2012 IL App (1st) 110878-U

SECOND DIVISION
September 28, 2012

No. 1-11-0878

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. 06 CR 12064
	)	
EFREN AGUILAR,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Murphy concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant set forth a cognizable claim of ineffective assistance of trial counsel to warrant further proceedings under the Post-Conviction Hearing Act, therefore, summary dismissal of defendant's post-conviction petition is reversed and the cause is remanded.

¶ 2 Defendant, Efren Aguilar, appeals from an order of the circuit court of Cook County dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends that the trial court's *sua sponte* dismissal of his

petition at the first-stage of the post conviction proceedings on the grounds that it did not make a "substantial showing" of a constitutional violation was not authorized by the Act and further, that the trial court erred in dismissing his petition because he set forth a nonfrivolous claim of ineffective assistance of trial counsel and appellate counsel. For the reasons set forth below, we reverse the summary dismissal of defendant's petition and remand this cause for further proceedings under the Act.

¶ 3 On April 25, 2006, defendant was arrested and charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1) &(2) (West 2006)) in the shooting death of Brandon McClelland. The evidence at trial consisted primarily of testimony from three of the victim's friends, who testified that on May 29, 2004, at approximately 10:30 p.m., they were sitting with the victim in Bessemer Park, in Chicago, Illinois, smoking marijuana, when defendant rode up on a bike, stopped approximately 20 feet in front of them, and asked them what gang they were in. After some of the men responded that they were not in a gang, defendant pulled out a gun and began to shoot at them. The victim, McClelland, was struck in the back by a bullet and later died at the hospital. Within 24 hours of the shooting, two of the victim's friend identified defendant as the shooter from a photo lineup. The third witness also picked defendant out as the shooter, but stated that he would need to see him in person to be sure. Approximately two years after the shooting, defendant was arrested following a traffic stop and placed in a lineup. All three witnesses identified defendant as the person who shot McClelland. The three witnesses also testified at trial and made an in-court identification of defendant as the shooter. A jury convicted defendant of first degree murder and the trial court subsequently sentenced him to 50 years'

imprisonment, 25 years for the first degree murder conviction and an additional 25 years for using a firearm during the offense.

¶ 4 On direct appeal to this court, defendant argued that: (1) the trial court erred in excluding testimony from an eyewitness identification expert; (2) the trial court erred in admitting evidence of his other crimes; (3) the State failed to prove him guilty beyond a reasonable doubt; and (4) the trial court's sentence of 50 years was excessive given his age at the time. This court affirmed defendant's conviction and sentence, finding that: (1) the trial court did not abuse its discretion in refusing to permit him to present an eyewitness identification expert where the court concluded that such testimony was not relevant and would not help the jury; (2) other crimes evidence was admissible to show defendant's consciousness of guilt; (3) based on the evidence presented, a rational trier of fact could have found defendant guilty beyond a reasonable doubt; and (4) the trial court did not err in enhancing defendant's sentence for use of a firearm, nor did the sentence violate the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Aguilar*, 396 Ill. App. 3d 43 (2009). The supreme court denied defendant's petition for leave to appeal. *People v. Aguilar*, 236 Ill. 2d 508 (2010).

¶ 5 On December 28, 2010, defendant filed a post-conviction petition, through counsel, alleging that his trial counsel was ineffective for failing to investigate and present alibi witnesses who would testify that defendant was in Sauk Village, Illinois and not in Bessemer Park at the time of the murder. The petition also claimed that counsel was ineffective for failing to investigate and present evidence that on the day of the murder defendant had shoulder length hair and did not have a shaved head with a ponytail as described by the three eyewitnesses. Lastly,

the petition claimed that trial counsel was ineffective for failing to file and litigate a motion to suppress identification testimony and that appellate counsel was ineffective for failing to allege trial counsel's ineffectiveness for failing to file and litigate such a motion.

