2014 IL App (1st) 111262-U

FIFTH DIVISION
NOVEMBER 7, 2014

No. 1-11-1262

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. 07 CR 16141
	)	
CEDRIC McRAY,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to present the gist of a constitutional violation.

¶ 2 Defendant, Cedric McRay, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He maintains that he raised an arguable claim of actual innocence based on affidavits from his friend, his grandmother, and the victim. In the alternative,

he contends that he raised an arguable claim of ineffective assistance of counsel based on counsel's failure to elicit testimony from the affiants at trial regarding the content of their affidavits.

¶ 3 The record shows that defendant and a codefendant, Christopher Dawson, who is not a party to this appeal, were tried in simultaneous but separate bench trials in connection with two shootings directed at the victim, Mario Brantley. The incidents occurred in the early morning hours of July 24, 2007, in an alley near West 53rd and Green Streets in Chicago, and in front of codefendant's home on West 52nd Street. Defendant was found guilty of three counts of aggravated discharge of a firearm and sentenced to concurrent terms of nine years' imprisonment. That judgment was affirmed on direct appeal over defendant's challenge to, *inter alia*, the sufficiency of the evidence. *People v. McRay*, No. 1-08-2384 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On June 22, 2010, defendant filed the form *pro se* postconviction petition at bar, contending that there was a substantial violation of his constitutional right to due process, "in that [he] is actually innocent of the crimes charged." In support of his petition, defendant filed affidavits from Brantley, Tidis Redmond, and Helen McRay. Brantley averred that he was intoxicated and "did not see no one that could have shot at [him]." It was "dark and [he] couldn't see what so ever." He further alleged that defendant "did not shoot at [him]" and is "innocent and in jail for no reason at all."

¶ 5 In his affidavit, Redmond stated that he and defendant went to a party, and "a short second" later, there was a shooting which caused him and defendant to leave. Defendant stopped at home, then came to his house to "talk about what happen[ed]." As defendant was leaving his

house, Redmond noticed two cars: Brantley's car, and a police car with no lights on. The police car stopped at 940 West 52nd Street and "did not proceed into [*sic*] they descover [*sic*] shooting coming from the way [defendant] was running." To keep from "getting shot" defendant ran into a building four or five houses down. Redmond further alleged that it was not possible for the police to have "seen those action from were they were parked. It was to many destraction there pluse darked area, trees, and a big truck [*sic passim*]."

¶ 6 Helen McRay averred that she is defendant's grandmother and lives at 934 West 52nd Street. On July 23, 2007, she was awakened by a shooting, and ran to her porch where she saw people running. She saw Redmond, her next-door neighbor, and asked him about her grandson. Redmond said he was putting his car in the garage. She "looked around" and saw defendant come through the gangway. She then went back inside, and began to watch television. She later heard "speeding," looked outside, and saw a car "zig-zag" with no lights on. She noticed a police car parked two doors west of her house which "just sat there." She came back into the house, then heard shooting again. The police car was still parked with the lights off, and it would have been "impossible for police *** to see from where they was [*sic*] parked" to codefendant's house where the shooting occurred.

¶ 7 On July 16, 2010, the circuit court entered a written order summarily dismissing defendant's petition as frivolous and patently without merit. Defendant now challenges that ruling on appeal.

¶ 8 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Although defendant need only set forth the “gist” of a constitutional

claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), section 122-2 of the Act requires that the petitioner clearly set forth the respects in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting the allegations or an explanation for their absence (725 ILCS 5/122-2 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). If the circuit court finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or in fact, it must dismiss the petition in a written order. 725 ILCS 5/122–2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10, 16). We review the summary dismissal of a postconviction petition *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388 (1998)), and may thus affirm on any ground substantiated by the record, regardless of the trial court's reasoning (*People v. Lee*, 344 Ill App. 3d 851, 853 (2003)).

¶ 9 Defendant first contends that the court erred in dismissing his petition because he raised a claim of actual innocence that had an arguable basis in fact and in law. The State disagrees, and asserts that summary dismissal was appropriate where defendant failed to meet the requirements for seeking relief based on newly discovered evidence of actual innocence.

¶ 10 To assert a claim of actual innocence based upon newly-discovered evidence, defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). To qualify as "newly discovered," the evidence must have been "unavailable at trial and could not have been discovered sooner through due diligence." *People v. Harris*, 206 Ill. 2d 293, 301 (2002). Here, defendant makes no effort to assert he was unaware of the potential testimony at the time of his trial. Instead, he merely asserts that the affidavits themselves were "signed and dated after [defendant's] trial[.]" When the affidavits

were created, however, is clearly insufficient to determine whether their contents are newly-discovered. *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007). The record shows that both Brantley and Redmond were available as they testified at defendant's trial, and were subject to extensive cross-examination. The record further shows that defendant's grandmother attended most of defendant's court dates and testified in mitigation at sentencing, thus indicating that she, too, was available to be called as a witness at trial.

