2013 IL App (1st) 110217-U

FIFTH DIVISION
October 25, 2013

No. 1-11-0217

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 03 CR 1429
	)	
CARLVOSIER SMITH,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BILL TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

HELD: Following his conviction for first-degree murder, defendant filed a postconviction petition alleging that his trial counsel had been laboring under a conflict of interest because he was simultaneously representing various police officers, the police department, and the State's Attorney's office. The circuit court's first-stage dismissal of defendant's petition was affirmed where defendant did not provide any evidence that would support an inference that his trial counsel represented any of those parties contemporaneously with his representation of defendant.

¶ 1 Defendant Carlvosier Smith appeals from the first-stage dismissal of his petition for postconviction relief.

¶ 2 Defendant was convicted of first-degree murder and sentenced to 75 years in prison. Prior to trial, defendant moved to suppress certain inculpatory statements that he made in police custody on grounds that they were not voluntarily given. Defendant's motion was denied.

¶ 3 After his conviction, defendant filed a petition for postconviction relief, alleging that his trial counsel, Richard Beuke, had been laboring under a conflict of interest because he was simultaneously representing the Chicago Police Department, the State's Attorney's office, and various Chicago police officers who had been accused of obtaining coerced confessions. The circuit court dismissed defendant's petition as being frivolous and patently without merit. Defendant now appeals. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The victim, James Armstrong, was found dead in his home on November 27, 2002, with multiple gunshot wounds to the head. Armstrong was defendant's next door neighbor. The State's theory of the case was that defendant was acting as a middleman on a drug deal between Armstrong and a man named Felix, in which Armstrong intended to purchase $50,000 worth of cocaine. However, before the deal could be finalized, defendant allegedly shot and killed Armstrong and took the $50,000 for himself.

¶ 6 Prior to trial, defendant moved to suppress certain inculpatory statements that he made in police custody on grounds that they were involuntary. Defendant now argues that the conduct of his counsel with regard to this motion is pertinent to his postconviction petition; therefore, we

shall discuss it in some detail. In his motion to suppress, defendant alleged that through a series of eight interviews, the police failed to read him his Miranda rights and ignored his request to have an attorney present during their questioning of him. Defendant also alleged that the police threatened to lock up his girlfriend, Camisha Gates, and take his son away from him unless defendant gave them the statements that they wanted.

¶ 7 The trial court, per Judge Stanley Sacks, held a hearing on defendant's motion. At that hearing, the State called Detectives James Hennigan and Edward Cunningham, both of whom interviewed defendant in police custody following his arrest.

¶ 8 Detective Hennigan testified that defendant was brought into police custody on the evening of November 27, 2002. He stated that around 11:00 a.m. the next morning, defendant knocked on the door of the interview room that he was being held in and asked to talk to detectives about his case. Detective Hennigan testified that he advised defendant of his *Miranda* rights and then spoke with him for approximately 20 minutes. At around 4:30 p.m., Detective Hennigan spoke with the defendant again, this time in the company of Assistant State's Attorney Theodore Adams, who explained that he was a prosecutor and again advised defendant of his *Miranda* rights. Defendant then told Adams essentially the same thing he had told Detective Hennigan earlier that day. During these meetings with defendant, Detective Hennigan denied threatening to charge defendant's girlfriend with murder or take away his son, and he also denied hearing any such threats from Adams. He further testified that defendant never told him that he wanted to speak to a lawyer or that he did not want to speak with detectives.

¶ 9 Detective Cunningham testified that he spoke with defendant on November 29, 2002, two

days after defendant was taken into custody. He stated that at around 8 a.m., the defendant knocked on the door of his interview room and said that he wanted to talk about his case. Detective Cunningham advised him of his *Miranda* rights, and then they spoke for about five minutes. Later that same morning, attorney Irv Miller arrived at the police station. Miller was representing the defendant in an unrelated matter. He spoke with defendant for approximately an hour, after which he informed the police that the defendant wished to exercise his right to remain silent. According to Detective Cunningham, almost immediately after Miller departed, defendant initiated a second conversation with him, saying, "I don't care what the lawyer said. I want to talk to you." Defendant then allegedly spoke about his involvement in the murder of Armstrong. Detective Cunningham denied that he threatened to charge defendant's girlfriend with murder or take away his son if defendant refused to make a statement.

