2011 IL App (1st) 100123-U

FOURTH DIVISION
November 3, 2011

No. 1-10-0123



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 04 CR 10726 |
| | ) | |
| DARNELL RIALS, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Where defendant failed to state an arguable claim that his trial counsel was ineffective, we affirm the judgment of the trial court dismissing his first stage *pro se* post-conviction petition.

¶ 2 Defendant Darnell Rials 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 2008). On appeal, defendant contends that his trial counsel was ineffective for failing to conduct forensic testing that could have advanced his claim of innocence. We affirm.

¶ 3 Defendant was arrested and charged with first degree murder stemming from the shooting of the victim, Earl Cribbs. A jury trial resulted in a mistrial, but defendant was retried in a bench trial, convicted of first degree murder, and sentenced to 60 years' imprisonment, which included a 25-year term for personally discharging a firearm.

¶ 4 The evidence at the bench trial showed that on November 26, 2000, at about 2:30 a.m., a blue van crashed into multiple cars on the street near 5120 South Carpenter Street in Chicago. Lennie Ramsey, Cribbs' girlfriend, testified that she heard the crash and saw Cribbs go to the front door. Cribbs yelled to someone to "come back," Ramsey heard a gunshot, and then found Cribbs lying on the ground and bleeding. Eshia, Ramsey's daughter, testified that she observed that a blue van had crashed into her car.

¶ 5 Brent Burchett, who was a neighbor of Cribbs and knew defendant for about 30 years, testified that he heard a loud bang, and when he looked outside, he saw that a van had crashed into two cars. He observed a man wearing a tan trench coat walk from the van toward the sidewalk. Burchett heard Cribbs shout, "You hit my car," and, when the man yelled back "f*** you," Burchett recognized defendant's voice. After shouting at Cribbs, Burchett saw defendant fire a shotgun toward Cribbs' house. Burchett identified defendant in a photo array and at trial. In exchange for his testimony, Burchett pleaded guilty to a federal gun charge and was sentenced to the minimum term.

¶ 6 Michael Gayden and Burchett lived at the same residence. Gayden testified similarly to Burchett, and also testified that he observed a man wearing a light brown trench coat, who he identified in court as defendant, get out of a blue van that had hit the victim's car. After hearing the exchange between Cribbs and defendant, Gayden saw defendant fire a shotgun in the direction of Cribb's residence. Gayden also indicated that defendant saw him in the window, and raised his shotgun toward him. Gayden subsequently identified defendant in a photo array and in

a lineup as the shooter. Gayden had two prior felony convictions for possession of a controlled substance.

¶ 7 The parties stipulated that Detective Castellanos would testify that she interviewed Gayden and he never told her that the shooter raised the gun in his direction. She would also testify that when Gayden viewed the photo array, he made a tentative identification of defendant. However, Detective David Evans testified that Gayden identified defendant in a lineup as the person he had seen in front of Cribbs' house.

¶ 8 Willard Thomas, who knew defendant for 15 years, testified that he was in his house at 5124 South Carpenter Street when he heard a loud sound. He observed that a blue and white van had crashed into two other cars. Thomas then heard a noise that sounded like a gun, and when he looked out of the window he saw defendant wearing a dark-colored trench coat standing in front of Cribbs' home holding a shotgun. He then saw defendant run away from the scene. In 2004, Thomas identified defendant in a photo array as the person he saw running from the scene and made an in court identification of him during trial. However, Detective Kevin Bor testified that when he spoke with Thomas on the day of the shooting, Thomas told him that he saw the shooter and gave a general description of him, but did not name anyone.

¶ 9 The parties stipulated to Cynthia Prus' testimony at defendant's previous jury trial. Prus, an expert in the field of latent print analysis and recovery, testified that she recovered 31 suitable latent impressions from the blue van, but none of them matched defendant's prints. However, no latent impressions were found in the front area near the driver's side of the vehicle, the steering wheel, or the exterior of the vehicle. She also discovered a "reddish brown stain" and a "footwear impression" in the van, but they were not tested. Prus testified that if defense counsel had asked her to test something, she would have complied. Morever, Detective Rolston told her not to test the stain and footwear impression.

