2012 IL App (1st) 101651-U

FIRST DIVISION
April 23, 2012

No. 1-10-1651

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 30440
	)	
ANTHONY RILEY,	)	Honorable
	)	Lawrence P. Fox,
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*: Defendant's petition did not state an arguably meritorious claim that counsel was ineffective for not investigating or calling a certain witness in support of defendant's self-defense claim when trial evidence from a disinterested bystander directly contradicted the proposed witness's account. Defendant's petition did not state an arguably meritorious claim that counsel was ineffective for not introducing into evidence the victim's convictions for unlawful use of a weapon when counsel tried to introduce the convictions but the trial court ruled that they were admissible only if evidence regarding defendant's battery arrests was also admitted, so that counsel had to consider the effect of the two opposing pieces of evidence as a matter of trial strategy, and where we held on direct appeal that the victim's convictions were inadmissible.

¶ 2 Following a 2006 jury trial, defendant Anthony Riley was convicted of first degree murder and sentenced to 50 years' imprisonment. We affirmed on direct appeal. *People v. Riley*, No. 1-06-2545 (2008)(unpublished order under Supreme Court Rule 23). Defendant appeals from the summary dismissal of his *pro se* post-conviction petition, contending that he stated arguably meritorious claims of ineffective assistance of counsel for not (1) investigating or calling a witness who would testify in support of defendant's self-defense theory of the case or (2) introducing at trial the victim's prior convictions for unlawful use of a weapon (UUW).

¶ 3 Defendant was charged with first degree murder in the November 2004 shooting death of Marcus Murphy. Defendant indicated during discovery that he may assert a self-defense claim. Before trial, the State sought in a motion *in limine* to bar defendant from introducing at trial Murphy's two convictions for UUW as evidence of his violent character. The State argued that Murphy's convictions were for merely possessing a gun rather than displaying or firing one so that the convictions would not be probative of violent character. The State also argued that if defendant was allowed to introduce Murphy's UUW convictions, the State should be allowed to introduce defendant's battery arrests and testimony regarding the batteries. Defendant argued that Murphy and defendant knew each other so that defendant would be aware of Murphy's UUW convictions and they would have affected his perception of Murphy's tendency towards violence. Defendant also argued that he was not going to introduce the bare convictions but call witnesses. The court ruled that the UUW convictions were admissible because defendant was aware of them and thus they affected his state of mind during the incident. However, the court also ruled that testimony regarding defendant's battery incidents would also be admissible. Defense counsel asked the court to clarify that if defendant did not introduce the UUW convictions, the State would not be allowed to present evidence on the batteries, because "we don't want to open the door to the battery." The State explained that it would introduce the battery evidence only in

rebuttal to the UUW convictions. The court ruled that the State's battery evidence would not be admissible unless defendant introduced the UUW convictions.

¶ 4 The undisputed evidence at trial was that defendant shot Murphy to death, against which he argued self-defense. By the account of State witnesses Taya Martin, Carreil Burnett, and Robert Boyd, all cousins of Murphy, they were in a car (with Boyd driving) when they passed defendant's car. Both drivers stopped so their cars were side-by-side. Defendant then discussed with Burnett and Martin a fight between them two weeks earlier, and in particular they were discussing setting aside their differences. When Murphy then walked towards the two cars, defendant showed a gun and professed to not be afraid of Murphy. When Murphy continued walking towards the cars, defendant fired several shots at him and then drove away.

¶ 5 Defendant's testimony agreed with the above account except on the key point: the State witnesses described Murphy as walking towards the cars with his arms by his sides and his hands empty, while defendant testified that Murphy had his hands under his shirt near his waist so that defendant feared he was about to draw a gun. Defendant admitted that he did not actually see a gun in Murphy's hand that day, but explained that he had heard a rumor that Murphy wanted to "get" him due to the earlier fight, and defendant had previously seen Murphy not only carry a gun but fire it at his (defendant's) brother. Defendant's testimony also placed Jarvis Washington and a man defendant knew only as Bubba in the other car along with Martin, Burnett, and Boyd. Defendant's friend Thomas Jackson testified that he was in defendant's car during the incident, and he corroborated that Murphy approached the car with his hand under his shirt before defendant fired. On cross-examination, defendant and Jackson admitted to telling police that another man – Maurice "Gino" Hale – had been in the car that evening and had fired the shots; each claimed that he independently devised the idea of implicating Hale.

¶ 6 Adriane McMillan testified that she was a passer-by on the day in question when she heard the shots being fired and saw Murphy fall wounded. McMillan did not see Murphy reach under his shirt, nor did she see him carry or drop a weapon. She also did not see anyone take a weapon from Murphy as she stayed with him until an ambulance arrived and did not leave until after Murphy was placed in the ambulance.

¶ 7 On this evidence, and having been instructed on first degree murder, second degree murder, and justification by self-defense, the jury found defendant guilty of first degree murder.

¶ 8 In his post-trial motion, defendant argued in relevant part that the court erred in ruling that he could not introduce Murphy's UUW convictions without the State being able to introduce evidence regarding defendant's battery arrests. Following oral arguments, during which the State argued in part that the UUW convictions were for mere possession and thus inadmissible, the court denied the motion.