¶ 10 After Detective Cunningham's testimony, the State rested. Defendant's counsel, Beuke, had defendant swear to the allegations contained in his motion to suppress. Beuke then argued that because the State had not presented testimony about all eight police interviews conducted with the defendant, the defendant's sworn allegations with regard to the remaining interviews stood unrebutted and proved that his statements were obtained illegally. Judge Sacks disagreed, stating that the allegations in defendant's motion did not constitute evidence, even when sworn to by the defendant. He commented, "[O]ne would expect good lawyers, which you both are, to be aware of procedures. I don't believe merely filing a motion saying 'I claim that's what occurred' will substitute for testimony of Carlvosier Smith, if that's what occurred." Beuke requested that the court reopen the proofs so that the defendant could testify to the allegations

contained in his motion, and Judge Sacks agreed.

¶ 11 Defendant testified that over the 40-hour period where he was interrogated by police in custody, they kept him handcuffed to the wall for a majority of the time, failed to advise him of his *Miranda* rights, denied him food or drink, and refused to honor his repeated requests to speak with his lawyer. He also testified that Sergeant Sam Cirone "said that he would take my child away from me and he was going to lock my girlfriend up and her mother for the rest of their life and we were all going to jail for the rest of our lives." In rebuttal, Assistant State's Attorney Adams and Sergeant Cirone testified that defendant was not handcuffed, that he never requested a lawyer or mentioned being threatened, and that he was informed of his *Miranda* rights prior to any conversations. Judge Sacks ruled that defendant's statements were voluntary and denied his motion to suppress.

¶ 12 The case proceeded to a jury trial, which took place from November 15 to 21, 2006. For purposes of this order, a brief summation of the testimony will suffice. The State called defendant's girlfriend, Gates, to testify against him. Gates stated that at 5 p.m. on the day of the murder, she called the defendant, who said that he was at Armstrong's house. Approximately an hour later, she called again to ask him to pick her up from work. Defendant did so and then drove her to her mother's house. Gates testified that during the drive, defendant received a call from Charles Tate, Armstrong's cousin, who inquired whether defendant had heard from Armstrong, because Armstrong was not answering his phone or the doorbell. Defendant said that he had not heard from Armstrong since he left to pick up Gates. Gates testified that after defendant hung up, he said "Lord forgive me" and "It wasn't supposed to go down like that."

¶ 13 Gates testified that when they arrived at her mother's house, the defendant opened the trunk of the car, where there was a red bag. He told her that there was a gun inside the bag, and he instructed her to take it and hide it in the house. Gates said that she did as she was told, placing the bag behind a stuffed animal in her former room. When she returned to the car, she asked him what was going on. According to her, defendant told her that he had shot Armstrong.

¶ 14 The State also called Sergeant Cirone and Detective Cunningham to testify regarding incriminating statements allegedly made by the defendant. Sergeant Cirone testified that on the evening of November 27, 2002, the defendant and Gates were both brought to the police station in connection with the Armstrong case. Sergeant Cirone interviewed the defendant. After he advised the defendant of his *Miranda* rights, the defendant allegedly told him that he and Armstrong had been involved in dealing narcotics. On that particular day, they had $50,000 in cash in the apartment, and they were awaiting the arrival of a man named Felix, from whom Armstrong would commonly purchase drugs. Before Felix arrived, defendant left to pick up his girlfriend.

¶ 15 Sergeant Cirone testified that he next interviewed Gates. Following that interview, he went to the house of Gates' mother, where he found a red bag containing a large amount of cash and a gun. (The State later called a forensic scientist to testify that a bloodstain on the bag matched Armstrong's DNA profile. However, the bullets and cartridges found at his apartment did not match the gun inside the bag.) Sergeant Cirone then returned to the police station and confronted defendant with the bag. He stated that defendant initially denied knowing anything about the bag. However, in a subsequent interview, defendant told Sergeant Cirone that while he

was with Armstrong in his apartment, he had been twirling a 9-millimeter handgun when it accidentally discharged and struck Armstrong. According to Sergeant Cirone, defendant said that he fired several more shots into Armstrong to make it look like a robbery and then fled with the money and Armstrong's gun. He threw away his own gun before he picked up Gates.