¶ 6 In support of his petition, defendant attached his own affidavit, an affidavit from his girlfriend, Pricila Pernillo, and affidavits from his mother, Maria Aguilar, his brother, Henry Aguilar, and his sister, Nira Aguilar. In his own affidavit, defendant averred that on May 29, 2004, at approximately 11 a.m., he and his friend, Jose Zambrano, picked up defendant's girlfriend, Pricila Pernillo, at her house in Lansing, Illinois. They then drove to Sauk Village, Illinois, where Zambrano lived with his girlfriend, Darlene Dilon. Defendant averred that on that day he was wearing a white T-shirt, jeans, and white shoes, and that he had shoulder length hair. He stated that he had a shaved head with a long tail when he was 14-or 15-years old but subsequently let his hair grow out and had not cut it. Defendant further stated that he was in Sauk Village for the entire day and that at approximately 10:40 p.m., his mother called Pernillo and told her that she had heard gunshots in Bessemer Park and wanted to make sure defendant was safe. Defendant stated that at 11:45 p.m., he and Zambrano took Pernillo home and that he spent the night at Zambrano's house and was not in Bessemer Park that night. Defendant stated that he told his attorney that he had an alibi, but that his attorney did not call Pernillo, Zambrano, or Dilon to testify. He also stated that he told his attorney that his mother had photos of him, taken around the time of the murder, that would show that he had long hair and did not have a shaved head, as the eyewitnesses had stated.

¶ 7 In her affidavit, Pernillo averred that defendant and his friend, Jose Zambrano, picked her

up at her house at 11 a.m. and that they went to Zambrano's house. Pernillo stated that they spent the entire day watching movies and playing video games and that at approximately 10:40 p.m., defendant's mother called and said that she had heard gunshots in Bessemer Park and wanted to make sure defendant was okay. Pernillo stated that at about 11:45 p.m., defendant and Zambrano drove her home and that defendant told her that he was going to sleep at Zambrano's house because it was too late to drive home. Pernillo further stated that on May 29, 2004, defendant had long hair and that he never had a shaved head with a pony tail.

¶ 8 Defendant's mother, Maria Aguilar, averred that on May 29, 2004, defendant left home at 10 a.m. when his friend, Jose Zambrano, picked him up to go visit Pernillo. She stated that at about 8 p.m., defendant's friend, Joban, arrived at her home looking for defendant. She further stated that she told Joban that defendant was at Zambrano's house and that she let Joban stay overnight in defendant's bedroom because he had gotten into an argument with his mother. At approximately 8:30 p.m., Maria went with her son Henry and her nine-year-old daughter Nira to Bessemer Park. While in the park, at approximately 10:30 p.m., they heard gunshots. Maria averred that she called Pernillo to find out where defendant was and Pernillo told her that they were still at Zambrano's home. Maria returned home with Henry and Nira to find the house surrounded by police cars. She stated that she initially refused to let the officers in the house, but eventually relented and let them conduct a search. She also stated that the officers asked her what defendant was wearing, how he wore his hair, and whether he owned a bicycle. She stated that she told them he was wearing a white T-shirt and jeans, that he had long hair, and did not have a bicycle.

¶ 9 Defendant's brother, Henry Aguilar, averred that defendant was not home on the evening of May 29, 2004, and that his mother had told him that defendant was with Pernillo at Zambrano's house. Both Henry and his sister, Nira Aguilar, averred that they were in Bessemer Park with their mother at approximately 10:30 p.m. when they heard gunshots. They returned home to find police cars surrounding the house, and the officers eventually entered the house and conducted a search.

¶ 10 In addition to the affidavits, defendant attached three photographs to his petition to support his claim that his appearance on the day of the shooting did not match the eyewitnesses' descriptions of the shooter. One of the photos was his school identification from the 2002-2003 school year, the second was his driver's license photo, issued on March 2, 2004, and the third was a picture of defendant with two friends taken when defendant was 16-years old, in 2003 or early 2004 All three photos show defendant with shoulder-length hair. Defendant also attached a map indicating where he lived, where in the park the shooting took place, and where his mother, brother, and sister claim that they were standing at the time of the shooting.

