2011 IL App (1st) 093362-U

FIRST DIVISION
September 26, 2011

No. 1-09-3362

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. 02 CR 2590
	)	
GERALD BERRY, JR.,	)	Honorable
	)	Frank G. Zelezinski and
	)	Luciano Panici,
Defendant-Appellant.	)	Judges Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant was not entitled to a jury instruction on the lesser-included offense of home invasion, he was not prejudiced by his counsel's alleged failure to discuss with him whether to tender such an instruction, and therefore he did not present the gist of an ineffective assistance of counsel claim.

¶ 2 Defendant Gerald Berry appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2000). On appeal, defendant contends he presented the gist of a constitutional claim of ineffective assistance of counsel based on his counsel's failure to discuss with him whether to offer a verdict

form for the lesser-included offense of home invasion in addition to the forms for first-degree murder and, therefore, the trial court erred in dismissing his petition. We affirm.

¶ 3 Defendant was charged with home invasion and first-degree murder under the theory of felony murder only (720 ILCS 5/9-1(a)(3) (West 2000)) and on an accountability theory for the deaths of Torrey James and Loree Scott Young which occurred during the home invasion. The State nol-prossed the home invasion charges before going to trial.

¶ 4 The evidence at trial showed that on December 27, 2001, defendant and his cofelons, Trumaine McClure, John McGowan, and Loree Scott Young, drove to the home of Torrey and Ricca James because McClure wanted to rob Torrey. When they arrived, Torrey's car was not present and the lights were off, so McGowan and Young went to the door. Young rang the doorbell and Ricca answered. McGowan and Young returned to the van and the four drove to look at another possible robbery location. They returned to the James residence around 8:30 p.m., and Young and McClure broke into the house while McGowan and defendant remained in the van as lookouts. Young and McClure went upstairs to the bedroom where Ricca was and told her they were waiting for Torrey because they wanted money. Torrey arrived home with his girlfriend a short time later, and McClure and Young dragged them both upstairs. Young demanded money from Torrey, then Ricca heard two gun shots and saw Young fall to the floor. Another shot went off and Torrey fell. McClure called McGowan and defendant asking for help. McGowan and defendant entered the James residence and carried Young's body out to the van. Both Young and Torrey died as a result of their gunshot wounds.

¶ 5 On April 21, 2005, the trial court instructed the jury on the elements of home invasion. However, the jury was only instructed and given verdict forms to determine whether defendant was guilty of the first-degree murders of Torrey and Young; the jury was not instructed or given verdict forms to determine whether defendant was guilty of the offense of home invasion.

During deliberations, the jury sent the trial court a note asking, "[i]s it possible for us to find him guilty of *home invasion* and not 1st degree murder?" (Emphasis in original.) The court, after conferring with both defense counsel and the State, responded that "the only charges for you to decide on are first degree murder. You have all the appropriate instructions for this charge." The record is unclear as to whether defendant was present while the trial court discussed the note with defense counsel and the State.

¶ 6 The jury found defendant guilty of the first-degree murder of Torrey James and Loree Scott Young.

¶ 7 On June 21, 2005, defendant requested new counsel and the trial court appointed a public defender to represent him. Defendant's motion for new trial was denied and the court sentenced defendant to a mandatory prison term of natural life based on the two murder convictions.

¶ 8 On direct appeal, defendant asserted, in pertinent part, that the jury was improperly instructed because the trial court failed to instruct the jury on proximate cause and thus the jury did not receive any instruction as to how defendant could be legally responsible for Torrey's actions, as opposed to the actions of his cofelons. This court found that, although a proximate cause instruction should have been given, defendant was not prejudiced by its absence because the evidence showed that he and his cofelons knew someone was home, and therefore knew that someone could resist and that death was a possible result. Defendant's convictions and sentence were affirmed. *People v. Berry*, No. 1-06-1732 (2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 9 On August 20, 2009, defendant filed a *pro se* postconviction petition. In his petition, he alleged that his counsel was ineffective for failing to tender an instruction for the offense of home invasion and for failing to consult with defendant about whether to tender such an instruction, particularly in light of the jury's note to the trial court. Defendant alleged he did not

learn of the jury note until his mother, Dorthea Hood, told him about it one or two days after trial. Defendant also attached the affidavit of his mother, in which she avers that she was present in the courthouse on April 21, 2005. While the jurors were deliberating, she was sitting outside the courtroom, but saw defense counsel and the State talking in the courtroom. After, defense counsel came into the hall and told Hood that the jury had sent a letter to the judge asking if they could find defendant guilty of home invasion only. Defense counsel told her that defendant did not know about the letter. Hood averred that in a phone call with defendant one or two days after the trial, defendant said that he did not know about the jury note and "he thought the jury was instructed on home invasion."

