2013 IL App (1st) 112535-U

SIXTH DIVISION
March 29, 2013

No. 1-11-2535

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. 01 CR 29139
	)	
JAMES SOTO,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition where the petition did not assert a claim of an arguable basis in law and fact that defendant's constitutional right to effective assistance of counsel was violated because trial counsel's alleged failure to advise defendant of his right to testify at trial did not prejudice defendant. We affirm.

¶ 2 Defendant James Soto appeals 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 the trial court erred in dismissing the petition because it presented an

arguable claim of ineffective assistance of counsel based on counsel's alleged failure to advise him of his right to testify at trial.

¶ 3 Following a bench trial, defendant James Soto was convicted of three counts of attempted first degree murder, two counts of aggravated discharge of a firearm, one count of aggravated battery with a firearm, one count of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. Defendant's convictions arose from a shooting incident in which defendant, armed with a handgun, and his codefendant Gerardo Gonzalez, armed with a sawed-off shotgun, opened fire on three men as they stood on a porch. Defendant was sentenced to a total of 24 years' imprisonment. Defendant's convictions for attempted first degree murder and his sentences were affirmed on direct appeal. *People v. Soto*, No. 1-02-3341 (2004) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 The trial evidence showed that on November 17, 2001, George Hernandez, Miguel Flor, and Joseph Martinez were on the front porch of the house located at 1839 North Tripp Avenue in Chicago. The State's witnesses testified that defendant, armed with a .45 caliber handgun, and codefendant Gonzalez, armed with a sawed-off shotgun, fired multiple shots at the three men on the porch. When the shooting began, Flor and Hernandez ran inside the hallway and lay on the floor. Martinez followed and threw himself down on the porch in the entrance. They were able to escape the shooting without severe injury. Hernandez, however, testified that although he did not bang his head on anything, he felt a stinging and burning sensation on his head. When he touched his head, he discovered he was bleeding. The bleeding did not last long, and Hernandez did not seek medical attention.

¶ 5 Anna Rosario testified she lived next door to 1839 North Tripp. She was home watching a movie when she heard four or five gunshots. She looked out of the window and observed

defendant and codefendant Gonzalez walking away carrying guns. They walked past her and into her neighbor's yard. She identified both men in a police line-up the same night of the shooting.

¶ 6 Officers John Kurtz and Anthony Jannotta of the Chicago police department were on patrol approximately two blocks west of the shooting at approximately 11:30 or 11:40 p.m. Kurtz testified he heard "gun blasts" and then observed two men in dark clothes running away. Both appeared to be carrying weapons, a handgun and a longer dark object that Kurtz believed was a rifle. The officers gave chase, with other police officers joining in the pursuit. The officers eventually subdued the men and recovered their weapons. Kurtz identified defendant and codefendant Gonzalez in open court as the two individuals who fled the scene carrying weapons. Police recovered a .45 caliber handgun from defendant and the sawed-off shotgun which the officers observed codefendant Gonzalez drop during the foot chase.

¶ 7 Evidence technician Thomas Slowinski testified he processed the scene of the shooting and recovered one live and two discharged 12-gauge shotgun shells, two discharged .45 caliber cartridges, and one fired bullet fragment. Detective Richard Cerny also investigated the crime scene and testified that the holes in the porch's ceiling appeared to be in a blast pattern of 15 to 20 holes. Brian Parr, an expert in firearms identification, determined the .45 caliber shells were fired from the weapon recovered from defendant and the recovered shotgun shells were fired from the shotgun codefendant Gonzalez was carrying. Despite determining the bullet fragment was .45 caliber, Parr's finding was inconclusive as to whether the fragment came from defendant's gun. Detective Terence Hart conducted a line-up at approximately 3 a.m on November 18, 2001. He testified that Martinez and Anna Rosario positively identified defendant and codefendant Gonzalez. Flor and another witness were unable to identify the shooters.

¶ 8 The parties stipulated to defendant's prior felony conviction for burglary and codefendant Gonzalez's conviction for delivery of a controlled substance. After the State rested, defendant

and codefendant Gonzalez presented stipulations that Hernandez told Officers Cerny and Kraak contradictory versions of where defendant and codefendant Gonzalez were located when they began shooting. According to the stipulations, Hernandez told Cerny that both gunmen were across the street from the house and told Kraak the two gunmen were on opposite sides of the street.

¶ 9 Defendant was found guilty of three counts of attempted first degree murder, one for each victim, aggravated battery with a firearm as to Hernandez, two counts of aggravated discharge of a firearm, one count of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. He was sentenced to concurrent terms of 24 years for the attempted first degree murder convictions, 15 years for the aggravated discharge of a firearm convictions, 10 years for the aggravated battery conviction, 7 years for aggravated unlawful use of a weapon and 5 years for unlawful use of a weapon by a felon. On direct appeal, defendant's convictions for attempted first degree murder, aggravated unlawful use of a weapon, and one count of unlawful use of a weapon by a felon, along with the corresponding sentences, were affirmed. *Soto*, No. 1-02-3341. The remaining convictions were vacated under the one-act, one-crime rule. *Id.*

¶ 10 On February 25, 2011, defendant filed the instant *pro se* postconviction petition. The petition alleges, in relevant part, that defendant was denied his right to effective assistance of trial counsel where counsel did not advise him of his right to testify, arguing that had he been advised, defendant would have testified. The petition does not proffer what defendant would have testified to, if given the opportunity. The trial court dismissed the petition as frivolous and patently without merit. This appeal follows.