¶ 11 On March 11, 2011, the circuit court dismissed defendant's petition in a written order that was accompanied by an oral ruling. The court found that the affidavits submitted by defendant's mother, brother, and sister, were irrelevant and largely consisted of hearsay since none of the three affiants had firsthand knowledge of defendant's whereabouts at the time of the shooting. The court found that the affidavit of defendant's girlfriend, Pricila Pernillo, did set forth an alibi, but that defense counsel's decision to call her as a witness could be a matter of reasonable trial strategy that would not support a claim of ineffective assistance of counsel. The court stated that

given that Pernillo was defendant's girlfriend and the mother of his daughter, her testimony may have carried little weight and could have detracted from defense counsel's primary trial strategy, which was to cast doubt on the identification testimony. With regard to defendant's affidavit, the trial court noted that the original affidavit submitted by defendant was not signed or notarized. The trial court granted defendant leave to resubmit the affidavit, which was purportedly signed by defendant but not notarized. Therefore, the court found that the affidavit had no legal effect and that even if it had been notarized, it would add nothing of significance to the petition because it merely stated that he would testify that he did not commit the crime, which he could have done at trial had he chosen to take the witness stand.

¶ 12 With regard to defendant's claim of ineffective assistance of trial counsel for failing to raise the alleged discrepancies in defendant's appearance, the court stated that although the shooter was described as having a shaved head with a pony tail and the photos showed defendant with long hair, the shooting took place on May 29, 2004, while the school photo was from the 2002-2003 academic year and the driver's license photo was taken on March 2, 2004. Therefore, the court concluded that the photos did not establish how defendant looked on the day of the murder and that defendant could have change his hairstyle between the time the photos were taken and the date of the murder.

¶ 13 As to trial counsel's failure to litigate a motion to suppress identification testimony and his claim of ineffective assistance of appellate counsel for failing to raise this issue on appeal, the trial court concluded that the lineups conducted by the police were not unduly suggestive as to give rise to a substantial likelihood of misidentification, and therefore, any motion to suppress

identification would have been futile. The court also found that since the underlying claim of ineffectiveness lacked support, the claim of ineffective assistance of appellate counsel also was without merit. Therefore, the trial court dismissed the petition, finding that defendant "failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings."

¶ 14 The Post-Conviction Hearing Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. At the first stage, within 90 days after the petition is filed, the trial court must determine independently, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122–2.1(a)(2) (West 2008).[1] A petition is 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, 12 (2009). "A petition which lacks an arguable basis in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *** Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17. If the petition is not dismissed during the first stage proceeding, the court must order the petition to be docketed for second stage proceedings. 725 ILCS 5/122-2.1(b) (West 2008). We review a trial court's first-stage summary dismissal of a postconviction petition *de novo*, which means we "are free to substitute our own

[1]The appellate court has found that during first stage proceedings, the "frivolous or patently without merit" applies regardless of whether the petition was filed *pro se* or was prepared by an attorney. See *People v. Usher*, 397 Ill. App. 3d 276, 282-283 (2009); *People v. Smith*, 326 Ill. App. 3d 831, 836 (2001). However, that issue is currently before the Illinois Supreme Court. See *People v. Tate*, No. 112214 (pet. for leave to appeal granted Sept. 28, 2011).

judgment for that of the circuit court in order to formulate the legally correct answer." *People v. Newbolds*, 364 Ill. App. 3d 672, 675 (2006).

¶ 15 On appeal, defendant first contends that the trial court's dismissal of his petition for failing to show a "substantial violation" of his constitutional rights was not permitted under the Post-Conviction Hearing Act. Defendant asserts that during first-stage proceedings, he only needed to make a showing that his petition was not "frivolous or patently without merit" in order to warrant a second stage proceeding. He asserts that because the trial court used the wrong standard, the dismissal order is void and the petition must be remanded to the trial court for second-stage proceedings.

¶ 16 The State argues that the trial court properly dismissed the petition at the first-stage of the proceedings after employing the correct standard of review and that even if the circuit court employed the incorrect standard of review, reversal is not required where the record clearly demonstrates that the petition was frivolous and patently without merit.

