

2012 IL App (1st) 102737-U

FIFTH DIVISION  
August 10, 2012

No. 1-10-2737

**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).

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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. 05 CR 12163
	)	
EDDIE CERVANTES,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.  
Justices McBride and Howse concurred in the judgment.

**ORDER**

¶ 1 *Held:* Court did not err in summarily dismissing defendant's post-conviction petition claiming ineffective assistance of trial counsel. His claim that counsel failed to call certain alibi witnesses at trial was based on conclusory affidavits, one of which is contradicted by the trial record and the remainder of which are merely cumulative. Defendant was not prejudiced by the absence of character witnesses at sentencing where they were cumulative of information in the sentencing record and where the sentencing judge, also presiding over the post-conviction proceedings, concluded that the proposed witnesses would not have affected his sentence.

¶ 2 Following a jury trial, defendant Eddie Cervantes was convicted of aggravated battery with a firearm and sentenced to 14 years' imprisonment. Defendant now appeals from the July

2010 summary dismissal of his *pro se* post-conviction petition filed the same month. He contends that his petition stated the gist of meritorious claims of ineffective assistance of counsel for not (1) calling certain alibi witnesses at trial, or (2) investigating or calling certain mitigation witnesses at the sentencing hearing.

¶ 3 At trial, Carlos Rodriguez, Alex Rodriguez (Alex R), and Raquel Silva testified that, at about 9 p.m. on May 7, 2005, they were standing on the sidewalk in front of the home of Bertha Torres smoking marijuana when a green van approached, then stopped at a nearby red traffic light. The driver "threw up" a Latin Kings gang sign with one of his hands. The witnesses ignored the gang sign and the van drove away. However, it passed by them a minute or two later and stopped, then the side door of the van opened and defendant appeared in the doorway with a gun. Both Carlos and Alex R were familiar with defendant, as "Trigger," from the neighborhood. Defendant fired several shots and the van sped away; Carlos suffered a gunshot wound to his buttocks for which he was briefly treated at a hospital. Silva had gone indoors before the van door opened, so she did not see the occupants of the van or identify defendant, but she heard the gunshots. Carlos told the police that "Trigger" shot him, and Carlos and Alex R described him. Both Carlos and Alex R identified defendant as the shooter in a lineup the following day.

¶ 4 Police officer Allen Yakes testified that, when he responded to the shooting of Carlos, Carlos told him that Trigger shot him and provided a description. Knowing that defendant was "Trigger" and matched Carlos' description, Officer Yakes went to defendant's home, where he saw defendant and his brother Alex Cervantes (Alex C) standing outside. Defendant and Alex C rushed inside the home and locked the door, and so Officer Yakes and other officers broke in the front door and arrested defendant and Alex C (the latter for an unrelated offense). There were two men, a young woman, and a child in the home along with defendant and Alex C at the time.

¶ 5 Bertha Torres testified for the defense that she was outside with Carlos, Alex R, and Silva on the night in question, though she was smoking a tobacco cigarette rather than marijuana.

While she saw a van pass by, she did not see anyone making gang signs. She finished her cigarette and went inside, where she heard the gunshots and then saw that Carlos had been shot.

¶ 6 Defendant testified that he had been "partying" with friends on the morning of the day in question, including drinking beer and snorting cocaine. He arrived at the home he shared with his brother Alex C at about 9 a.m., spoke briefly with Alex C, then went to his bedroom and slept for about nine hours. When he awoke at that time to use the washroom, he saw Alex C, his cousin Joel Valencia, Nicholas Baran, and John Steed in the living room. Baran and Steed were defendant's friends, who he had known since he moved to the neighborhood four years before the 2006 trial. Defendant went back to his bedroom, where he remained until the police arrived. Defendant admitted that he was a gang member while Carlos and Alex R were members of a rival gang, the Latin Kings. However, he attributed his nickname "Trigger" to his previous ownership of a dog with that name, which preceded his gang membership. While defendant mentioned that Alex C's girlfriend and her baby were often at the home, he did not testify to seeing anyone being there that day but Alex C, Valencia, Baran, and Steed.

¶ 7 Joel Valencia and Alex Cervantes testified that they were at Alex C's home with Baran and Steed at about 9 a.m. on the day in question when defendant arrived home, spoke with them for a few minutes, and then went to bed. While Alex C did not mention anyone else present, Valencia testified that the girlfriend of defendant or Alex C (Valencia said "his girlfriend" without clarification) was also in the home that day. Both Valencia and Alex C were in the living room until late in the evening, and neither saw defendant leave his bedroom except for a brief trip to the washroom, which Valencia placed at about 8 p.m. and Alex C placed at about 9 p.m. Neither saw defendant leave the home until he was taken away by the police, and Alex C

explained that the back door was blocked by furniture due to remodeling so that anyone exiting the home would have to use the front door and be seen from the living room.

¶ 8 On this evidence, the jury found defendant guilty of aggravated battery with a firearm.

