2012 IL App (1st) 103225-U

THIRD DIVISION
November 7, 2012

No. 1-10-3225

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 11283
	)	
CORDELL PERRY,	)	Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Salone and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition was affirmed where trial counsel did not interfere with defendant's right to testify or err in failing to investigate potential witnesses.

¶ 2 Defendant Cordell Perry 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 2010)). On appeal, defendant contends that his petition stated a legally and factually nonfrivolous constitutional claim of ineffective assistance of trial counsel where counsel interfered with his right to testify on his own behalf, and failed to investigate three witnesses. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder in connection with the shooting of the victim, Denzel Calhoun, on April 1, 2005, at Magnum Motors at Cicero and Wabansia Avenues in Chicago. Defendant was sentenced to 65 years' imprisonment for the murder, which included the mandatory enhancement for discharging a firearm.

¶ 4 At trial, Latavia Hayden testified that on April 1, 2005, she was with her boyfriend, Calhoun, at Magnum Motors because Calhoun was selling his car and buying a new one. While Calhoun filled out paperwork, Hayden stepped onto the balcony to smoke a cigarette and noticed defendant standing on the corner. Hayden and Calhoun left the office to transfer Calhoun's belongings from his old car to his new one. As Calhoun walked between two SUVs, shots were fired and Calhoun fell to the ground. Defendant stood in one spot as he fired one shot to Calhoun's head, and three or four shots at Calhoun's body.

¶ 5 Hayden identified defendant as the shooter by his nickname (Bushwick) to police that afternoon, then in a photo array, a lineup, and in court. However, Hayden told her friend, Keisha Reese, that she did not see the shooter's face. Hayden testified that she said that to Reese because Reese would discuss their conversation with other people. Hayden acknowledged that she signed a statement that defendant ran up with a gun in his hand, but she denied that the statement was accurate. Hayden also testified that she knew a man named Vernon Holman from the neighborhood, but she denied seeing him at the car lot. The trial court sustained the State's objection to questions regarding any prior relationship Hayden may have had with Holman.

¶ 6 Holman testified that he knew Hayden and defendant, and that he sold drugs near Magnum Motors. On the day in question, while cutting through the car lot, he saw Hayden talking to a man who looked like Calhoun, whom he had not met. As Holman passed by, he noticed defendant, who was wearing a coat and a black hoodie, standing alone between two vans on the lot. As Holman walked towards Wabansia Avenue, he heard three or four shots, at which

point he ran home. Holman had two prior felony convictions for murder and possession of a controlled substance with intent to deliver. On April 2, 2005, Holman was arrested on a drug charge and initially denied knowing about the Calhoun shooting. However, Holman gave information to the police about the shooting several days later. Holman also had a pending misdemeanor charge. He testified that the State had not promised him anything for his testimony. Assistant Public Defender Monique Patterson testified that on May 11, 2007, Holman told her that he had not seen defendant in the car lot on April 1, 2005, and was afraid of being charged with perjury.

¶ 7 Boykin Gradford testified that he and his wife were driving on Cicero Avenue when he heard shots. Gradford saw a short, stocky African-American man wearing a black hoodie and a white do-rag standing behind an SUV on the lot, with his arm outstretched and a gun in his hand. Gradford also saw the victim standing between two parked cars, approximately three to four feet away from the shooter. He saw the victim fall to the ground, and did not recall any shots fired thereafter. On April 7, 2005, Gradford viewed a lineup and thought defendant looked like the shooter, but was not 100% certain. The viewing was recorded by police as a "negative lineup." Officer Robert Bullock testified that his case report did not reflect Gradford saying he saw a man with a gun. Detective Stanley Colon testified that when he interviewed Gradford on April 1, 2005, Gradford did not mention seeing a gun fired or someone running with a gun.

¶ 8 After police arrested defendant on April 6, Detective Michael Barz interviewed him. Barz testified that defendant admitted he was at the scene of the shooting, but he denied seeing who fired the shots. Defendant further stated that he recognized Calhoun as the man who killed his friend, Anderson Thomas a/k/a "Shug." Defendant had a tattoo on his arm that read "RIP Shug." A certified copy of Calhoun's 1993 murder conviction was entered into evidence.