¶ 10 The trial court subsequently found defendant guilty of first degree murder. In doing so, the trial court stated that the witnesses identified defendant as the man with the shotgun outside of Cribbs' residence. The court further held that, based on the totality of the circumstances, the State met its burden of proving defendant guilty beyond a reasonable doubt. We affirmed the trial court's judgment on direct appeal. *People v. Rials*, No. 1-06-2873 (2008) (unpublished order under Supreme Court Rule 23).

¶ 11 On October 5, 2009, defendant filed a *pro se* post-conviction petition alleging, in pertinent part, that his trial counsel provided ineffective assistance by failing to investigate DNA and fingerprint evidence. Defendant attached his own affidavit, which was not notarized, to his petition. In it, defendant stated that he instructed his counsel to investigate the reddish brown stain, the footwear impression, and the fingerprints, but counsel refused to do so. Defendant explained that his affidavit was not notarized due to his status as a prisoner, and that he could not obtain an affidavit from his attorney. Defendant also attached various sections of the report of proceedings to his petition. On December 3, 2009, the trial court dismissed his petition holding that the stain and the footprint could have tied defendant to the shooting just as easily as it could have exonerated him. The court indicated that counsel instead attacked the credibility of the State's witnesses, which was reasonable in light of the fact that some of them were convicted felons.

¶ 12 On appeal from that dismissal, defendant contends that his trial counsel was ineffective. He specifically maintains that counsel failed to conduct forensic testing of the reddish brown stain and footwear impression found in the van. We review the trial court's dismissal of defendant's petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 13 The dismissal of a petition is appropriate at the first stage of post-conviction review where the trial court finds that it is frivolous and patently without merit. 725 ILCS 5/122-

2.1(a)(2) (West 2008). A petition that has no arguable basis in either law or fact is considered frivolous and patently without merit. *Id.* at 11-12. No arguable basis in law or fact exists if the petition is based on an "indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Id.* at 9-10. Nevertheless, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2008); *Hodges*, 234 Ill. 2d at 10. The failure to attach the required documents or explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 14 The State correctly observes that defendant failed to attach a notarized affidavit to his petition, and that section 122-2 of the Act mandates that the petition must have attached to it "affidavits, records, or other evidence" to support the allegations, or explain why such document is not attached. 725 ILCS 5/122-2 (West 2008). Concomitantly, section 122-1(b) of the Act provides that a post-conviction proceeding commences when the petition is filed and the petition must be "verified by an affidavit." 725 ILCS 5/122-1(b) (West 2008).

¶ 15 An affidavit that is not notarized has no legal effect under the Act. *People v. Carr*, 407 Ill. App. 3d 513, 515-16 (2011) (lack of notarization invalidates a defendant's purported affidavit attempting to verify the veracity of the contents of the petition under section 122-1(b)); *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (lack of notarization invalidates purported affidavits attached to the petition under section 122-2); see also *People v. Wilborn*, 2011 IL App (1st) 092802, ¶77 (decided by 1st Dist., 6th Div. September 23, 2011 (an unnotarized affidavit by a codefendant did not satisfy section 122-2). "A trial court properly dismisses a post-conviction petition where the petition does not comply with the requirements under the Act." *Carr*, 407 Ill. App. 3d at 515, citing *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 16 Defendant maintains, however, that the absence of notarization should be excused because he explained in his petition that he is a prison inmate "and the Warden through his staff has selectively denied the only possible independent or objective verification because the law library in Menard C.C. staff believes that petitioner can proceed under statute, irrespective of the above authority to the contrary. Further because petitioner cannot obtain an affidavit from his attorney and cannot access public notary his failure to comply with 122-2 should be excused." We agree that defendant's failure to attach an affidavit from trial counsel attesting to his own incompetence is not dispositive. *People v. Hall*, 217 Ill. 2d 324, 333 (2005). However, even accepting defendant's noncompliance with the notarization requirements based on his explanation, the summary dismissal of his petition was proper.