¶ 9 At sentencing, the pre-sentencing investigation report (PSI) showed five findings of juvenile delinquency including a 1999 finding for robbery and battery, then misdemeanor convictions for retail theft and criminal sexual abuse, and a felony conviction for possession of a stolen motor vehicle. The PSI stated that defendant "described a close relationship with his siblings and mother" and that his girlfriend Lauren Rublio and their daughter, with whom defendant had "a good relationship," had lived with him until his arrest. The State argued in aggravation the aforementioned criminal history, that the PSI also showed that defendant did not have a troubled childhood or history of psychological disability to mitigate his actions, and that it was luck or happenstance that Carlos was not more severely injured by defendant's gang-motivated shooting. Defense counsel noted that defendant had never been sentenced to prison, argued that he has a daughter and maintains a good relationship with her and her mother, and stated that defendant intended to pursue his GED. Except for defendant's brief address to the court, acknowledging that he "messed up in the past" and "would love to take care of my daughter," no evidence in aggravation or in mitigation was presented. The court sentenced defendant to 14 years' imprisonment, noting that the victim's injuries were not severe but also that defendant had fired several shots in public and also noting defendant's significant criminal history demonstrating that juvenile detention and probation apparently did not affect him.

¶ 10 Defendant's general post-sentencing motion was denied, with the court finding that its sentence was "moderate." Defendant filed an appeal, but upon defendant's motion we issued a summary disposition that only corrected defendant's pre-sentencing detention credit. *People v. Cervantes*, No. 1-07-0513 (2008).

¶ 11 In the instant petition, defendant alleged in relevant part that trial counsel was ineffective for not interviewing or presenting "certain character witnesses \*\*\* necessary to defendant's defense for mitigating factors at sentencing and at trial." He listed Baran, Valencia, Alex C, Cynthia Garcia, Erica Cervantes, Lisa Reyes, Lydia Rivera, and Dennise Rivera. Attached to the petition were affidavits from all eight persons.

¶ 12 Baran, Cynthia, and defendant's mother Dennise each averred that counsel "failed to allow me to testify to the whereabouts of" defendant, and opined that the result of the trial would have been different had each testified, but none averred to what those whereabouts had been.

¶ 13 Valencia and Reyes each averred that he or she "was never given the opportunity to testify of the character and witness to" defendant, with Reyes describing that character as "a wonderful friend, a loving father, and a man who is willing to help any one in need." Alex C averred that he was told by counsel that he could testify on defendant's behalf at sentencing to "tell the court what kind of person my brother \*\*\* is" but then was not informed of the sentencing date. Erica, defendant's sister, also averred that counsel told her that she could testify on defendant's behalf at sentencing to show "the court the true person my brother really is" but then was not told the sentencing date. Lydia, defendant's grandmother, averred that counsel failed to inform her of the sentencing hearing date, so that she was unable to testify that defendant "is loving and kind man," "a good father, brother, and son even [though] he grows up without a father," and is "very respectful and willing to help people." Dennise averred that counsel failed to inform her of the sentencing hearing date, so that she was unable to testify that "my son [defendant] is a loving man, a hard worker, and a man who is determined to become a better father [and] is not the man the State portrayed him to be."

¶ 14 On July 15, 2010, the court – presided over by the same judge who presided over defendant's trial and sentencing – summarily dismissed the petition. The court found that

defendant's ineffectiveness claim for not calling character witnesses at sentencing would not succeed because "there was quite a bit of" aggravating evidence. The court also found that sentencing would likely not have been different where the court already demonstrated leniency by sentencing defendant to "less than half of the maximum sentence." This appeal followed.

¶ 15 On appeal, defendant contends that the summary dismissal of his post-conviction petition was erroneous as he stated a claim of arguable merit that trial counsel was ineffective for not calling the specified alibi witnesses at trial, and not investigating or calling the specified mitigation witnesses at the sentencing hearing.

¶ 16 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.

¶ 17 Here, as to the affidavits of Baran, Cynthia, and Dennise, it is questionable whether the latter two are indeed alibi witnesses: while all three affiants aver that they would testify to defendant's whereabouts, none of them aver to what those whereabouts were nor that the affiant was with defendant at or around the time in question. Moreover, the trial testimony refutes Dennise's affidavit: while Officer Yakes' testimony places a young woman at defendant's home that day, Valencia clarified that she was the girlfriend of defendant's brother Alex C rather than their mother Dennise. Lastly, assuming *arguendo* that Baran and Cynthia would testify consistently with defendant, Valencia, and Alex C, the evidence would be merely cumulative of the alibi testimony already presented. To this point, defendant argues that Baran and Cynthia, unlike Valencia and Alex C, were not blood relatives of defendant and thus not subject to impeachment as such. However, both would have been subject to similar impeachment, as defendant's friend and his brother's girlfriend respectively, and we consider it fanciful that two additional alibi witnesses would have affected the outcome of trial.

¶ 18 As to the absence of character witnesses at trial, prejudice was no longer arguable – that is, it was no longer arguable that there was a reasonable probability their testimony would have affected defendant's sentencing – when the sentencing judge, presiding over the post-conviction proceedings, found that it would not have affected his sentencing decision. The court's finding is supported by the fact that the PSI referenced defendant's good relationship with his girlfriend, daughter, mother, and siblings, so that testimony to the same effect would have been cumulative.

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

¶ 20 Affirmed.