¶ 16 Similarly, Detective Cunningham testified that he interviewed defendant on the morning of November 29, 2002. According to Detective Cunningham, defendant said that he was with Armstrong in his apartment, awaiting the arrival of a man named Felix. He was twirling a 9-millimeter handgun, and it accidentally discharged twice, hitting Armstrong. Defendant then fired more shots at Armstrong to make it look like a robbery "so [he] could blame someone else."

¶ 17 Defendant was found guilty and sentenced to 75 years imprisonment. Defendant filed a direct appeal contending that (1) his trial counsel was ineffective for waiving closing argument and (2) the trial court failed to give the jury necessary instructions. We affirmed defendant's conviction and sentence. *People v. Smith*, No. 1-07-0588 (2009) (unpublished order under Supreme Court Rule 23).

¶ 18 On October 10, 2010, defendant filed a *pro se* petition for postconviction relief. In his petition, he contended that his trial counsel, Beuke, had been laboring under a conflict of interest while representing him at trial because Beuke was simultaneously representing former Chicago police officer Jon Burge[1] and other Chicago police officers who were accused of obtaining

[1] There is no indication in the record that Jon Burge was personally involved in defendant's case, in his capacity as a police officer or otherwise.

coerced confessions through torture and other related acts. Defendant asserted that Beuke and his law firm had been "on the payroll of the City of Chicago" from 2003 to 2010, having been retained "to defend the Chicago Police Department against any allegations of misconduct, abuse, torture, violation of State law and perjury." Defendant further stated that he believed Beuke had been representing "various and certain member" of the Cook County State's Attorney's office.[2]

¶ 19 In support of his petition, defendant attaches a letter dated July 6, 2009, from Beuke to a man named Geoffrey Freeman. In that letter, Beuke states that he is an attorney for former Chicago police officer Jon Burge. Defendant also attaches copies of two online news articles concerning Jon Burge. The first article is dated April 1, 2010, and states that Jon Burge was indicted on charges of perjury and obstruction of justice in October 2008 and is being represented by Beuke. The second article, dated May 26, 2010, states that the perjury charges against Jon Burge stem from allegations that he lied about torture that occurred in the 1970s and 1980s. Beuke is not mentioned in this second article.

¶ 20 Defendant additionally attaches his own affidavit. In that affidavit, he states that subsequent to his trial, he learned that Beuke had been representing "the City of Chicago, Chicago Police Department, as well as the State's Attorney of Cook County in matters concerning Jon Burge and Associates" since 2003, the year in which defendant first retained

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[2] Defendant also argued that he was entitled to relief because his trial counsel was not aware, until Judge Sacks informed him, that defendant's swearing to the allegations in his motion to suppress was not a substitute for defendant's testimony. However, defendant does not raise this issue on appeal.

Beuke. Regarding the source of this information, defendant states:

> "7. That upon my inquiring of Richard Beuke as to whether he represented the City of Chicago and the Chicago Police Department after my trial, I was told by Richard Beuke that who he represented was none of my business.
>
> 8. That Richard Beuke further stated that everyone is entitled to a defense in court, even the Chicago Police and State's Attorney's.
>
> 9. That I understood that response to represent a 'yes' to his representing both parties."

Defendant additionally states that he discovered an "internet generated document" stating that Beuke represented Jon Burge, but he admits that the document did not indicate how long the representation had been going on or who else Beuke may have represented.

¶ 21 The circuit court found that defendant's allegation that trial counsel was laboring under a conflict of interest was "entirely conclusory" and further stated, "The petition is devoid of any facts supporting petitioner's contention." The circuit court therefore dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant contends that the circuit court erred in summarily dismissing his postconviction petition. He therefore requests that we reverse the circuit court's dismissal and remand for second-stage proceedings on his petition. We review the summary dismissal of defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 24 At the first stage of proceedings on a postconviction petition brought under the Illinois

Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)), the circuit court independently reviews the petition and summarily dismisses it if the court finds it to be "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). At this stage, the petitioner need only present the " 'gist of a constitutional claim' " to avoid dismissal. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1986)). In addition, because petitioner has not yet been afforded an evidentiary hearing, we are to take all well-pleaded allegations in the petition as true and liberally construe them in favor of petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153 (2009); *Coleman*, 183 Ill. 2d at 380-81 (1998).

