2014 IL App (1st) 121928-U

FIRST DIVISION
MAY 12, 2014

No. 1-12-1928

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. 05 CR 8598
	)	
LATRICE BURNS,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed where defendant failed to comply with the requirements of the Post-Conviction Hearing Act.

¶ 2 Defendant Latrice Burns appeals from an order entered by the circuit court of Cook County which summarily dismissed her *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). She contends that her petition set forth a claim with an arguable basis in law and fact that her trial counsel was ineffective for failing to call a co-defendant whose testimony would have been exculpatory. We affirm the judgment of the circuit court of Cook County.

¶ 3 The record reveals that after a jury trial, defendant was convicted of first-degree murder and armed robbery. The State's theory at trial was that defendant was accountable for the actions of two men, Dorwin Davis (Davis) and William Kenlow (Kenlow), who robbed and shot to death the victim, Lionell Reed, on March 17, 2005. The State's primary evidence against defendant consisted of statements she made to prosecuting authorities after the incident. Defendant, who testified in her own defense, denied that she knew of Davis and Kenlow's plan to rob the victim and asserted that her statements were coerced and untruthful.

¶ 4 At trial, Assistant State's Attorney Cathleen Dillon testified about a videotaped statement defendant made after the shooting. In that statement, which was presented to the jury, defendant stated that Davis was her ex-boyfriend and she knew Kenlow from the neighborhood. In the afternoon on March 17, 2005, Davis called defendant to ask if she would drive him to buy shoes from a man who sold them on the street. Later, defendant picked up Davis and Kenlow and drove them to "get the shoes" from 95th Street and the Dan Ryan Expressway (the Dan Ryan). On the way, Kenlow asked Davis how they were going to obtain the shoes. Davis said he would "[beat] the man ass and take the shoes," and Kenlow added that "we might as well lay him down or lay him out and take the car too." Defendant understood this to mean that Kenlow suggested that he and Davis shoot the victim. Davis responded that they only needed to take the shoes.

¶ 5 After they arrived at 95th and the Dan Ryan, Davis and Kenlow did not see the intended victim. Davis used defendant's cellular phone to call the victim, who directed Davis to meet him nearby. Defendant drove Davis and Kenlow to that location and parked, whereupon Davis left the car to get the shoes while Kenlow stayed in the car. At that point, defendant claimed that she thought Davis would beat the victim and take the shoes. While defendant and Kenlow waited in defendant's car, Kenlow received a call from Davis asking for $10 because he was "short." After

Kenlow ascertained Davis' location, Kenlow left the car to meet him. Defendant claimed that although she considered leaving to get gas, she decided to wait for Davis and Kenlow so she could drive them to wherever they needed to go next.

¶ 6 A few minutes later, defendant heard a gunshot and saw Davis and Kenlow running toward her car, with Davis carrying a box of shoes. Defendant unlocked the door and let in Davis and Kenlow. When defendant asked what happened, they told her to "go" because someone was shooting. Defendant drove away. Soon after, the defendant's car was stopped by the police.

¶ 7 Detective Cedric Parks testified about a statement defendant made to him after the incident, which recounted largely the same series of events that defendant described in her videotaped statement. Additionally, defendant told Detective Parks that after her car was stopped, police recovered a gun from the back seat.

¶ 8 The State presented evidence that the victim died of a gunshot wound to the chest and the manner of death was homicide. Additionally, a test for gunshot residue was positive for Davis and negative for Kenlow.

¶ 9 Testifying in her defense, defendant asserted that she knew nothing about plans to rob and kill the victim, and that she thought Davis was planning to buy shoes. On March 17, 2005, Davis asked defendant whether she would take him to buy shoes from a man who sold them, and though she was reluctant at first, she eventually agreed. Later, she drove Davis and Kenlow to 95th and the Dan Ryan to make the purchase. Defendant denied that Davis and Kenlow discussed planning a robbery on the way to meet the victim, and maintained that instead the group discussed a personal situation involving defendant's friend. When they arrived and did not see the man who sold shoes, Davis used defendant's cellular phone to call him, and then directed

defendant to a location nearby. After Davis made a second call, he left the car while Kenlow remained in the car. Davis then called Kenlow to ask for $10 because he was "short." Kenlow agreed to bring $10 to Davis. When Kenlow left the car, defendant believed he was going to give Davis $10. Defendant then heard a gunshot and saw Davis and Kenlow running toward her car. This prompted defendant to think that someone may have been chasing or shooting at them. Davis and Kenlow entered the car and told defendant to "go" because someone was shooting. Defendant drove away and was soon stopped by the police.