¶ 17 We find that defendant's petition failed to state the "gist" of a claim of ineffective assistance of trial counsel. Specifically, a defendant alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 18 Decisions regarding which witnesses and evidence to present at trial on defendant’s behalf are matters of trial strategy (*People v. West*, 187 Ill. 2d 418, 432 (1999)), and are generally immune from claims of ineffective assistance of counsel (*People v. Guest*, 166 Ill. 2d 381, 394 (1995)). See also *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994) (the decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable'"). Even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

¶ 19 In the case *sub judice*, the record shows that trial counsel's decision not to request forensic testing of the stain or the footprint was a matter of trial strategy. We first note that, although defendant maintains that this evidence could have been exculpatory, there was an equal chance that the evidence could have matched defendant thus showing that he was inside the van. More importantly, even if the stain and footprint were tested and proved not to match defendant's profile, this evidence would not have been exculpatory where the record shows that 31 prints were lifted from the van and none of them matched defendant. At most, evidence that the stain and footprint did not match defendant would have been cumulative to the fingerprint evidence. Additionally, as the trial court found, defense counsel's strategy of attacking the credibility of the State's witnesses was sound where some of the witnesses were convicted felons.

¶ 20 Even assuming *arguendo* that counsel's performance in failing to have the stain and the footprint analyzed could be considered deficient, defendant has failed to show arguable prejudice. As we found in defendant's direct appeal, "[t]he evidence here was not closely balanced," particularly where Burchett, Gayden, and Thomas identified defendant. *Rials*, No. 1-06-2873, slip op. at 8. Burchett and Gayden specifically testified that they saw defendant fire the shotgun, and Thomas testified that he saw defendant at the scene holding a shotgun and running away. The credible testimony of one eyewitness is sufficient to convict defendant. *People v. Robinson*, 153 Ill. App. 3d 272, 275 (1987). Furthermore, there was corroborating testimony that defendant was driving a blue van and wearing a trench coat.

¶ 21 Defendant contends, however, that there were inconsistencies in the testimony of the State's witnesses, and Gayden and Burchett had "suspect motivations" for testifying. Despite defendant's arguments to the contrary, it is the responsibility of the trier of fact to assess the credibility of witnesses and resolve any conflicts in their testimony. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). Here, the trial court was made aware of any inconsistencies in the State's

witnesses through cross-examination, was informed that Burchett had entered into a plea agreement in exchange for his testimony, and knew of the witnesses' prior convictions. Notwithstanding this information, the trial court found defendant guilty beyond a reasonable doubt, and we find no reason to disturb the findings of the trial court based on its credibility determination. *People v. Berland*, 74 Ill. 2d 286, 306 (1978).

¶ 22 In reaching this conclusion, we consider *People v. Johnson*, 205 Ill. 2d 381 (2007), *People v. Montgomery*, 327 Ill. App. 3d 180 (2001), *People v. Dunn*, 306 Ill. App. 3d 75 (1999), and *People v. York*, 312 Ill. App. 3d 434 (2000), relied on by defendant to be distinguishable from the case at bar. In those cases, evidence existed that could have potentially advanced the defendants' claims of innocence. See *Johnson*, 205 Ill. 2d at 396-97 (DNA testing of a rape kit that was never completed); *Montgomery*, 327 Ill. App. 3d at 185-86 (medical evidence showing the victim may have died from a seizure and not strangulation); *Dunn*, 306 Ill. App. 3d at 80-81 (DNA testing which was not available at the time of the defendant's trial); *York*, 312 Ill. App. 3d at 437-38 (exculpatory DNA evidence supporting defendant's claim). Unlike the cases above, forensic testing of the stain and footwear impression would not have exculpated defendant.

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

¶ 24 Affirmed.