¶ 25 Under section 122-2 of the Act, a postconviction petitioner must either provide "affidavits, records, or other evidence" which supports the allegations in the petition or explain the absence of such documentation. 725 ILCS 5/122-2 (West 2010). The purpose of this requirement is "to establish that a petition's allegations are capable of 'objective or independent corroboration.' " *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005)). Our supreme court has held that failure to attach the necessary documentation under section 122-2 or explain its absence is "fatal" to a postconviction petition (*People v. Turner*, 187 Ill. 2d 406, 414 (1999)) and by itself justifies the petition's summary dismissal (*Delton*, 227 Ill. 2d at 255 (citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (where defendant's petition lacked affidavits, records, or other evidence supporting his claims, his petition was properly dismissed as frivolous and patently without merit))).

¶ 26 In this case, defendant's petition alleges that he is entitled to a new trial because his trial counsel was laboring under a conflict of interest. Specifically, defendant claims that from 2003

to 2006, the period during which he retained Beuke in connection with this case, Beuke also represented former Chicago police officer Jon Burge, the Chicago Police Department, and various unnamed members of the State's Attorney's Office. In response, the State contends that the supporting documents presented by the defendant do not corroborate his allegation of contemporaneous representation, and the circuit court was therefore correct in summarily dismissing his petition.

¶ 27 Every criminal defendant is guaranteed the right to effective assistance of counsel, and inherent in this right is the principle that the defendant is entitled to the undivided loyalty of counsel, free from any conflict of interest. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Holloway v. Arkansas*, 435 U.S. 475, 489-91 (1978) (defense counsel's joint representation of conflicting interests requires reversal even where no particular prejudice is shown and the defendant is clearly guilty); *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). Our supreme court has identified two categories of conflicts of interest: *per se* and actual. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). A *per se* conflict of interest arises where the defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant. *Hernandez*, 231 Ill. 2d at 142. Courts have identified three situations in which a *per se* conflict exists: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution, (2) where defense counsel contemporaneously represents a prosecution witness, or (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant. *Taylor*, 237 Ill. 2d at 374; *Hernandez*, 231 Ill. 2d 143-44. Such a conflict is grounds for automatic reversal, even if defendant cannot

show that his attorney's actual conduct was in any way affected by the conflict. *Taylor*, 237 Ill. 2d at 374-75; *People v. Washington*, 101 Ill. 2d 104, 110 (1984); see *Holloway*, 435 U.S. at 489-91. By contrast, an actual conflict of interest exists where there is "some specific defect in [defense] counsel's strategy, tactics, or decision making attributable to the conflict." *Taylor*, 237 Ill. 2d at 376.

¶ 28 In the present case, the allegations in defendant's complaint present the gist of a claim that his trial counsel was acting under a *per se* conflict of interest. If, in fact, defendant's attorney served as counsel for the Chicago Police Department and the State's Attorney's Office at the same time that he was representing the defendant, it would raise the possibility that his loyalty to the defendant would have been compromised by his conflicting obligations. See *Washington*, 101 Ill. 2d at 112-13 (*per se* conflict of interest existed where the defendant's attorney also served as a prosecutor for the municipality, since defense counsel was obliged "to oppose and to attempt to discredit a police officer and representative of the municipality he was serving as its prosecutor," which might have impacted his duty of undivided loyalty to the accused). However, as defendant's counsel conceded at oral argument before this court, such a conflict would only arise if Beuke's representation of these parties was contemporaneous with his representation of defendant. See *People v. Fields*, 2012 IL 112438, ¶25 (in cases where defense counsel has represented a State's witness, a *per se* conflict of interest only exists where the professional relationship between the attorney and the witness is contemporaneous with defense counsel's representation of the defendant).

¶ 29 The State argues that defendant has failed to present any evidence to suggest any such

contemporaneous representation. In this regard, the State points out that all of defendant's evidence relates to events that occurred after the conclusion of defendant's trial. The State therefore contends that defendant's petition should be dismissed for failing to meet the factual documentation requirements set forth in section 122-2 of the Act. 725 ILCS 5/122-2 (West 2010); see *Collins*, 202 Ill. 2d at 66 (affirming first-stage dismissal of postconviction petition for failing to meet the requirements of section 122-2). We agree with the State.

