

2012 IL App (1st) 100704-U

FIFTH DIVISION
June 8, 2012

Nos. 1-10-0704 and 1-11-0006, Consolidated

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. 03 CR 26188
)	
SALVADOR CONTRERAS,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice J. Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant acted as the aggressor in altercation with victim, counsel's failure to introduce testimony of victim's argumentative nature in presenting self-defense theory did not constitute ineffective assistance, and post-conviction petition thus contained indisputably meritless legal theory; the summary dismissal of defendant's petition was affirmed.

¶ 2 Defendant Salvador Contreras appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends his petition presented an arguable claim that his trial counsel was ineffective for failing to interview and present witnesses who would have testified

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about the victim's propensity toward violence to support defendant's claim that he shot the victim in self-defense. We affirm.

¶ 3 Following a jury trial in 2006, defendant was convicted of first degree murder and concealment of a homicidal death in the shooting of Octavio Guzman. At trial, the State presented evidence that on November 3, 2003, defendant fatally shot the victim while both were riding in a van with Jose Gonzalez, Mauro Trejo and Israel Ramirez. All except defendant were involved in a marijuana-growing operation in Wisconsin.

¶ 4 Before defendant was picked up, the group in the van included Ramon Licon, who was present to intimidate the victim while the others questioned the victim about a quantity of marijuana missing from their joint venture. All were drinking beer. Licon and the victim argued, and Licon struck the victim in the head with a weapon. The gun fired but no one was injured.

¶ 5 The group then drove to defendant's house because Licon wanted to get out of the van. Defendant drove Licon to his car while the group waited in defendant's garage, drinking beer. The victim also smoked some marijuana during that time. When defendant returned home, everyone got back in the van, and Ramirez drove.

¶ 6 In the van, Gonzalez handed a gun to defendant and told him to "put it away." Defendant and the victim sat next to each other. The victim started smoking marijuana in the van, and Gonzalez, who owned the van and was sitting in the front passenger seat, asked the victim not to smoke in the vehicle. The victim became upset and began pointing at defendant. Gonzalez and Ramirez testified they believed the victim mistook defendant for Licon, with whom the victim had argued earlier.

¶ 7 Trejo testified that the victim grabbed defendant's jacket and asked, "Who are you?" The victim started to ridicule defendant. The victim told the defendant he did not "have the balls" to

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shoot him. Ramirez testified that the victim raised his shirt and told defendant he was not afraid of him. Defendant told the victim he was "crazy" and to "shut up." The others told the victim to calm down. Gonzalez testified the victim and defendant were screaming at each other, and the victim began striking defendant.

¶ 8 Gonzalez turned from his front seat and fired a shot into the rear floor of the van to separate the two. Defendant and the victim stopped momentarily but then resumed fighting. Gonzalez testified the victim was on top of defendant and was choking him. Defendant then shot the victim twice while pushing the victim away. Gonzalez said the victim did not threaten to harm defendant and had no visible weapon. The group left the victim's body in an alley. The State presented testimony of a medical examiner that the victim sustained five gunshot wounds at close range and had a .275 blood alcohol level at the time of his death.

¶ 9 A detective testified that Trejo told him defendant repeatedly told Gonzalez to shoot the victim and then told Gonzalez to give him the gun. Trejo told the detective that defendant pointed the gun at the victim's head while holding the victim in a headlock. The parties stipulated that Trejo testified before a grand jury that after defendant first shot the victim, defendant "lifted [the victim] up a little bit and shot him again."

¶ 10 Defendant testified he was not involved in the marijuana business and had never met the victim before the day of the shooting. Defendant said that in the van, the victim became upset after arguing with Gonzalez. Gonzalez had given defendant a gun earlier and told him to "put it away." Defendant kept the gun near him.

¶ 11 Defendant said after the victim started smoking marijuana in the van, the victim began attacking him because he had a weapon. Defendant testified he told the victim to leave him alone, but the victim "came at me again and grabbed my jacket and ripped it." Defendant testified the victim grabbed him by the neck, and "[w]ith the other hand he was going to hit me,

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and that's when I got the gun." When defendant fired the weapon, one of the victim's hands was poised to strike defendant. Defendant said he was "very scared." On cross-examination, defendant said everyone in the van, other than him, was drunk. Defendant said the victim was on top of him when he fired each shot but admitted that there was no blood on his jacket.

¶ 12 At a jury instruction conference, the trial court concluded that the evidence did not support the defense's requested instruction on the mitigating theory that defendant's actions constituted second degree murder because he was seriously provoked by the victim. The court ruled that, in addition to first degree murder, the jury should be instructed that it could convict defendant of second degree murder if it found that defendant acted with an unreasonable belief of the need for self-defense.

