2013 IL App (1st) 113358-U

FIRST DIVISION
May 6, 2013

No. 1-11-3358

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 15346
	)	
RUBEN SILVA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant failed to establish an arguable claim that appellate counsel was ineffective, and his claims of a *Brady* violation and ineffective assistance of trial counsel were forfeited, we affirmed the circuit court's summary dismissal of his postconviction petition at the first stage.

¶ 2 Defendant Ruben Silva appeals from an order summarily dismissing 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 his petition sufficiently sets forth the following claims: (1) his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) were violated when the State belatedly disclosed a photograph which constituted exculpatory evidence (the photograph); (2) he was denied effective assistance of trial counsel because trial counsel failed to investigate the photograph; and (3) he was denied effective assistance of appellate counsel because appellate counsel failed to raise these same issues on direct appeal. We affirm.

¶ 3 In 2009, defendant and his codefendant,[1] Dariel Webber, were tried simultaneously before separate juries for the murder of Guadalupe Ramirez and the attempted murder of Juan Rodriguez.

¶ 4 During the first day of trial, the following exchange occurred regarding the photograph:

> "MS. ARMBRUST [Assistant State's Attorney]: It came to my attention after speaking with [defense counsel] today about her client, that there's *** one sentence in a police report, by the detectives, indicating that they told her client that there was a photograph of him in the area of 89th and Commercial. I went through my file twice, could not find anything ***. There was no photograph inventoried. I asked the detective to look. He in fact did have a still photo, it's the back of a person on a bike in a tank top shirt.
>
> THE COURT: Taken supposedly when.
>
> MS. ARMBRUST: About 6:50 on the 25th of June, 2007. I indicated to him that we would not be using that photograph, we would not be questioning him about that because we never had it, never tendered it. I let [defense counsel] know. So that if she questions him about the photograph, he's going to say he hasn't -- but again, the [S]tate does not intend to use that in any way, shape or form.
>
> MS. NIESEN [defense counsel]: That photograph you said was taken from the rear, is that correct?
>
> MS. ARMBRUST: From the rear. You can see a face on the person and it's a grainy photograph. And he doesn't know why it was not included in the GPR's."

Following this dialogue, the State resumed presenting evidence. The photograph has never been made part of the record.

¶ 5 Juan Rodriguez testified that on June 25, 2007, at about 6:30 or 6:40 p.m., he and Guadalupe Ramirez were at a restaurant at 89th Street and Commercial Avenue in Chicago. While Mr. Ramirez

[1]Mr. Webber was acquitted of all charges.

was inside the restaurant ordering food, Mr. Rodriguez waited outside. Defendant walked past and said that Mr. Rodriguez was not supposed to be on that block, then left. Mr. Rodriguez had seen defendant on previous occasions in front of James Bowen High School where members of the Latin Kings gang congregated. Mr. Rodriguez knew defendant's nickname was "Saigon," and that defendant was a Latin King.

¶ 6 After defendant left, Mr. Rodriguez went inside the restaurant and told Mr. Ramirez that they should leave. Mr. Ramirez said he would not leave until he received his food. After about 10 to 15 minutes, Mr. Rodriguez left the restaurant and, looking down the street, saw defendant riding up toward him on a bicycle.

¶ 7 Defendant stopped and told Mr. Rodriguez that he should not be on the block and asked what he was doing there and where was his friend. Mr. Rodriguez did not respond. Defendant told Mr. Rodriguez that he was a Latin King, his name was Saigon, and he ran the block. Defendant then pulled out a silver automatic gun from his waistband and pointed the gun toward Mr. Rodriguez. Mr. Ramirez then exited the restaurant. Defendant pointed the gun and began to fire at Mr. Ramirez. At that time, defendant was approximately three to four feet away from Mr. Rodriguez and Mr. Ramirez, and it was still light out.