¶ 11 At the first stage of postconviction proceedings, summary dismissal is allowed only if the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Taking the allegations in the petition as true and liberally

construed (*Brown*, 236 Ill. 2d at 184), a petition is considered frivolous or without merit only if it "has no arguable basis either in law or in fact," meaning it is "based on an indisputably meritless legal theory or a fanciful factual allegation." (*People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009); see also *People v. Tate*, 2012 IL 112214, ¶¶ 9, 12 (explaining that the threshold for survival at the first stage is low and that the "petition cannot be said to be at issue")). "The allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Brown*, 236 Ill. 2d at 184. Petitions based on meritless legal theories or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. We review *de novo* the trial court's dismissal of a postconviction petition at the first stage. *People v. Williams*, 186 Ill. 2d 55, 59-60 (1999); *People v. Coleman*, 183 Ill. 2d 366, 378 (1998).

¶ 12 A first stage petition claiming ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and that it is arguable that the defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This court may dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, without determining whether counsel's performance was deficient. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 13 Defendant contends that his trial counsel interfered with his right to testify by failing to advise him of the right. Had he been advised, defendant contends he would have testified. He further alleges he was prejudiced by counsel's failure because the alleged error denied him the opportunity to rebut the State's evidence. Defendant argues his claim is not rebutted by the record because the trial court did not address defendant's right to testify before the parties rested.

¶ 14 The State cites *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994) in responding that defendant's claim fails because he did not contemporaneously assert his right to testify at trial by informing the trial court of his desire to testify. Defendant's contention, however, falls outside of

Thompkins because in that case, the record reflected the defendant in fact knew of his right to testify where he indicated to counsel his desire to testify, yet the defendant failed to assert that right at trial. *Id.* at 177. Here, defendant argues he was denied the right to testify because counsel *never* advised him of the right. Had he known of his right to testify, defendant asserts he would have exercised that right. Further, the State's citation to *People v. Vaughn*, 354 Ill. App. 3d 917, 925 (2005) and *People v. Smith*, 176 Ill. App. 3d 217, 235 (1997), are similarly misplaced because those cases involve trial courts' improper admonishments of the defendant's right to testify.

¶ 15 Defendant cites to *People v. Dredge*, 148 Ill. App. 3d 911 (1986), as instructive in the present case because in that case the appellate court vacated the summary dismissal of the defendant's postconviction petition alleging her trial counsel was ineffective for unilaterally informing petitioner she could not testify. However, *Dredge* is not dispositive here because the appellate court limited its analysis to whether the defendant's postconviction petition adequately stated "a claim of deprivation of [the defendant's] constitutional right to testify at her trial." *Id.* at 913. It did not analyze the defendant's claim under *Strickland*, and instead appeared to assume that because defendant sufficiently alleged in her postconviction pleadings that her counsel deprived her of the right to testify, defendant was therefore prejudiced by this deprivation. *Id.* at 913. More recent cases, however, have made it clear that a defendant must allege at least arguable prejudice when claiming ineffective assistance of counsel based on trial counsel's alleged deprivation of the defendant's right to testify. See e.g., *Hodges*, 234 Ill. 2d at 17; and *People v. Hernandez*, 351 Ill. App. 3d 28, 36 (2004).

¶ 16 Turning to the merits of defendant's ineffective assistance of counsel claim, we first note that the State argues that in light of defendant's familiarity with the criminal justice system, as evidenced by his three prior felony convictions, it is incredible that he was not aware of his right

to testify. Although the State's argument might be persuasive at an evidentiary hearing on defendant's petition, we do not make credibility determinations at this stage of postconviction proceedings and we must accept all well pleaded facts as true. See *Brown*, 236 Ill. 2d at 184.

¶ 17 However, defendant has not demonstrated he was arguably prejudiced by counsel's deprivation of his right to testify because defendant failed to allege what his testimony would have been had he testified and he does not explain how his testimony would have rebutted the State's evidence. *Hodges*, 234 Ill. 2d at 17. As we observed on direct appeal, the evidence presented during the State's case-in-chief was more than sufficient to prove defendant fired at the victims. *Soto*, No. 1-02-3341, Order at 4-6. Martinez testified he was on the porch of the house located at 1839 North Tripp Avenue with Flor and Hernandez when defendant and codefendant approached and began shooting at them. Cerny testified the ceiling of the porch had a blast pattern of 15 to 20 holes, and that house and the one next door had numerous other bullet holes. Martinez and Rosario positively identified defendant and codefendant Gonzalez as the shooters. Officer Kurtz was patrolling in the immediate area of the shooting with Officer Jannotta when Kurtz heard "gun blasts." He then observed two men in dark clothing carrying weapons. The two officers gave chase and eventually subdued defendant and codefendant Gonzalez. The officers recovered a .45 caliber handgun from defendant and the 12-gauge sawed-off shotgun that codefendant Gonzalez was seen carrying. Evidence technician Slowinski recovered from the scene .45 caliber and 12-gauge shotgun shells and firearms identification expert Parr determined the recovered shells matched the weapons recovered from defendant and codefendant Gonzalez.

¶ 18 In light of the overwhelming evidence against defendant and defendant's failure to proffer how his testimony would have rebutted this evidence, defendant failed to present the gist of a claim with an arguable basis in law and fact that he was prejudiced by counsel's failure to advise him of his right to testify. See *Hernandez*, 351 Ill. App. 3d at 35-36 (concluding the trial court

did not err in summarily dismissing the defendant's post-conviction petition where the defendant could not demonstrate he was prejudiced by his trial counsel's depriving him of the right to choose whether to testify because the evidence of defendant's guilt was overwhelming).

¶ 19 For the foregoing reasons, we affirm the ruling of the circuit court of Cook County.

¶ 20 Affirmed.