¶ 9 On direct appeal, defendant contended that the jury should have been instructed on involuntary manslaughter, that the jury was not properly instructed on the burdens of proof for first and second degree murder, and that the prosecution made improper and prejudicial remarks in rebuttal closing arguments. Defendant also contended that the trial court erred in ruling that defendant could not introduce Murphy's UUW convictions unless the State could also introduce evidence regarding defendant's arrests for battery. On this claim of error, we held that the court "improvidently granted defendant's initial motion *in limine* allowing [Murphy]'s prior convictions for UUW" because it was not established that these convictions involved violence as opposed to mere possession of a weapon. Noting that defendant testified to more immediate evidence of Murphy's violent tendency – that he saw Murphy fire a gun at another person as well as possess one – we held that any error in the second portion of the ruling, that defendant's battery arrests would be admissible, was harmless.

¶ 10 In April 2010, defendant filed the instant *pro se* post-conviction petition. He contended that trial counsel was ineffective for (1) filing a motion to suppress his statement but then not calling witnesses or presenting evidence, (2) presenting defendant's self-defense theory without investigating or calling witnesses other than defendant himself to support that theory; in particular, that "had counsel investigated" in some unspecified manner, he would have found Andre Clifton, who would have testified that Murphy had a gun during the incident, (3) failing to investigate Murphy's violent reputation personally and as a street-gang member, and (4) failing to investigate the violent reputation of Murphy's cousin and "their" potential to lie about Murphy being armed during the incident. Attached to the petition was defendant's affidavit to the effect that he discussed various potential witnesses with counsel, though Clifton is not mentioned as one of the witnesses so discussed. Also attached was Clifton's affidavit to the effect that he attended to the wounded Murphy, saw a gun in his waistband, took it from him, and gave it to "one of his cousins" nearby.

¶ 11 On May 4, 2010, the court summarily dismissed defendant's petition. The court found that there was no evidence that trial counsel was aware of, or with reasonable effort could have become aware of, Clifton or his potential testimony. As to Murphy's UUW convictions, the court noted our decision on direct appeal that the convictions were inadmissible and consequently ruled that trial counsel could not have been ineffective for not introducing them. This appeal timely followed.

¶ 12 On appeal, defendant contends that his *pro se* post-conviction petition stated arguably meritorious ineffective-assistance claims for not (1) investigating or calling as a witness Andre Clifton, who would testify that he retrieved Murphy's gun after the shooting or (2) introducing at trial Murphy's prior convictions for UUW as evidence of his violent reputation and tendencies.

¶ 13 Under section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 (West 2010)), the circuit court may examine the trial record and any action by this court in evaluating a post-conviction petition within 90 days of its filing, and must summarily dismiss the petition if it is frivolous or patently without merit. A *pro se* petition is frivolous or patently without merit only if it has no arguable basis in law or fact; that is, if it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as one that is fantastic or delusional. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). On a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him; in other words, that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *Id*. at 496-97. A petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Id*. at 497. The summary dismissal of a post-conviction petition is reviewed *de novo*. *Id.* at 496.

¶ 14 Here, we find no error in the summary dismissal of defendant's petition. As to the absence of Clifton as a trial witness, Clifton's account of taking a gun from the wounded Murphy was firmly contradicted by the trial testimony of disinterested bystander McMillan, who attended to Murphy until after the ambulance arrived and did not see anybody take a gun from Murphy. As to Murphy's UUW convictions, the issue of whether defendant could introduce the UUW convictions was presented to the trial court, which ruled that defendant could do so but then the State would be able to introduce evidence regarding defendant's arrests for battery. Trial counsel asked the court to clarify that, if defendant did not introduce the UUW convictions, the State would not be able to introduce the battery evidence, and the court so ruled. Despite defendant's

argument to the contrary, the need to balance the effect these two pieces of potential evidence would have on defendant's case – Murphy's UUW convictions, as best as can be determined from the record, were for mere possession, while defendant's battery cases were not convictions but would have introduced to the jury evidence of prior violence by defendant – falls squarely under the umbrella of trial strategy. Stated another way, the fact that trial counsel concluded that the risks from introducing the conjoined UUW and battery evidence outweighed the benefits while defendant concludes to the contrary does not somehow render the decision beyond or outside sound trial strategy.

¶ 15 Moreover, our direct appeal decision, that the UUW convictions were inadmissible because mere possession of a weapon is insufficient to show violent tendency or reputation, clearly controls here. Counsel cannot render ineffective assistance by not introducing evidence that legally he could not introduce. Nonetheless, defendant urges us to hold that trial counsel was arguably ineffective for not introducing the UUW convictions at trial because the then-governing ruling of the trial court was that they were admissible. Such a holding would contradict the clear statutory authority that this court's decisions are relevant in evaluating whether to summarily dismiss a petition, and it would bizarrely invert the authority of this court relative to the circuit court. We therefore decline to do so.

¶ 16 Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.