¶ 9 The jury found defendant guilty of first degree murder and the court sentenced him to 65 years' imprisonment. We affirmed that judgment on direct appeal. *People v. Perry*, No. 1-07-2761 (2009) (unpublished order under Supreme Court Rule 23).

¶ 10 On July 7, 2010, defendant filed a *pro se* postconviction petition alleging, in pertinent part, that he received ineffective assistance of counsel where counsel coerced, lied, threatened, and intimidated him into waiving his right to testify. Defendant specifically maintained that he told counsel he wanted to testify that he witnessed Holman shoot Calhoun and that he only ran from the scene because he had drugs on him and knew the police would arrive soon. Defendant also stated that he did not tell police what he saw, because Holman was his friend and his life would be in danger if he talked to police. Counsel allegedly responded that he would not call defendant because the jury would not find him credible. According to defendant, a debate then ensued, culminating in counsel admonishing defendant that unless he wanted to represent himself and lose his case, "keep your mouth shut and when the judge ask[s] if you want to testify you tell him no and don't say it's because I told you to, you tell him that you are intelligently waiving your right to testify on your own." The foregoing allegations were corroborated in large part by an affidavit that was signed by defendant, but was not notarized.

¶ 11 Defendant also alleged in his petition that trial counsel was ineffective for failing to interview and call three witnesses, *i.e.*, Russell Smith (defendant's friend), Jovan Peoples (defendant's brother), and Christopher Morrow (defendant's cousin), whose testimony would have exposed Hayden's dual motives for falsely implicating defendant in Calhoun's shooting. In particular, defendant maintained that these witnesses would support his theory that Hayden blamed him for the shooting "both to protect her lover *** (Holman) and to exact her revenge against [defendant] for exposing her infidelities in the past which caused the break up of her prior relationship with [defendant's] brother, [Jovan] Peoples."

¶ 12 Defendant appended to his petition unnotarized affidavits from Smith, Peoples, and Morrow. Smith attested that Holman and Hayden were romantically involved in 2005. Peoples attested that he was romantically involved with Hayden from 1999 through 2001, and that he broke up with her because he learned from his brother, *i.e.*, defendant, that she was cheating on him. Hayden blamed defendant for the break-up, expressed to Peoples how much she hated defendant, and vowed revenge against him. Peoples indicated that he strongly believed that Hayden blamed defendant for this murder out of revenge. Peoples finally noted that Hayden was dating Holman when the murder occurred. Morrow's affidavit substantially corroborated Peoples' affidavit.

¶ 13 On September 30, 2010, the circuit court issued a written order dismissing the petition as frivolous and patently without merit. In doing so, the court found that defendant failed to supply any notarized affidavits, and that the decision whether to call a witness is a matter of trial strategy. The court further found that defendant failed to show that counsel refused to let him testify upon his timely assertion of that right. In this appeal, defendant challenges the propriety of that dismissal.

¶ 14 The State initially contends that defendant's petition was properly dismissed because he failed to append any notarized affidavits. Pursuant to the Act, a postconviction petition must be "verified by affidavit" (725 ILCS 5/122-1(b) (West 2010)), and must be accompanied by affidavits to support its allegations (725 ILCS 5/122-2 (West 2010)). Here, none of the affidavits attached to defendant's petition was notarized.

¶ 15 Decisions of this court have resulted in a split of authority as to whether the lack of notarization of 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 postconviction review. See, *e.g.*, *People v. Terry*, 2012 IL App (4th) 100205, ¶ 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 of postconviction review); *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 postconviction 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).

¶ 16 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) (appellant brief filed April 5, 2012); see also *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (in second-stage postconviction 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 postconviction claims.

