2012 IL App (1st) 101486-U

FIRST DIVISION
March 19, 2012

No. 1-10-1486

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. 05 CR 20074
	)	
JEANINE ELAM,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held*: In light of the low threshold imposed on *pro se* petitions, this court will consider affidavits apparently filed in support of a postconviction petition despite the lack of a formal motion to amend. Further, when supported by affidavits defendant's postconviction petition made an arguable claim of ineffective assistance of counsel. Accordingly, the trial court's order dismissing the *pro se* petition was reversed and the matter remanded for further proceedings.

¶ 2 Defendant Jeanine Elam appeals from the summary dismissal of her petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal defendant contends that this dismissal was improper because her petition, in conjunction with

affidavits filed later, set forth an arguable claim that her trial counsel was ineffective for failing to investigate and present witnesses. We reverse and remand for further proceedings under the Act.

¶ 3 Following a bench trial, defendant was found guilty of first degree murder, and the trial court further found that she personally discharged a firearm proximately causing the victim's death. Defendant was also convicted of unlawful use of a weapon by a felon. The trial court sentenced defendant to concurrent terms of 45 years' and 3 years' incarceration respectively. On appeal, this court affirmed defendant's conviction and sentence, rejecting her argument that her conviction should be reduced to second degree murder. *People v. Elam*, No. 1-07-0980 (2009) (unpublished order under Supreme Court Rule 23). In 2010, defendant filed a postconviction petition alleging, *inter alia*, "ineffective assistance of counsel due to my attorney not doing the proper leg work in my case, overviewing [*sic*] evidence, and not calling witnesses." The trial court dismissed defendant's petition concluding, in part, that her claims of ineffective assistance of counsel were waived because they were based entirely on the trial record. Defendant timely appealed.

¶ 4 The facts of this case are fully set forth in our disposition of defendant's direct appeal. *Elam*, No. 1-07-0980. Only a summary of the facts is necessary for an understanding of this appeal.

¶ 5 According to the State's theory of the case defendant "brought a gun to a fist fight." The shooting which ultimately led to charges against defendant arose out of a fight between members of a street gang, the Four Corner Hustlers, and some other young men who lived on a block "controlled" by the gang. At some point, defendant's mother became involved in the fight, attempting to break it up. Defendant pulled a handgun from her purse, and the gun discharged twice. Defendant testified that the first shot was accidental. There was no dispute that the

second shot, which struck the victim in the head, was fired intentionally. The primary dispute between the parties was the victim's actions between the first and second shots. The State argued the victim was running away. Defendant, to the contrary, testified that the victim was running toward her. Defendant further testified that she feared for her safety because she had been threatened by gang members after she maced a leader of the gang during an altercation several days earlier. After reviewing the physical evidence, including the autopsy report and the location of a recovered projectile, the trial court held that "this victim was running away from his attacker at the time he was shot." The trial court ultimately rejected defendant's self-defense theory, in its entirety, finding: "This [d]efendant was not acting in self defense. There is no second degree murder here. The [d]efendant is guilty of first degree murder."

¶ 6 The Act provides a method for persons in the penitentiary to assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Because at the first stage of postconviction proceedings, the petitions are often drafted by prisoners with little legal knowledge or training, our supreme court has adopted a low threshold for surviving summary dismissal. *Id.* A petition may be dismissed as frivolous and patently without merit only if it lacks an arguable basis in law and fact. *Id.* at 16.

¶ 7 Before reaching the merits of defendant's ineffective assistance claim, we need to address the state of the record before us. Although the trial court indicated in its order that defendant had failed to support her ineffective assistance claim with evidence outside the trial record, it appears that this statement was inaccurate. The record on appeal contains approximately 30 pages of affidavits and medical records that defendant filed with the trial court. The stack of documents includes a proof of service dated April 1, 2010, and bears a "filed" stamp with the date of April 9,

2010. This date is approximately two months after defendant's postconviction petition was filed but is still 20 days prior to the trial court's written order dismissing the petition.

¶ 8 The State argues that we should ignore these documents because of irregularities in the form of the affidavits and because defendant never filed a motion to amend her petition to include these documents. First, we find that the irregularities in the affidavits do not demand that we ignore their substance. For example, the State argues that we should ignore the affidavit of Mary Baker because it uses what appears to be a form intended for the use of prisoners and states only that "defendant-appellant" swears that the statements made in attached document are true in substance and in fact. The State cites no authority for this proposition, and we believe that it would be contrary to the spirit of the *Hodges* court's "arguable" standard to hold an untrained prisoner to the same exacting standards we might impose on an attorney drafted affidavit. See *Hodges*, 234 Ill. 2d at 9. Second, we do not believe that we can ignore the documents merely because defendant did not move for leave to amend her petition. Once again, while we might be able to demand such exacting pleading requirements from those with formal legal training, doing so for an untrained prisoner would be contrary to the our supreme court's liberal interpretation of the Act. Therefore, despite their irregularities we will consider these documents as part of defendant's pleadings and evaluate the merits of her claims accordingly.

¶ 9 Claims of ineffective assistance of counsel are judged against the familiar *Strickland* standard. See *Strickland v. Washington*, 466 U.S. 668 (1984). "A defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective

standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 10 In this case, the only relevant additional evidence is the affidavit of Mary Baker. In her affidavit, Baker averred that the victim came toward defendant "aggressively." The State argues that this statement is factually "fanciful and delusional," (see *Hodges*, 234 Ill. 2d at 17) because it is rebutted by the physical evidence. We disagree. Although the trial court interpreted the physical evidence to support its conclusion that the victim was running away from defendant at the time she shot him, there was no expert testimony to support this conclusion. It is entirely possible that the trial court might have interpreted the physical evidence differently if it was presented with a credible witness account that the victim was charging at defendant. We cannot conclude from a single conclusory statement in an affidavit that Baker would have been a credible witness, but neither can we legitimately describe this evidence as fanciful or delusional.

¶ 11 The State also argues that defendant's legal theory, *i.e.*, that defense counsel was ineffective for failing to investigate or call Baker as a witness, is indisputably meritless because it is contradicted by the record. *Id.* We disagree. The State argues that because Baker was listed as a potential witness in defense filings, we must conclude that counsel investigated her testimony, and made the strategic decision not to call her. The State gives us no basis for drawing such broad conclusions from the simple fact that Baker's name appeared on a list of potential witnesses. To the contrary, the presence of Baker's name on the list supports a conclusion that defendant informed counsel of her existence. We can draw no conclusion from the record before us about whether defense counsel investigated Baker's potential testimony. At this stage of the proceedings, we must accept defendant's allegations as true. See *People v. McMillen*, 2011 IL App. (1st) 100366, ¶ 19. Accordingly, we find that is at least arguable that defense counsel failed to investigate Baker's testimony before trial. Generally, the failure to

make a *reasonable* investigation, interview witnesses and subpoena witnesses, falls below an objective standard or reasonableness for an attorney. See *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008). Furthermore, it is at least arguable that the trial court might have interpreted the evidence differently and accepted defendant's self-defense or imperfect self-defense claims, if it had been presented with additional credible testimony corroborating her version of events.

¶ 12 In reaching this conclusion, we find only that defendant's *pro se* petition was sufficient to survive the low threshold applied at the first stage of postconviction review. We express no opinion on ultimate merits of this petition; such a decision on the merits would be improper prior to allowing appointed counsel an opportunity to amend the petition and allowing the State to file responsive pleadings. See *Hodges*, 234 Ill. 2d at 22.

¶ 13 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings pursuant to sections 122-4 through 122-6 of the Act.

¶ 14 Reversed and remanded.