¶ 10 Defendant further testified that when she was being questioned by detectives, she repeatedly told them that she did not know about the robbery, but was told she was lying. Additionally, Detective Parks told defendant that Davis and Kenlow had implicated her in the robbery; that all three of them would be charged with murder; and that she needed to "start talking." Detective Parks also told defendant he would use her as a witness, and if she said she knew about the robbery, she would go home. Eventually, she told the detective "what he wanted to hear." Defendant testified that her statement to the Assistant State's Attorney was true "except for the part about me knowing about the robbery." Defendant had thought that what she said on the videotape did not matter because she would be going home.

¶ 11 Defendant also presented the testimony of a number of witnesses concerning her good character and reputation for being law-abiding and honest.

¶ 12 Following deliberations, the jury found defendant guilty of first-degree murder and armed robbery. Defendant was sentenced to consecutive prison terms of 20 years' imprisonment for first-degree murder and 6 years' imprisonment for armed robbery.

¶ 13 On direct appeal, defendant argued that her guilt was not established beyond a reasonable doubt and that she was entitled to a new trial because: (1) the trial court prevented her from fully

presenting her defense; (2) her trial counsel was ineffective for failing to request jury instructions on withdrawal and a separate jury verdict form for felony murder; (3) her trial counsel presented final argument that diminished the effect of her character witnesses; and (4) the prosecutor denied her a fair trial by improperly denigrating that same character evidence. On August 27, 2008, this court affirmed defendant's convictions and sentences. *People v. Burns*, No. 1-06-1026 (2008) (unpublished opinion under Supreme Court Rule 23), *appeal denied*, No. 107648 (January 28, 2009).

¶ 14 Defendant filed the instant untimely *pro se* postconviction petition on September 10, 2010. Defendant alleged, among other issues, that her sixth amendment right to effective assistance of counsel was violated because her counsel refused to "try to get one of [her] 'willing co-defendants' on the stand" when she asked him to do so. Defendant averred that this co-defendant could have testified to the fact that she "knew nothing about a scam" or the incident in general. However, her counsel refused out of concern that the co-defendant might "flip the script" on her.

¶ 15 Attached to the petition was an affidavit from Davis, in which he recounted the events of March 17, 2005. In that document, he claims that he called defendant to ask if she could drive him to buy shoes, and later, defendant picked him up and later picked up Kenlow. While defendant was driving, Davis called the person from whom he planned to buy shoes and agreed to meet at a specific location. "Nothing was discussed" on the way to that location and they listened to the car radio. When they arrived at 95th Street, defendant let Davis out of the car and went to park the car. Between the time Davis called defendant earlier in the day and when he left the car, they "never talked about anything concerning any crimes or criminal behavior because there was nothing taking place." Davis further averred that "the only thing [defendant] was

doing is driving me to purchase some [shoes] and that is the extent [of] her knowledge of anything that transpired that day." Davis' affidavit which was attached to defendant's petition, was not notarized.

¶ 16 Following the affidavit was a document signed and dated by Davis that stated:

> "Pursuant to 28 USC 1746, 18 USC 1621 or 735 ILCS 5/1-109, I declare, under penalty of perjury, that everything contained herein is true and accurate to the best of my knowledge and belief. I do declare and affirm that the matter at hand is not taken either frivolously or maliciously and that I believe the foregoing matter is taken in good faith."

¶ 17 On December 3, 2010, the circuit court dismissed defendant's petition as frivolous and patently without merit. In part, the court found that counsel's explanation for not calling Davis —fear that he could testify unfavorably—supported the conclusion that counsel's decision was sound trial strategy.

¶ 18 In this court, defendant argues that her petition set forth a claim with an arguable basis in law and fact that her counsel was ineffective for failing to call Davis, an exculpatory witness. Defendant contends that aside from herself, only Davis and Kenlow could have stated what happened during the car ride and potentially corroborate her defense that she was not aware of a plan to rob the victim. Defendant asserts that because Davis' affidavit affirmed that she did not know about the robbery, and the only evidence of her knowledge was the statement made at the police station that she strongly contested, it is arguable that counsel was ineffective for failing to present Davis' testimony.