¶ 11 We also note that Brantley testified at trial that he was "a little intoxicated" and could not see the shooters during either incident, while Redmond maintained that he was with defendant when they witnessed the two incidents, but defendant was not one of the shooters. As such, the averments in Brantley and Redmond's affidavits are substantially similar to their trial testimony, and cannot be construed as "newly discovered."

¶ 12 Defendant additionally asserts, however, that the contents of Brantley's affidavit are newly discovered because he was a "reluctant witness" at trial, and it is therefore "arguable that he would have been unwilling to come forward with the real shooter's identity at trial or he discovered the identity of the shooter after trial." This argument, however, is merely speculative and misstates the contents of Brantley's affidavit, which contains no such averments. In fact, Brantley repeats his trial testimony regarding his intoxication, and reiterates that it was dark out and that he could not identify the shooters. Under these circumstances, we conclude that the information provided in the supporting affidavits is not newly discovered. *Harris*, 206 Ill. 2d at 301.

¶ 13 We also find that the evidence contained in the affidavits is merely cumulative of the trial testimony. Evidence is considered cumulative when it "adds nothing to what was already before

the jury." *Ortiz*, 235 Ill. 2d at 335. As noted above, Brantley and Redmond's affidavits are substantially similar to the testimony they provided at trial. Although defendant maintains that Brantley's affidavit affirmatively rules out defendant as the shooter, this contention is not borne out by the affidavit in which Brantley reiterates his trial testimony that he "did not see no one that could have shot at [him]" and it was "dark and [he] couldn't see what so ever." Although he states that defendant "did not shoot at [him,]" he also states that he could not see the actual shooter, and provides no basis for knowing that it was not defendant. Under these circumstances, we find his affidavit cumulative of his trial testimony.

¶ 14 Finally, we conclude that the affidavits are not of such a conclusive character that they would probably change the result on retrial. The record shows that two police officers witnessed the second shooting and identified defendant and codefendant as the shooters. They then saw defendant and codefendant dispose of three guns, which were later analyzed and determined to have been used in the shootings in the alley and in front of codefendant's house. At trial, Redmond, Brantley and both officers testified regarding the position of the police car at the time of the second shooting, and Officer Rosales specifically stated that the headlights on Brantley's vehicle were illuminated, there was nothing obstructing his view, and he was able to see defendant and codefendant when he turned on the spotlight of the police car. Although Brantley maintained at trial that he was unable to see the shooters, the State introduced evidence that he previously identified defendant and codefendant as the shooters in both incidences.

¶ 15 In these circumstances, the affidavits of Brantley, Redmond and defendant's grandmother, at best, merely conflict with the eyewitness testimony of the officers, and, given the totality of the evidence establishing defendant's guilt, they do not exonerate defendant as

required for a claim of "actual innocence." *People v. Collier*, 387 Ill. App. 3d 630, 636-37 (2008) (when evidence merely impeaches or contradicts trial testimony, it is not typically of such conclusive character as to justify postconviction relief); *Ortiz*, 235 Ill. 2d at 335 (impeachment of a prosecution witness is an insufficient basis for granting a new trial). As a result, we find no basis for concluding that the affidavits would probably change the result on retrial (*Harris*, 206 Ill. 2d at 301-02), and conclude that defendant failed to set forth an arguable claim of actual innocence requiring further proceedings under the Act.

¶ 16 In apparent anticipation of the failure of his actual innocence claim, defendant alternatively contends that the court erred in dismissing his petition because it contains an "arguable claim of ineffective assistance of counsel." Defendant acknowledges that he did not "specifically raise the issue of ineffective assistance of counsel" in his petition, but claims that the facts alleged support such a claim for counsel's failure to elicit testimony impeaching the officers' identifications through Redmond and defendant's grandmother. The State responds that this court is precluded from review of such a claim, as it was not raised in defendant's *pro se* petition. We agree.

¶ 17 As the State points out, not only did defendant fail to use the phrase "ineffective assistance of counsel" in his petition, he did not include *any* allegations regarding counsel's allegedly deficient performance or even mention counsel "in any manner[.]" Our supreme court has reminded this court that, in such situations, we are "not free, as [the supreme court] is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction

petition." *People v. Jones*, 213 Ill. 2d 498, 508 (2004). We therefore find that the issue has been forfeited for review and warrants no further discussion. *Jones*, 213 Ill. 2d at 508.

¶ 18 Based on the foregoing, we affirm the order of the circuit court of Cook County, dismissing defendant's postconviction petition as frivolous and patently without merit at the first stage of proceedings.

¶ 19 Affirmed.