¶ 8 As defendant began firing, Mr. Webber approached the scene and defendant told him to fire at Mr. Rodriguez. Mr. Rodriguez had also seen Mr. Webber at Bowen High School in the past. Mr. Webber was known as "Twin" because he has a twin brother. Mr. Rodriguez could tell the twin brothers apart by the way they dressed–one brother always wore black and gold gloves–the other always wore red and black gloves–and the brothers wore different hairstyles. Mr. Webber pulled out a small, black revolver and began to shoot at Mr. Rodriguez. Mr. Rodriguez attempted to run around Mr. Ramirez's truck, which was parked nearby. Defendant fired more than five shots and Mr. Webber fired four to five shots. Mr. Rodriguez went around Mr. Ramirez's truck and saw Mr. Webber firing his gun while running northbound toward a liquor store at Commercial Avenue and

89th Street. Defendant also fled in that direction on foot.

¶ 9 After defendant and Mr. Webber ran away, Mr. Ramirez ran toward the driver's side of his truck. Mr. Rodriguez ran for the passenger side of the truck. After they both got into the truck, Mr. Ramirez told Mr. Rodriguez that he had been shot. Mr. Ramirez began to drive toward a fire station on 93rd Street.

¶ 10 When they had reached 91st Street and Commercial Avenue, Mr. Ramirez stopped the truck and said that because of his gunshot wounds, he was unable to drive any further. They both exited the vehicle to switch drivers, however, as Mr. Ramirez attempted to enter the passenger side of the truck, he fell onto the street.

¶ 11 Mr. Rodriguez called on his cell phone for an ambulance. During the call, the police began to arrive, and an ambulance arrived shortly thereafter. Mr. Rodriguez gave the police the nicknames of the shooters and described what they were wearing. Mr. Ramirez was brought by ambulance to the hospital.

¶ 12 Mr. Rodriguez subsequently went to Area 2 headquarters. While there, Mr. Rodriguez identified both defendant and Mr. Webber in a photo array. Later that night, Mr. Rodriguez identified Mr. Webber in a line-up and gave a handwritten statement to an Assistant State's Attorney (ASA).

¶ 13 On cross-examination, Mr. Rodriguez testified that he was not and never had been a member of the Latin Counts gang, however, he admitted that police officers refer to him as "Bam-Bam." Mr. Rodriguez testified that he did not know if Mr. Ramirez was a Latin Count at the time of the incident, but thought it was likely defendant was giving them the message that the "Latin Counts ain't supposed to be there." Mr. Rodriguez denied telling police officers in June 2007 that he was a Latin Count. Finally, Mr. Rodriguez testified to having a misdemeanor DUI case that was pending in Cook County, but that he had not been made any promises or deals with regard to that case.

¶ 14 During cross-examination, Mr. Rodriguez also answered questions about what defendant was

wearing that day:

"Q. [Ms. Niesen]: You remember what [defendant] was wearing on the bike or walking as you say?

A. [Mr. Rodriquez]: Yes. The first time I did see him, he had a muscle shirt and I could see tattoos. And the second he came back he had covered it with a white shirt, so now he was in a white shirt.

Q. Excuse me, are you finished?

A. Yes

Q. When this person came back he had on different clothing, is that what you're saying?

A. He had the same thing underneath, but a white shirt now over it.

Q. Was the shirt open?

A. No, it was just [a] white plain T-shirt, almost see through; thin, white shirt.

Q. Did he have on anything different other than that?

A. I don't believe so, ma'am, no. I believe he probably had a hat.

Q. Do you remember if he had a hat the first time he came by?

A. I believe he did have a hat.

Q. The second time you remember if he had a hat?

A. I don't think so. It was either [the] first time or second time he had a hat.

* * *

Q. What did he have on as far as pants?

A. I just [saw] when he lifted up, he had pants

Q. Do you remember what kind of pants he had on?

A. Blue jeans I believe.

Q. They were blue?

A. Yes."

¶ 15 Chicago Police Officer, Jaime Luna, testified that he and his partners Officers Spremo and Halloran, at "slightly" before 7 p.m. on June 25, 2007, received a call of shots fired near 91st Street and Commercial Avenue. At the time of the call, Officer Luna and his partners were at the 9600 block of Commercial Avenue–about 4 blocks away. When the officers arrived at 91st Street and Commercial Avenue at about 7 p.m., they found Mr. Ramirez lying on the ground on the passenger side of a Ford pickup. Mr. Ramirez had been shot multiple times in his upper body. Mr. Rodriguez told Officer Luna that individuals named "Saigon" and "Twin" had shot Mr. Ramirez. Officer Luna had worked in the district for several years and knew both "Saigon" and "Twin." He knew that Mr. Webber and his twin brother were Latin Kings from 89th Street. Officer Luna and his partners toured the area and, within minutes, found Mr. Webber nearby, but no weapon was recovered.

