averred that her "trial testimony was a lie" and that "one time [defendant] came over to my house and got

really drunk and I took advantage of him sexually." L.D. also stated that she visited defendant in prison and told him that she lied in court because of the State's threats.

In a written order, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. The court noted that at trial, defendant raised similar issues as presented in the affidavit, and that the judgment of an 11-year-old victim of sexual abuse as to whether defendant was intoxicated is not enough to conclusively negate the existence of required mental state for conviction. Defendant also filed a motion for reconsideration of his petition, which the court denied, finding that defendant merely reargued the same points he raised in his post-conviction petition.

Defendant now appeals, contending that the trial court erred in summarily dismissing his petition because he asserted a gist of a constitutional claim that his conviction was based on the knowing use of perjured testimony.

Section 122-2 of the Act requires that a post-conviction petitioner set forth the respects in which his constitutional rights have been violated. 725 ILCS 5/122-2 (West 2008). A *pro se* petition may be dismissed as frivolous and patently without merit only if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Our review of the petition is *de novo*. *Id.* at 9.

Our review of the record shows that there is nothing in the affidavit or in the record that indicates that L.D.'s testimony was false or that the State had any knowledge that it was presenting false testimony. *People v. Nowicki*, 385 Ill. App. 3d 53, 97 (2008). L.D. claims that she was threatened and confused by the State into providing her trial testimony that she and defendant had engaged in numerous acts of sexual intercourse. Defendant has not provided any support for these claims in his petition.

Taking L.D.'s affidavit as true, however, it still establishes that defendant engaged in sexual intercourse with an 11-year-old. Defendant attempts to excuse this act by asserting that he was intoxicated. Although voluntary intoxication no longer excuses criminal conduct (720 ILCS 5/6-3

(West 2002)), prior to 2002, Illinois provided for such an affirmative defense (*People v. Anderson*, 325 Ill. App. 3d 624, 633 (2001)). The events in question occurred in November 2001, therefore voluntary intoxication would have been available to defendant. However, the facts in this case do not support a voluntary intoxication defense.

In order to assert an intoxication defense, defendant must have shown that his drunkenness was so extreme that it suspended his power of reason and rendered him incapable of forming a specific intent to commit the crime. *Id.* If the record indicates that defendant acted with any purpose or rationality, the defense is unavailable. *Id.* Here, the record shows that defendant remembered specifics from the evening in question, such as the fried fish and spaghetti dinner he ate with L.D. and her mother, the couch on which he slept and what he drank. Therefore, we find defendant testified that, at points in the evening, he acted with purpose and rationality and the defense is unavailable to him.

As to L.D.'s claims that she "took advantage of him sexually," it is well established that L.D., 11 years old at the time, lacked the capacity to consent to sexual activity with an adult (*People v. Davis*, 10 Ill. 2d 430, 444 (1957); *People v. Douglas*, 381 Ill. App. 3d 1067, 1080-81 (2008)), and that such sexual activity is indefensible (*People v. Reed*, 148 Ill. 2d 1, 14 (1992)). Finally, we note that L.D. does not necessarily recant her testimony in her affidavit. This indicates that sexual intercourse occurred between the two, a conclusion that is supported by DNA results.

Accordingly, we find that defendant failed to set forth a meritorious claim of the State's knowing use of perjured testimony. We affirm the summary dismissal of his *pro se* post-conviction petition by the circuit court of Cook County.

Affirmed.