¶ 17 A petition brought pursuant to the Act may be dismissed summarily at the first stage as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law when it is grounded in "an indisputably meritless legal theory," *i.e.*, a legal theory which is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16-17. We review *de*

novo the circuit court's summary dismissal of a postconviction petition at the first stage. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 18 A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing of deficient performance by counsel and prejudice to the defendant from the deficient performance. *Hodges*, 234 Ill. 2d at 17. At the first stage of postconviction proceedings, a petition may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 19 A defendant's right to testify at trial is a fundamental constitutional right, as is his right to choose not to testify. *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855 (2009) (citing *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997)). Undue interference with an accused's right to testify may constitute ineffective assistance of counsel. *People v. Seaberg*, 262 Ill. App. 3d 79, 82-83 (1994). The decision whether or not to testify rests ultimately with the defendant alone and is not merely a matter of trial tactics to be left to counsel. *People v. Brown*, 336 Ill. App. 3d 711, 719 (2002). However, merely advising a defendant not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel absent evidence that counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 20 We find that defendant's postconviction claim was based on an indisputably meritless legal theory. Our supreme court "has consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings." *People v. Torres*, 228 Ill. 2d 382, 394 (2008). We will not credit allegations which are positively rebutted by the record. *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007). Here, the record reveals that defendant's decision not to testify was his own choice, not that of his trial counsel. After the State rested its case, the following colloquy occurred:

"THE COURT: Is the defendant going to testify?

MR. WOLF [defense attorney]: No.

THE COURT: [Defendant], *** at this point it's your turn to present evidence in this case and your lawyer indicated that you made the decision not to testify in this case; is that correct?

THE DEFENDANT: Yes.

THE COURT: All right. That's your personal decision to make and your personal right. No one can make that decision for you. You can talk to your lawyer about whether you want to testify or not; but in the end, the decision is yours and yours alone; you understand that?

THE DEFENDANT: Yes.

THE COURT: No one forced you or threatened you to get you to decide not to testify. And you know that if you wanted to, you could get up here and give your testimony, correct?

THE DEFENDANT: Yes.

THE COURT: Okay. And neither one of your lawyers or anyone else has told you that you can't testify in this case, have they?

THE DEFENDANT: No.

THE COURT: Fine. The record will so indicate."

Based on this exchange, it is clear defendant's legal theory is completely refuted by the record.

¶ 21 With regard to defendant's second argument, it is well established that the decision whether to call a witness to testify at trial is a matter of trial strategy (*People v. Enis*, 194 Ill. 2d 361, 378 (2000)), and the decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable'" (*People v. McGee*, 373 Ill. App. 3d 824, 835 (2007) (quoting *People*

v. Palmer, 162 Ill. 2d 465, 476 (1994)). In fact, 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.

¶ 22 In this case, defense counsel was not deficient in choosing to forgo pursuing these witnesses because the jury likely would have viewed them as biased since Peoples was defendant's brother, Morrow was his cousin, and Smith was his friend. See *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (stating that the testimony of family members is given little weight). More importantly, none of the proposed witnesses was present when Calhoun was shot, and thus, could not shed any light on his murder.

¶ 23 Moreover, we find under the facts of this case that it is not arguable defendant was prejudiced by trial counsel's alleged errors. Despite defendant's contention in his petition that it was Holman who shot Calhoun, the evidence that defendant was the shooter in question was substantial. Hayden testified that as Calhoun walked between two SUVs at Magnum Motors, defendant shot him. Hayden immediately identified defendant as the shooter to police the day of the shooting. Holman testified that he saw defendant standing in the car lot between two vans just prior to the shooting. In addition, Boykin Gradford heard gunshots as he was driving on Cicero Avenue. Gradford saw a short, stocky African-American man wearing a black hoodie and a white do-rag standing behind an SUV on the lot, with his arm outstretched and a gun in his hand. Gradford viewed a lineup and thought defendant looked like the shooter, but he was not 100% certain. In addition, although defendant denied shooting the victim, he admitted to police he was at the scene of the crime and recognized the victim as the man who killed his friend "Shug." According to police, defendant had a tattoo on his arm reading, "RIP Shug."

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.