¶ 17 A review of the record fails to clarify whether or not the trial judge used the correct standard in dismissing defendant's petition. The trial judge stated that he was making a ruling within 90 days of the filing without input from either side, as required for first stage proceedings. He also stated that defendant's claim of ineffective assistance of counsel was "patently erroneous" and "without merit." However, at the beginning of his written order the trial judge states that defendant has "the burden of establishing that a substantial violation of his constitutional rights occurred at trial or sentencing" and, he concludes by stating that "petitioner has failed to make a substantial showing that his constitutional rights were violated in either the trial court or

appellate proceedings." These latter statements are inappropriate, given that the proceeding was at the first stage. The relevant question was not whether defendant's petition made a substantial showing of a constitutional violation, which is a second stage inquiry, but rather, whether defendant's petition was properly dismissed at the first stage of the post-conviction proceedings. However, this alone is not grounds for reversing and remanding to the trial court. As we have previously explained, "[d]ue to the elimination of all factual issues at the dismissal stage of a post-conviction proceeding, the question is, essentially, a legal one, which requires the reviewing court to make its own independent assessment of the allegations. Thus, a court of review [is] free to substitute its own judgment for that of the circuit court in order to formulate the legally correct answer." *Newbolds*, 364 Ill. App. 3d at 675. Therefore, we now turn to the substance of defendant's petition.

¶ 18 Defendant argues that his post-conviction petition raises a nonfrivolous claim that his trial counsel was constitutionally ineffective for: (1) failing to investigate and present alibi witnesses to testify that defendant was not in Bessemer Park on the night of the shooting; (2) failing to present evidence regarding his physical appearance on the night of the shooting; and (3) failing to file a motion to file a motion to suppress identification testimony.

¶ 19 In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant.

Strickland, 466 U.S. at 687. More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. " *Strickland*, 466 U.S. at 697.

¶ 20 Here, defendant first claims that trial counsel was ineffective in failing to call alibi witnesses, including his girlfriend, Pricila Pernillo, who defendant claims was prepared to testify that at the time of the shooting, defendant was with her at a friend's house in Sauk Village, Illinois, a half hour from Bessemer Park. Defendant contends further that his alibi is corroborated by his own his own affidavit, wherein he claimed to be at Zambrano's house at the time of the murder and the affidavit of his mother, Maria Aguilar, who averred that shortly after the shooting, she spoke with Pernillo on the phone, who confirmed that defendant was with her in Sauk Village. Defendant contends that the affidavits of his brother Henry, and his sister Nira, provide further corroboration, because they state that on the night of the shooting, their mother told them that defendant was with Pernillo.

¶ 21 First, with regard to defendant's own affidavit, the State notes that it is not notarized. Further, even if it had been notarized, it only includes information that defendant could have presented at trial had he chosen to testify. He was instructed at trial that it was his choice whether or not to testify and chose not to do so. Further, we note that in order to successfully advance a claim of actual innocence, the proponent must demonstrate the evidence offered is: (1) newly discovered; (2) material and noncumulative; and (3) "of such conclusive character that it

would probably change the result on retrial." *People v. Garcia*, 405 Ill. App. 3d 608, 618 (2010). However, as our supreme court has noted, it is "illogical" for a defendant to claim that evidence of an alibi is new, where he knew about it at trial and on appeal. *People v. Edwards*, 2012 IL 11171 (2012). Therefore, the State has a strong argument that the contents of defendant's affidavit do not support his claim that he was denied effective assistance of counsel with regard to his alibi defense.

¶ 22 The State argues that as for defendant's mother, brother, and sister, none of those individuals actually provide an alibi for defendant because they were not with him at the time of the shooting. In addition, although their affidavits state that they were in Bessemer Park on the evening of May 29, 2004, and heard gunshots, none of them actually witnessed the shooting. Defendant's mother, Maria, averred that she spoke with Pernillo shortly after hearing the gunshots, and that Pernillo told Maria that defendant was with her. However, this was inadmissible hearsay, as are the conversations that Maria had with her children and defendant's friend, Joban, in which she claims to have told them that defendant was with Pernillo at his friends' house in Sauk Village. Therefore, the State argues that defendant's claim that his trial counsel was ineffective for failing to present these three witnesses at trial had no arguable basis in either law or fact.

¶ 23 Turning to defendant's girlfriend, Pricila Pernillo and trial counsel's failure to call her as an alibi witness, we note that it is well-settled that strategic choices made by defense counsel after a thorough investigation of the law and facts relevant to the plausible options are virtually unchallengeable. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). It is equally settled that trial

counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel. *People v. Brown*, 336 Ill. App. 3d 711, 718 (2002). However, our case law also holds hat counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense. *Id*.