¶ 16 Chicago Police Detective Brian Forberg testified that Mr. Rodriguez identified defendant as "Saigon" from a photo array on the same night as the shooting. Two days later, defendant was located in Crown Point, Indiana. Defendant was subsequently transported to Area 2 where, on July 4, 2007, Mr. Rodriguez identified defendant in a lineup as the person who fired shots at Mr. Ramirez, and who told Mr. Webber to shoot at him. Detective Forberg identified People's exhibit number 41 as a photograph of defendant's left wrist with the word "Sigon" tattooed on it, along with other gang related symbols.

¶ 17 The autopsy performed on Mr. Ramirez revealed several gunshot entrance and exit wounds. Five bullets had been recovered from Mr. Ramirez's body: one was an old gunshot wound in his neck; the others were recovered from his sternum, abdomen, groin, and hip. There was no evidence of close-range firing. Additionally, Mr. Ramirez had abrasions consistent with his having fallen to the ground.

¶ 18 Chicago Police evidence technician, Yvonne Cary, arrived at 91st Street and Commercial Avenue at 7:52 p.m. that evening. She found blood on the street. By the restaurant where the

shooting occurred, the officer found three shell casings on the street and blood on the sidewalk. She did not find any fired bullets at the scene.

¶ 19 Leah Kane, a forensic scientist with the Illinois State Police crime lab, determined that the three fired casings found at the scene were fired from one gun. Ms. Kane also testified that the four bullets and one bullet fragment that had been recovered during the autopsy had been fired from one gun. Ms. Kane said, however, that bullets and casings cannot be compared and since there was no gun recovered in this case, she could not determine whether the gun that fired the bullets was the same gun that discharged the casings.

¶ 20 Courtney Melendez, a forensic scientist with the Illinois State Police crime lab, tested the cartridge casings that had been found in front of the restaurant, and found no latent prints on them.

¶ 21 During his case-in-chief, defendant introduced two stipulations as to the testimony of Officer Carlos Sanchez and ASA Aidan O'Connor. There was a stipulation that Mr. Rodriguez told Officer Sanchez the day after the shooting that he was a member of the Latin Counts street gang, a rival of the Latin Kings. It was further stipulated that ASA O'Connor would testify Mr. Rodriguez told her during an interview that when Mr. Rodriguez saw defendant the first time, defendant was riding past the restaurant on his bicycle and defendant did not speak to Mr. Rodriguez at that time.

¶ 22 During closing arguments, counsel for defendant raised numerous points attacking the credibility of Mr. Rodriguez and the inconsistencies in his testimony. Counsel questioned, among other things, the testimony as to defendant's purported change of clothes when he came back to the restaurant. Defense counsel argued there was no physical evidence or corroboration of Mr. Rodriguez's testimony that defendant was at the scene, and pointed out that there was no evidence that a bicycle was found.

¶ 23 Following closing arguments, the jury found defendant guilty of first-degree murder where he personally discharged a firearm and attempted first-degree murder. Prior to his sentencing, defendant wrote a letter to the trial judge alleging ineffective assistance of trial counsel. The trial

court held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), to determine whether his allegations warranted the appointment of new counsel to represent him on his claims. Defendant told the judge, in pertinent part, that trial counsel did not conduct a proper investigation as to the photograph. Defendant stated that he saw the photograph when he was interrogated by police in Indiana, that the photograph showed him on a different block at the time of the shooting and wearing different clothing than described by the eyewitness. The ASA responded that the State did not initially have the photograph and that detectives subsequently provided a copy of it. According to the State, the photograph showed the back of an individual on a bicycle in the area where the shooting occurred. The State also represented that the photograph was beneficial to the State because it showed a person in a white tank top, which matched the description of defendant provided by Mr. Rodriguez, and contended that defense counsel "realized this." Defense counsel made no statements during the *Krankel* hearing regarding the photograph.

