2014 IL App (1st) 120584-U

SECOND DIVISION
MARCH 25, 2014

No. 1-12-0584

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 6358
	)	
JOSEPH MONTGOMERY,	)	The Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's *pro se* postconviction petition affirmed where defendant's claim that trial counsel threatened and coerced him into not testifying was contradicted by the record.

¶ 2 Defendant Joseph Montgomery appeals from 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 circuit court erred in dismissing his petition because his claim has an arguable basis in law and fact. Specifically, defendant claims that he was denied effective assistance of counsel because counsel used scare tactics and coercion to force him not to testify at trial. For the following reasons, we affirm.

¶ 3 Defendant's arrest and prosecution arose from the fatal shooting of the victim Monty Grant. At defendant's jury trial, the State established through, *inter alia*, the testimony of Curtis James and Jarrod Johnson, that defendant shot the victim. Specifically, Johnson testified that after he heard shots, he saw defendant pointing a gun at a man, that is, the victim.

¶ 4 Defendant did not testify on his own behalf at trial. The record shows that after the State called the last witness in its case-in-chief, but before it formally rested in front of the jury, the court excused the jury for a short recess while the parties remained on the record. At this time, defense counsel informed the court that he had told defendant that it was defendant's choice whether to testify and that defendant had informed counsel that defendant did not wish to testify. The court then inquired whether defendant had thought about testifying and whether defendant had the opportunity to speak to, and get advice from, counsel on this issue. Defendant answered in the affirmative. The court then stated that although defendant's attorney was very knowledgeable, no one could give up defendant's right to testify except defendant. Defendant responded that he understood. The court then asked whether defendant understood he was giving up the right to testify, whether anyone forced defendant or threatened him to make this decision, and whether defendant was acting voluntarily. Defendant indicated that he understood he was giving up the right to testify, was acting voluntarily, and he had not been threatened or forced into not testifying.

¶ 5 Defense counsel then told the court that there were "potential unforeseen developments" that might change defendant's mind. The court replied that defendant could change his mind "right now." The court inquired whether defendant understood that he could change his mind and defendant indicated that he did. The court reiterated to defendant that it was "incumbent" upon him to inform defense counsel if he changed his mind about testifying.

¶ 6 Although the defense argued that it was Johnson who shot the victim, defendant was ultimately convicted of first degree murder and sentenced to a total of 75 years in prison. This judgment was affirmed on direct appeal. See *People v. Montgomery,* No. 1-08-3623 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 In 2011, defendant filed the instant *pro se* postconviction petition alleging, in pertinent part, that he was denied due process and effective assistance of counsel when trial counsel used threats, scare tactics and coercion in order to deprive him of the right to testify in his own defense. Specifically, defendant alleged that before trial he told defense counsel that he wanted to testify that he saw Johnson shoot the victim after the victim attempted to stab defendant. However, counsel told defendant that he did not plan to put defendant on the witness stand because counsel believed that he had a good chance of establishing reasonable doubt. When defendant continued to assert that he wanted to testify, counsel told defendant that they would discuss this issue "another time." The petition further alleged that defendant told counsel during trial that he wanted to tell his side of the story to the jury.

¶ 8 In his affidavit in support of the petition, defendant averred that when he spoke to counsel about testifying after the close of the State's case, counsel told defendant that under the law defendant would be guilty of first degree murder if he admitted that he was present when the victim was killed, and that if defendant took the stand, he would be found guilty and would

spend the rest of his life in prison. Defendant further averred that counsel stated that if defendant testified he would have to find a new attorney, but that the trial court would not permit defendant to obtain new counsel because of how "late" the parties were in the case, so defendant would have to proceed *pro se*. He also averred that counsel told him that there would not be any refunds, even if defendant found a new attorney. Defendant finally averred that counsel told him that defendant had to tell the court that he was not testifying, that it was his choice not to testify, and that he had not been forced into deciding not to testify. Defendant complied because he felt he "had no choice in the matter" based upon the risks counsel indicated were involved. The circuit court subsequently summarily dismissed the petition as frivolous and patently without merit.

¶ 9 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 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 *People v. Tate*, 2012 IL 112214, our supreme court stated that first-stage review permits the circuit court " 'to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' " Tate, 2012 IL 112214, ¶ 9, quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). 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; see also *Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). 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 example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 10 On appeal, defendant contends that the circuit court erred by summarily dismissing his *pro se* petition because he was denied effective assistance of counsel when defense counsel used threats and coercion to force him not to testify on his own behalf at trial.

¶ 11 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 12 A defendant's right to testify at trial is a fundamental constitutional right. *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855 (2009). His decision whether to testify belongs to him alone, but should be made with the advice of counsel. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). Advising a defendant not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel without evidence suggesting that counsel refused to allow the defendant to testify. *Youngblood*, 389 Ill. App. 3d at 217. The dismissal of a postconviction petition must be affirmed unless defendant made a " 'contemporaneous assertion *** of his right to testify' " during trial. *Youngblood*, 389 Ill. App. 3d at 217 (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)).

¶ 13 Here, defendant averred in the affidavit attached to his petition that he spoke with counsel about testifying after the close of the State's case, that counsel made a number of statements that had the effect of forcing him not to testify, and that counsel even told him what to say to the court in regard to his decision not to testify. The problem here is that there was no break in the proceedings between the close of the State's case and defendant's colloquy with the court regarding his decision not to testify during which counsel and defendant could have had this conversation. Since the alleged conversation in which defendant asserted his right to testify at trial clearly did not happen, we find that dismissal of defendant's claim was proper. *Youngblood*, 389 Ill. App. 3d at 217. We further note that defendant's claim that he was forced into testifying is entirely belied by the record in any event, given that during the lengthy colloquy between him and the court he expressly denied being forced or threatened into not testifying and stated that he was voluntarily giving up the right to testify. See *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007) (noting that a reviewing court "will not credit allegations positively rebutted by the record").

¶ 14 Defendant's reliance on *People v. Dredge*, 148 Ill. App. 3d 911 (1986), is misplaced. In *Dredge*, 148 Ill. App. 3d at 913, the court found that the "defendant's allegation that she was deprived of her right to testify at her trial [was] uncontradicted by anything appearing in the trial record." Here, to the contrary, defendant's allegations in the instant case are contradicted by the record. His petition is thus based on an "indisputably meritless legal theory" and summary dismissal was, therefore, warranted. *Hodges*, 234 Ill. 2d at 16.

¶ 16 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.