¶ 30 At the first stage of postconviction proceedings, a *pro se* defendant is not required to set forth a complete and detailed factual recitation. *Delton*, 227 Ill. 2d at 254; *cf. Edwards*, 197 Ill. 2d at 244-45 (rejecting the notion that a petitioner at the first stage of postconviction proceedings must allege "sufficient facts" which, if true, would demonstrate that he had been deprived of his constitutional rights). Nevertheless, in order to satisfy the requirements of section 122-2 and avoid summary dismissal, a defendant must provide evidence that would "support an inference" that his factual allegations are true. *Delton*, 227 Ill. 2d at 257. In this regard, the facts of *Delton* are instructive. The *Delton* defendant was convicted of two counts of aggravated battery of a police officer following his attack on two police officers who stopped him for a traffic violation. *Id.* at 249-50. Subsequently, Delton filed a postconviction petition contending that his trial counsel was ineffective for failing to investigate his claims of long-term harassment by the two officers in question. *Id.* at 251. He alleged that, prior to trial, he and his wife had told his attorney that the officers were the aggressors and had committed similar acts of harassment in the past. *Id.* at 251-52. In support of his claims, he attached an excerpt from his wife's cross-examination testimony where she stated that upon his exit from the car, Delton said that he had

filed a complaint against those two officers for prior harassment. *Id.* at 255-56. He also attached an excerpt from his defense counsel's closing argument in which counsel said, "Apparently it stressed [Delton] from having a familiarity with those police on prior occasions. I believe that's what he was getting at when he said why do you people keep harassing me." *Id.* at 256.

¶ 31 The *Delton* court held that these transcript excerpts were legally insufficient to satisfy the corroboration requirement of the Act. *Id.* Although they showed that defense counsel knew about the complaint *during trial*, they did nothing to support an inference that defense counsel had been told about the complaint *prior to trial*, the operative time period for Delton's claim of failure to investigate. *Id.* at 256-57. Accordingly, the *Delton* court affirmed the summary dismissal of Delton's petition. *Id.* at 258-59.

¶ 32 Similarly, in the present case, although defendant has evidence to show that Beuke represented former officer Jon Burge after defendant's trial, the evidence does nothing to support an inference that such representation was contemporaneous with Beuke's representation of defendant. As noted, defendant's evidence (besides his own affidavit, which shall be discussed below) consists of a 2009 letter in which Beuke identifies himself as counsel for Jon Burge, a 2010 news article that states that Jon Burge is being represented by Beuke, and another 2010 news article that discusses the charges against Jon Burge but does not mention Beuke. None of this evidence tends to show that Beuke represented Jon Burge from 2003 to 2006, the period during which Beuke was representing the defendant.

¶ 33 As for defendant's affidavit, the only evidence he presents in support of his claim of improper contemporaneous representation is the following conversation he allegedly had with

Beuke:

"7. That upon my inquiring of Richard Beuke as to whether he represented the City of Chicago and the Chicago Police Department after my trial, I was told by Richard Beuke that who he represented was none of my business.

8. That Richard Beuke further stated that everyone is entitled to a defense in court, even the Chicago Police and State's Attorney's.

9. That I understood that response to represent a 'yes' to his representing both parties."

At the outset, we note that this conversation occurred at some unspecified time after trial, so it is unclear whether Beuke was still representing the defendant. Moreover, we fail to see how Beuke's statement, in which he specifically declined to comment on whether he represented third parties, can be construed as evidence that he did represent such parties. Defendant's followup comment, that he "understood" Beuke's response to constitute agreement, is conclusory and unsupported by the conversation that he cites.

¶ 34 Defendant nevertheless argues that his petition should not be summarily dismissed because nothing in the record contradicts his allegations. This, by itself, is insufficient to satisfy the documentation requirements of section 122-2. In *Delton*, there was nothing in the record that would contradict the petitioner's allegations; the trial testimony of petitioner's wife and the closing argument made by defense counsel were both consistent with petitioner's claim that he told his counsel about his allegations of police harassment prior to trial. *Delton*, 227 Ill. 2d at 256-57. Nevertheless, the *Delton* court found his evidence to be inadequate, insofar as it did not

"support" his claim. *Id.* Likewise, in this case, the mere fact that defendant's allegations are consistent with the record is legally insufficient for his petition to withstand summary dismissal.

¶ 35 Thus, for the foregoing reasons, we affirm the summary dismissal of defendant's postconviction petition.

¶ 36 Affirmed.