¶ 24 The circuit court rejected defendant's arguments and did not appoint new counsel. Defendant was sentenced to 45 years' imprisonment for first-degree murder, which included a 20-year enhancement for personally discharging a firearm, and a consecutive 10-year term for attempted murder. We affirmed the judgment on direct appeal. *People v. Silva*, No. 1-09-0601 (2010) (unpublished order under Supreme Court Rule 23). In affirming, we found that Mr. Rodriguez's identification of defendant was reliable where he knew defendant, had a clear view of defendant prior to the shooting, gave defendant's nickname to the police, and identified defendant in a photo array and lineup.

¶ 25 On July 28, 2011, defendant filed a *pro se* postconviction petition which alleged, in relevant part, that: (1) the State committed a *Brady* violation by its untimely disclosure of the photograph; (2) his trial counsel was ineffective for failing to investigate and present the photograph at trial as exculpatory evidence; and (3) his appellate counsel was ineffective for failing to raise these issues. In his petition, defendant alleged that he was in the photograph "wearing a black Du-rag on top of

his head, shorts on with white T-shirt over right shoulder at 6:50 p.m. the time this crime occurred almost a block away around a corner." On September 23, 2011, the trial court, in a thirteen-page order, dismissed the claims raised by defendant in his petition, finding them frivolous and patently without merit.

¶ 26 The Act provides a defendant with a collateral means to assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction and sentence. 725 ILCS 5/122-1 (West 2010). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In considering the petition, a circuit court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court. 725 ILCS 5/122-2.1(c) (West 2010). To avoid dismissal at the first stage, a petition "need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12. Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional," and an indisputably meritless legal theory is one that is completely contradicted by the record. *Id*. at 16-17. Additionally, a postconviction petition may be dismissed at the first stage as frivolous and patently without merit when the claims raised therein are barred by *res judicata* or forfeiture. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). "The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal." *Id*. at 443. Forfeiture refers to "issues that could have been raised, but were not, and are therefore barred." *Id*. This court reviews the summary dismissal of a postconviction petition *de novo. People v. Tate,* 2012 IL 112214, ¶ 10.

¶ 27 Defendant failed to raise his *Brady* violation and ineffectiveness of trial counsel claims on

direct appeal. Therefore, these issues have been forfeited. The circuit court did not err in dismissing the petition at the first stage as to these issues. Defendant seeks to avoid the bar of forfeiture by arguing ineffectiveness of appellate counsel in failing to raise these claims on direct appeal.

¶ 28 We review a claim of ineffective assistance of appellate counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Jones*, 219 Ill. 2d 1, 23 (2006). To prevail on such a claim, "defendant must show that counsel's failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him." *Id*. "Appellate counsel is not required to brief every conceivable issue on appeal and may refrain from developing nonmeritorious issues without violating *Strickland* *** because defendant suffers no prejudice unless the underlying issue is meritorious. ***" (Citations omitted.) *Id*. At the first stage of postconviction proceedings, a petition should 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.

¶ 29 We first consider whether the petition sufficiently asserts a claim of ineffectiveness of appellate counsel for failing to raise a *Brady* violation as to the photograph. Under *Brady*, the State has an affirmative duty to disclose any evidence that is favorable to the accused and material to either guilt or punishment. *Brady*, 373 U.S. at 87. A *Brady* claim requires a showing that the undisclosed evidence is favorable to the accused because it is exculpatory or impeaching, the evidence was suppressed by the State either willfully or inadvertently, and the accused was prejudiced because the evidence is material to guilt. *People v. Jarrett*, 399 Ill. App. 3d 715, 727-28 (2010) (citing *People v. Burt*, 205 Ill. 2d 28, 47 (2001)). "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id*. at 728.

¶ 30 The record shows the police reports documented that the photograph was shown to defendant during an initial interrogation. Defendant, at his *Krankel* hearing, stated he saw the photograph when he was interrogated by the police in Indiana. At trial, the ASA reported that the photograph had not

been found in the State's files after two searches, but a detective had found the photograph at the time of trial. The State complied with its continuing duty to disclose material information even if discovered during trial. Ill. S. Ct. R. 415(b) (eff. Oct. 1, 1971). Additionally, the State agreed not to discuss or introduce the photograph at trial. We need not determine whether the State actually suppressed the photograph wilfully or inadvertently, in violation of *Brady*, because defendant's petition does not make a sufficient showing that the photograph would have created a reasonable probability that the outcome of his trial would have been different.