¶ 24 In her affidavit, Pernillo stated that on May 29, 2004, at the time of the murder, she and defendant were together at a friend's house in Sauk Village Illinois and were not in Bessemer Park. She further stated that she contacted defendant's attorney and informed him that she was willing to testify at trial, that she was in the courtroom during the trial, but that she was never called to testify.

¶ 25 In dismissing defendant's petition, the trial court stated, with regard to Pernillo's affidavit, "[g]iven the relationship between Aguilar and Pernillo her credibility may have carried little weight. [Citation.] As such, the decision not to call Pernillo as a witness was a matter of reasonable trial strategy. Thusly, defendants claim of ineffective assistance fails." First, we note that the trial court erred in dismissing defendant's petition based on its assessment of a witnesses' credibility. At the first stage of a postconviction proceeding, the only issue before the trial court was whether defendant's claim that he was deprived of a constitutional right to present a defense through an alibi witness was frivolous or patently without merit. As this ineffective assistance claim is based on a factual allegation, we can affirm the trial court's holding only if we found the allegation to be "fantastic or delusional." *Hodges*, 234 Ill. 2d at 17. Based on the contents of

Pernillo's affidavit, we find that the allegation was not fantastic or delusional and therefore, the trial court should not have summarily dismissed defendant's petition. Therefore we reverse the trial court. As noted above, defendant's petition raises several other claims, however, because we reverse the court's dismissal on this issue, we need not address the other issues raised by defendant's petition and remand the entire petition for further proceedings under the Post-Conviction Hearing Act. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

¶ 26 Defendant asks that we remand this case to a different judge. Defendant argues that by adopting a "substantial showing" standard in his order and stating that defendant's petition has failed to meet that standard, the trial court has prejudged the issues that will be before him at the second stage proceeding. Defendant asserts that in its order, the trial court has already stated that Pernillo would not be a credible witness, that the decision to not call her as a witness was a matter of reasonable trial strategy, and that there is no evidence that the lineups were unduly suggestive. Therefore, defendant argues"[i]t would be futile to remand Aguilar's petition for determination of whether there has been a 'substantial showing' in front of a judge who has already predetermined that there has not."

¶ 27 A defendant has no absolute right to a substitution of judge in a postconviction proceeding. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). In fact, the judge who presided over the criminal trial should hear the postconviction petition unless it is shown that the judge is substantially prejudiced. *Id.* Disqualifying a judge for cause is not a judgment to be lightly made. *People v. Patterson*, 192 Ill. 2d 93, 134 (2000). The defendant must show something more than simply that the judge presided over the criminal trial. *People v. Reyes*, 369 Ill. App.

3d 1, 25 (2006). In fact, the United States Supreme Court has held that a judge's prior rulings in the case rarely, if ever, can form the basis of a recusal motion. *Liteky v. United States*, 510 U.S. 540, 555 (1994). The allegations must demonstrate "animosity, hostility, ill will, or distrust" or "prejudice, predilections or arbitrariness." *Reyes*, 369 Ill. App. 3d at 25. In some limited circumstances, where there may be an appearance of prejudice, a judge must recuse himself from postconviction proceedings. *People v. Thompkins*, 181 Ill. 2d 1, 22 (1998). Alternatively, a judge may decide to recuse himself if he determines he cannot be impartial. It is presumed that judges will be impartial, but they must ultimately determine whether they can "hold the balance nice, clear and true between the State and the accused." *Harvey*, 379 Ill. App. 3d at 522.

¶ 28 In this case, defendant alleged that "[i]t would be futile to remand Aguilar's petition for a determination of whether there has been a 'substantial showing' in front of a judge who has already predetermined that there was not." However, that allegation alone does not suggest that the trial judge was unable to hold the balance "nice, clear and true" between defendant and the State. Moreover, defendant's allegation is based on the trial judge's prior ruling in the case, which is not a valid basis for a recusal motion. *Liteky*, 50 U.S. at 555. Further, defendant has not alleged a bias that demonstrates "animosity, hostility, ill will, or distrust" toward him. *Reyes*, 369 Ill. App. 3d 1 (2006). Therefore, we remand the case back to the original trial court for further proceedings under the Act.

¶ 29 Reversed and remanded.