¶ 13 The jury convicted defendant of first degree murder and concealment of a homicidal death. The trial court sentenced defendant to 50 years for first degree murder, which included a 25-year sentence enhancement for discharging a firearm causing the victim's death, and a consecutive 5-year sentence for the concealment of a homicidal death, for a total sentence of 55 years.

¶ 14 On direct appeal, defendant argued, *inter alia*, that the trial court erred in ruling that the jury should not be instructed on a second degree murder theory based on provocation by the victim. This court rejected that argument and defendant's additional contentions and affirmed defendant's convictions and sentence. *People v. Contreras*, No. 1-06-2952 (2008) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied leave to appeal. *People v. Contreras*, No. 107282 (November 26, 2008).

¶ 15 On November 10, 2009, defendant filed a *pro se* post-conviction petition raising the ineffectiveness of his trial and appellate counsel. Among the claims raised by defendant in the petition was that although he provided his trial counsel with the names of six witnesses who

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would have testified about the victim's propensity toward violence, counsel did not interview those individuals. Defendant further asserted that Gonzalez and Ramirez, who were present at the shooting, could have bolstered his self-defense claim by testifying about the victim's violent reputation. Defendant attached, in relevant part, six purported affidavits from the six named witnesses.

¶ 16 In a written order on January 29, 2010, the circuit court found the claims in defendant's petition to be frivolous and patently without merit and dismissed the petition, noting that evidence of a violent character is only relevant when the defendant has met the victim prior to the event in question. Defendant filed a motion to reconsider that ruling, which the circuit court also denied. Defendant now appeals those decisions in this consolidated appeal (Nos. 1-10-0704 and 1-11-0006).

¶ 17 Before reaching the substance of defendant's petition, we address the State's challenge to the validity of the six documents that defendant appended to the petition as affidavits in support of his post-conviction claims. None of the documents, which are handwritten letters in Spanish, are signed by the author. Each letter was translated to English by an interpreter and bears the signature of the attester. None of the letters or translations are notarized, and the State thus contends those documents do not qualify as affidavits under the Act. In addition, the record shows that defendant's verification of his petition was not notarized.

¶ 18 Pursuant to the Act, a post-conviction petition must be "verified by affidavit" (725 ILCS 5/122-1(b) (West 2008)) and accompanied by "affidavits" to support its allegations (725 ILCS 5/122-2 (West 2008)). Decisions of this court have resulted in a split of authority as to whether the lack of notarization on a defendant's statement of the veracity of his petition or an accompanying affidavit in support of the petition's claims renders the petition a nullity at the initial stage of post-conviction review. See, e.g., *People v. Terry*, 2012 IL App (4th) 100205, ¶

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23 (unnotarized petition does not justify summary dismissal); *People v. Wilborn*, 2011 IL App (1st) 092802, ¶72 (modified on denial of rehearing) (failure to notarize affidavit in support of petition does not invalidate petition at first stage); *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 35 (lack of notarization of defendant's verification of his petition's claims does not warrant summary dismissal); but see *People v. McCoy*, 2011 IL App (2d) 100424, ¶ 10 (affirming dismissal of post-conviction petition at first stage of review based on defendant's unnotarized verification, deeming it "not a proper affidavit under the Act"); *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011) (same).

¶ 19 The Illinois Supreme Court has granted leave to appeal in an unpublished decision addressing this issue in a different procedural posture, holding that, at the second stage of post-conviction proceedings, a defendant's unnotarized affidavit verifying his petition's claims renders the petition a nullity. *People v. Cruz*, 2011 IL App (1st) 091944-U, ¶ 22 (modified on denial of rehearing), *appeal allowed*, No. 113399 (January 25, 2012); see also *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (in second-stage post-conviction review, defendant's unnotarized affidavits have no legal effect, and dismissal of petition without an evidentiary hearing was affirmed). Given the indefinite status of the law on the validity of unnotarized affidavits, we elect to consider the substance of defendant's post-conviction claim.