¶ 31 The photograph is not in the record, but we may accept as true certain things about it at this stage. The State told the trial court that the picture was taken at 6:50 p.m. on the night of the shooting in the area of 89th Street and Commercial Avenue. The record also shows that the State said that the person in the photograph was wearing a "tank top shirt" and was on a bicycle. Defendant, in his petition, did not contradict these statements. Defendant admitted during the *Krankel* hearing and in his petition that he is the person pictured in the photograph. In his petition, defendant asserts that the photograph was taken "almost a block away around a corner" from the shooting at about 6:50 p.m. that night. Defendant contended that, in the photograph, he was wearing a "Du-rag" and shorts, and had a white T-shirt over his shoulder.

¶ 32 The photograph puts defendant with a bicycle very near the scene at about the time of the shooting and, thus, corroborated the testimony of Mr. Rodriguez to the same. The depiction of the white T-shirt over defendant's shoulder while wearing a "tank top shirt" would tend to corroborate Mr. Rodriguez's testimony that when defendant returned to the scene on a bicycle, he had a white shirt on over a "muscle shirt." The overall impact of the picture, if it had been shown to the jury, would have been to strengthen Mr. Rodriguez's key testimony and provided evidence of defendant's presence in close proximity to the scene. The photograph did have possible use as impeachment as to Mr. Rodriguez's testimony that defendant was wearing pants and may have been wearing a hat. Nonetheless, the photograph would have undermined the defense arguments that no bicycle was ever

found, and that there was no corroboration of Mr. Rodriguez's testimony that defendant was the shooter. The photograph would not have detracted from the reliability of Mr. Rodriguez's identification of defendant as the person who committed the charged conduct. The petition does not make even a gist of a showing that the photograph would have placed "the whole case in such a different light as to undermine confidence in the verdict." *People v. Coleman*, 183 Ill. 2d 366, 393 (1998). The trial court did not err in dismissing the petition as to the claim of ineffectiveness of appellate counsel because the *Brady* issue was not raised on direct appeal.

¶ 33 We now turn to defendant's claim that appellate counsel was ineffective for not raising on direct appeal an argument that his trial counsel was ineffective for failing to investigate and use the photograph at trial. The State, after disclosing the photograph existed, agreed not to admit it or use it at trial in support of the charges against defendant. Thus, the State agreed to forego the introduction of evidence which would have corroborated key aspects of Mr. Rodriguez's testimony. Defendant, however, contends his counsel should have investigated the photograph and used the photograph as exculpatory evidence. "Matters of trial strategy or tactics are not proper areas of inquiry into claims of ineffective assistance and a defendant must overcome a strong presumption in favor of finding that counsel's advocacy was effective." *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 31. Similarly, decisions of appellate counsel, as to which issues to raise on direct appeal, are entitled to substantial deference. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001).

¶ 34 Even if trial counsel's decision as to the photograph could be viewed as falling below an objective stand of reasonableness, defendant, in his petition, failed to show an arguable basis for prejudice within the meaning of *Strickland*. *People v. Lacey*, 407 Ill. App. 3d 442, 457 (2011) (court may dispose of claim of ineffectiveness of trial counsel on prejudice prong only). In his petition, defendant maintained the photograph showed him wearing a "Du-rag" and shorts, which differs from Mr. Rodriguez' testimony that defendant was wearing jeans and possibly a hat and, when he returned, he was wearing a shirt over the muscle shirt.

¶ 35 However, as we discussed above, the photograph established defendant was in close proximity to the scene of the shooting, at or about the time of the shooting, with a bicycle. The photograph corroborated Mr. Rodriguez's testimony in very central aspects. The petition did not establish an arguable basis that defendant was prejudiced by the decision of trial counsel, particularly in light of the reliability Mr. Rodriguez's identification testimony. Because the ineffectiveness of trial counsel claim was nonmeritorious, appellate counsel's decision not to raise it was not erroneous. *Rogers*, 197 Ill. 2d at 223 (where defendant's underlying claim of ineffectiveness of trial counsel is meritless, ineffectiveness of appellate counsel also fails). There was no error in dismissing the petition on the basis of this claim.

¶ 36 For the foregoing reasons, we affirm the trial court's order dismissing his *pro se* postconviction petition.

¶ 37 Affirmed.