¶ 19 The Act provides a three-step process for defendants to challenge their convictions or sentences for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2010). Proceedings begin when a defendant files a petition in the court where the conviction took place. 725 ILCS 5/122-1(b) (West 2010). The petition need only present the "gist" of a constitutional claim, which is a low threshold that requires only a limited amount of detail. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the court acts strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. The court will dismiss the petition if it finds the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is frivolous or patently without merit only if the petition has no arguable basis in law or fact, meaning that 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). We review the dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 20 As an initial matter, the State contends that defendant's petition was properly dismissed because Davis' affidavit was unsworn and in violation of section 122–2 of the Act (725 ILCS 5/122–2 (West 2010)), relying on this court's decision in *People v. Wideman*, 2013 IL App (1st) 102273. In response, defendant urges us to follow appellate court precedent holding that an unsworn affidavit is not fatal to a first-stage postconviction petition. We agree the State's reliance on *Wideman*.

¶ 21 Section 122-2 of the Act mandates that a defendant's petition must have attached "affidavits, records, or other evidence" supporting its allegations *or explain why those documents are not attached*. 725 ILCS 5/122-2 (West 2010). In particular, a claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness.

People v. Enis, 194 Ill. 2d 361, 380 (2000). Further, an affidavit must be sworn to be valid. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 497 (2002).

¶ 22 In *Wideman*, this court discussed the important distinction between the affidavit requirements of section 122-1 of the Act and the affidavit requirements of section 122-2 of the Act. *Wideman*, 2013 IL App (1st) 102273, ¶ 16. This court recognized that the purpose of a section 122-1 affidavit is to confirm that a defendant's allegations are being brought truthfully and in good faith, while the purpose of a section 122-2 affidavit is to establish that the defendant's allegations can be objectively and independently corroborated. *Id*. This court noted that our supreme court has held that failure to comply with the affidavit requirements of section 122-2 of the Act is enough to justify summary dismissal; and if the affidavits attached to the defendant's petition do not comply with section 122-2 then the defendant must *at least* provide an explanation as to why the affidavits were unobtainable. (Emphasis in original.) *Id*. (citing *Collins*, 202 Ill. 2d at 67-68).

¶ 23 In this case, Davis' affidavit fails to comply with section 122-2 of the Act in several ways. First, as previously discussed, the affidavit is not notarized. Additionally, there are no records or other evidence to support the allegations in the affidavit. Further, defendant provides no explanation whatsoever as to why she could not obtain a notarized affidavit as required by the statute. In *Wideman*, we acknowledged that inmates may face substantial hardships in obtaining a notarized affidavit. *Wideman*, 2013 IL App (1st) 102273, ¶ 18. However, like the defendant in *Wideman*, neither defendant nor Davis claim to have experienced those difficulties. If the affidavit is not notarized, the statute gives the affiant an opportunity to say *why* it is not. What the statute does *not* do, is give the affiant the right to present an unnotarized affidavit with no further explanation. As such, defendant's petition does not comply with *any* of the requirements

of section 122-2 of the Act. Thus, as the State points out, the purported affidavit is fatally deficient in any event because while defendant may have asserted in her petition that Davis was willing to testify on her behalf, the affidavit is silent on the crucial issue. That issue is: the *reason* for the lack of notarization. Our courts have clearly identified this as an important element of validating a purported affidavit under circumstances such as these. See *People v. Brown*, 371 Ill. App. 3d 972 (2007). This principle was reaffirmed in *People v. Jones*, 399 Ill. App. 3d 341 (2010).

¶ 24 Additionally, the State argues credibly that since Davis was an indicted codefendant at the time of defendant's trial, he would have had a right against self incrimination. Therefore, defendant's argument in her postconviction petition would be more persuasive if Davis affirmatively stated in the purported affidavit that he had been willing to waive his right against self incrimination in order to testify in defendant's behalf as she now claims. There is support for the State's argument that the absence of a clear averment by Davis of willingness to waive his right and testify on defendant's behalf, weakens her assertion that his testimony is the thing that would have tipped the scales in her favor. See *People v. Hobley*, 182 Ill. 2d 404, 455 (1998). Pursuant to *Collins*, *Wideman*, *Brown*, *Jones*, and *Hobley*, defendant's failure to comply with section 122-2 of the Act cannot be overlooked. Accordingly, the trial court did not err in summarily dismissing defendant's postconviction petition at the first stage of proceedings.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.