¶ 20 At the first stage of post-conviction review, a petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a post-conviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

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¶ 21 Defendant contends his petition set forth an arguable basis of a constitutional claim that his trial counsel was ineffective for failing to interview witnesses and present testimony about Guzman's propensity towards violence. To establish ineffective assistance of counsel, a defendant must prove both that: (1) his attorney's actions or inactions constituted error so serious as to fall below an objective standard of reasonableness "under prevailing professional norms"; and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). At the first stage of post-conviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that both (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 22 Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rests with trial counsel, and it is well settled that these types of decisions are considered to be matters of trial strategy that are generally immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002); *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 23 Defendant nevertheless asserts that his counsel provided deficient representation by failing to present testimony from six potential witnesses who knew Guzman. In defendant's petition, he asserted he told his trial counsel that those individuals could testify regarding Guzman's violent character to establish that Guzman was the initial aggressor. Collectively, the supporting statements indicated that Guzman had used different names, had been arrested three times in Wisconsin, got into "a lot of fights" and had been shot by a relative, had "always" been a "problematic person" and "was very aggressive [*sic*] with everybody."

¶ 24 If a defendant acts with intent or knowledge to kill another, but does so due to a sudden and intense passion resulting from serious provocation, or if the defendant acts under an

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unreasonable belief he was acting in self-defense, the defendant commits second degree murder. 720 ILCS 5/9-2(a)(1) (West 2008). Here, the jury was instructed that it could find that defendant committed second degree murder if it determined that defendant had an unreasonable belief that he needed to act in self-defense in response to Guzman. The jury rejected that theory and returned a verdict of first degree murder.

¶ 25 Pursuant to *People v. Lynch*, 104 Ill. 2d 194, 200-01 (1984), when a self-defense theory is properly raised, the defendant may offer evidence of the victim's aggressive or violent character for two purposes. First, a defendant may demonstrate his knowledge of the victim's tendencies that affected both his perception and his reaction to the victim's behavior. *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 42 (citing *Lynch*); *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). A second alternative is used where, as here, the defendant did not know the victim prior to the event in question.

¶ 26 In the second *Lynch* alternative, where there are conflicting accounts regarding who acted as the initial aggressor, evidence of the victim's propensity for violence may be admissible to support the defendant's account of events. *Lynch*, 104 Ill. 2d at 200. For example, evidence that the victim was a violent person or committed violent acts can help to corroborate the defendant's testimony that the victim was the initial aggressor. *People v. Hanson*, 138 Ill. App. 3d 530, 537 (1985); see also *People v. Hill*, 315 Ill. App. 3d 1005, 1015-16 (2000) (victim's convictions for crimes of violence such as battery and aggravated battery are admissible as "reasonably reliable evidence of a violent character"). Such testimony regarding the victim's character is circumstantial evidence that can be probative to assist the trier of fact in judging the credibility of the witnesses and to provide the trier of fact with a more complete picture of what occurred. *People v. Dennis*, 373 Ill. App. 3d 30, 52 (2007), citing *Lynch*, 104 Ill. 2d at 200; *People v. Cook*, 352 Ill. App. 3d 108, 127 (2004).

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¶ 27 Here, the accounts of the altercation that led to defendant fatally shooting Guzman were not conflicting. Gonzalez, Trejo and Ramirez each testified that Guzman shouted at defendant and grabbed his jacket, apparently mistaking defendant for Licon, who had struck Guzman earlier. Guzman and defendant argued and wrestled. Defendant then shot the unarmed Guzman five times. Where, as here, the defendant becomes the aggressor in a purported self-defense case, that fact can support the exclusion of any evidence of the victim's aggressive tendencies. See *Figueroa*, 381 Ill. App. 3d at 842-843 (where defendant held the sole weapon present, defendant became aggressor upon firing shots, as opposed to avoiding confrontation; thus, *Lynch* evidence was properly barred); *People v. Jackson*, 293 Ill. App. 3d 1009, 1014 (1997) (*Lynch* evidence may be excluded where no conflict existed as to who was the aggressor).

¶ 28 Moreover, the purported affidavits attached to defendant's petition do not indicate that Guzman had been convicted of any violent crime. Although a prior altercation or an arrest, without a conviction, can be adequate proof of violent character when it is supported by firsthand testimony as to the victim's behavior (*Cook*, 352 Ill. App. 3d at 128), the alleged affidavits in this case describe Guzman's general nature, *i.e.*, that he abused alcohol and drugs and had a combative personality. Because that potential testimony was of little or no probative value as to Guzman's violent character, defendant's case would not have been furthered had his trial counsel attempted to support defendant's version of the shooting by offering that testimony. Therefore, counsel was not ineffective in failing to present that testimony. Defendant's post-conviction claim represents an indisputably meritless legal theory that warrants summary dismissal. See *Hodges*, 234 Ill. 2d at 16-17.

¶ 29 Accordingly, the summary dismissal of defendant's post-conviction petition is affirmed, as is the denial of the motion to reconsider the circuit court's judgment.

¶ 30 Affirmed.

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