¶ 10 On October 15, 2009, the trial court summarily dismissed defendant's petition in a written order. Defendant filed a timely appeal.

¶ 11 On appeal, defendant contends that he set forth an arguable claim of ineffective assistance of counsel because his counsel never consulted with him about whether to tender a verdict form for the lesser-included offense of home invasion and, in light of the jury note, had the verdict form been offered the jury likely would have convicted him of home invasion instead of murder.

¶ 12 Initially, the State contends that defendant forfeited his arguments because his claims are based entirely on the record and could have been raised on direct appeal. See *People v. Scott*, 194 Ill. 2d 268, 282-83 (2000). We disagree. Here, defendant bases his ineffective assistance of counsel claim on his counsel's alleged failure to consult with him about the jury note and about whether to offer a verdict form for home invasion. Conversations between defendant and his attorney would not be on the record and therefore defendant properly brought his claim in a postconviction petition. See *People v. Parker*, 344 Ill. App. 3d 728, 737 (2003). Moreover, a defendant generally will not be required to bring an ineffective assistance of counsel claim on a

direct appeal or else forfeit it, because the trial record is often " 'incomplete or inadequate for this purpose' " as it is not sufficiently developed to litigate or preserve such a claim. *People v. Bew*, 228 Ill. 2d 122, 134 (2008) (quoting *Massaro v. United States*, 538 U.S. 500, 504-05 (2003)). Therefore, defendant has not forfeited review of his claim.

¶ 13 At the first stage of proceedings, a postconviction petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A petition is considered frivolous or without merit only if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. At this stage, defendant's petition need only demonstrate the "gist" of a constitutional claim. *Brown*, 236 Ill. 2d at 184.

¶ 14 A first stage petition claiming ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17.

¶ 15 Defendant was not entitled to a verdict form on home invasion. Defendant correctly observes that "[a]ccording to Illinois law, the predicate felony underlying a charge of felony murder is a lesser-included offense of felony murder." *People v. Smith*, 233 Ill. 2d 1, 17 (2009). However, defendant fails to mention that *Smith* also observed that "the predicate offense will not support a separate conviction or sentence." *Id.* To be clear, defendant was tried only on felony murder, not any other murder theory. See *People v. Calhoun*, 404 Ill. App. 3d 362, 375 (2010).

> "The purpose behind the felony-murder statute is to limit the violence that accompanies the commission of forcible felonies, so that anyone engaged in such violence will be automatically subject to a murder prosecution should someone be killed during the

> commission of a forcible felony." *People v. Belk*, 203 Ill. 2d 187, 192 (2003).

Accordingly, a finding that a defendant committed the forcible felony (here, home invasion) does not end defendant's culpability because he is then automatically liable for a murder committed during the course of the felony.

¶ 16 Moreover, defendant's claim of prejudice lacks merit. Here, the alleged prejudice resulting from the ineffective assistance of defendant's counsel is, essentially, that the jury was not given a verdict form on the lesser-included offense of home invasion. A defendant is only entitled to a lesser-included offense instruction if, upon examination, the evidence would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense. *People v. Smith*, 402 Ill. App. 3d 538, 545 (2010) (citing *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997)). Defendant was charged with felony murder for the deaths of Young and Torrey during the commission of a home invasion. Home invasion requires that the defendant "knows or has reason to know that one or more persons are present" in the dwelling being entered. 720 ILCS 5/12-11(a) (West 2000). As this court stated on direct appeal, because the cofelons knew someone was home when Young and McClure entered:

> "[i]t is reasonable for [the cofelons] to foresee or expect someone to resist, during which the possibility that one would die is a very foreseeable consequence of the home invasion. Thus, when Young was killed by Torrey, because defendant intended to aid and abet the home invasion, he became legally responsible for Young's death." *Berry*, No. 1-06-1732, slip op. at 14.

A defendant is legally responsible for the foreseeable consequences of his actions. *People v. Hudson*, 222 Ill. 2d 392, 401-02 (2006). An injury is foreseeable when a reasonable person

would see it as a likely result of his conduct. *Hudson*, 222 Ill. 2d at 401; see also *People v. Klebanowski*, 221 Ill. 2d 538, 548 (2006) (stating that a defendant who commits a forcible felony knows the victim may resist). Therefore, no rational jury could have found defendant guilty of home invasion and not have held him responsible for the foreseeable consequence of someone in the home resisting and that resistance resulting in death. Accordingly, defendant was not entitled to a verdict form for home invasion and suffered no prejudice due to his counsel allegedly not discussing with him whether to offer such a verdict form.

¶ 17 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 18 Affirmed.