2014 IL App (1st) 130179-U

THIRD DIVISION
October 8, 2014

No. 1-13-0179

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. 10 CR 19031
	)	
CARLOS DIAZ,	)	The Honorable
	)	Nicholas R. Ford
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by summarily dismissing defendant's postconviction petition as frivolous and patently without merit. Specifically, the petition's allegations did not indicate that trial counsel denied defendant's right to testify and the petition, in conjunction with the record, did not show that the State indoctrinated the jury during *voir dire*.

¶ 2 This appeal arises from the trial court's order summarily dismissing defendant Carlos Diaz's petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.*

(West 2012)). On appeal, defendant asserts that the trial court erred in dismissing his petition because he stated that gist of a constitutional claim that trial counsel usurped his right to testify, and that the State indoctrinated the jury during *voir dire*. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, alongside codefendants Francisco Estrada and Jonathan Hernandez, was charged with numerous counts involving a fire that killed Jesus Samano and severely injured Sergio Camarena. In addition, codefendant Ricardo Morales was subjected to juvenile proceedings. Following a jury trial, defendant was convicted of first-degree murder, attempted first-degree murder, and two counts of aggravated arson. Defendant was ordered to serve concurrent 15-year prison terms with regard to the aggravated arson convictions, a consecutive 50-year prison term for murder, and a consecutive 30-year prison term for attempted murder.

¶ 5 At trial, Camarena testified that on August 6, 2005, he and Samano drove around in the latter victim's black Cadillac and visited friends until 4 or 4:30 a.m. They then drove to a third friend's house to wait until the Maxwell Street flea market was to open at 6 a.m. Until then, Camarena and Samano reclined their car seats and went to sleep. Camarena subsequently awoke, however, when he felt heat and realized that both he and the car were on fire. Camarena also saw codefendant Estrada, who ran away. After exiting the car and rolling on the ground, he checked on Samano, whose entire body was burned. In addition, a man sprayed water on Samano but he asked the man to stop because it was painful. Camarena subsequently lost consciousness and remained in a coma for about six weeks, after which he endured further medical procedures. In October 2005, Camarena identified a photograph of Estrada for the police. Furthermore, Camarena testified, as corroborated by the testimony of Samano's sister, that neither of the victims was a gang member.

¶ 6 Codefendant Ricardo, who pleaded guilty as a juvenile, testified that on the day in question, he was with Hernandez and Estrada, who were members of the Insane Unknowns, as well as his brother George Morales and defendant, who were members of the Latin Kings. While driving around, Ricardo noted a black Cadillac that he and Hernandez had seen earlier. Specifically, the Cadillac's occupants had yelled at Hernandez and Ricardo. Defendant, known as Rat Boy, then drove to a gas station and purchased a container of gasoline, which defendant gave to Hernandez. Upon defendant's inquiry, Ricardo said he had matches. When they next saw the black Cadillac, defendant said that a member of a rival gang had been driving the Cadillac and they should set the Cadillac on fire. Ricardo agreed to help because he feared being harmed if he did not do what defendant asked. When the five men found the Cadillac, Hernandez poured gasoline into the Cadillac through the driver's side window. Ricardo then threw a lit match into the passenger's side window and the Cadillac caught on fire. Defendant, who had stayed with his car, drove the five men away from the scene.

¶ 7 Delfino Gutierrez, who had been staying nearby the scene of the crime, testified that he heard the commotion and saw codefendant Hernandez as he fled. Gutierrez ultimately sprayed water on one of the men who was on fire. In addition, Dr. Richard Gamelli testified that while 40 to 45% of Camarena's body had been burned, 100% of Samano's body was burned and he had no chance of survival. Furthermore, medical examiner Michelle Jorden testified that Samano died from thermal injury, toxic gases and neurogenic shock, which was defined as excruciating overwhelming pain. Finally, Detective John Patrick Fuller testified that after defendant was arrested, he gave a videotaped statement. In this statement, defendant said that on the day in question, he saw a white Chevrolet Celebrity that belonged to his cousin Gordo, a rival gang member. Hernandez then suggested that they set the car on fire. After defendant purchased

gasoline, he pointed out that car to his companions but stayed with his own car while the others went to start the fire. Defendant later learned they had burned the wrong car.

¶ 8 On direct appeal, we affirmed the judgment, rejecting defendant's assertions that (1) the evidence was insufficient to support the State's accountability theory; (2) the prosecutor made improper closing arguments; (3) the trial court erroneously admitted hearsay; and (4) defendant's aggravated arson convictions violated the one-act, one-crime doctrine. *People v. Diaz*, No. 1-07-3174 (2010) (unpublished order under Supreme Court Rule 23). In September 2012, defendant filed a 74-page *pro se* postconviction petition alleging, in pertinent part, that trial counsel erroneously told defendant that "he should not testify and to inform the judge it was his decision not to testify during the proceedings, and thereafter [Public Defender] Thompson informed the court to admonish Petitioner about not testifying and Petitioner followed PD Thompson's directions to tell the court what she wanted him to." In addition, the petition alleged that the State engaged in prosecutorial misconduct during *voir dire* by indoctrinating the jury and that appellate counsel was ineffective for failing to raise all claims on direct appeal.

¶ 9 In defendant's affidavit attached to the petition, he stated that he "followed the directions of my attorney to inform the Judge I did not want to testify when she told the judge to admonish me. I never told her I did not want to testify as she always stated I would not." In addition, defendant alleged he was later told that testifying would allow him to explain his statement and his lack of knowledge regarding what codefendants planned to do. Furthermore, defendant stated, "Had I fully understood at trial what I know now, I would have testified on my own behalf." The trial court subsequently dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant contends that the circuit court erred by summarily dismissing his *pro se* postconviction petition because his claims that trial counsel usurped his right to testify and that the State indoctrinated the jury had arguable bases in law and fact. We review the first stage dismissal of a postconviction petition *de novo* (*People v. Petrenko*, 237 Ill. 2d 490, 496 (2010)), and as a result, may affirm on any basis in the record (*People v. Smith*, 2014 IL App (4th) 110220, ¶ 21).

¶ 12 At the first stage of postconviction proceedings, the trial court must determine whether a petition is frivolous and patently without merit. *Petrenko*, 237 Ill. 2d at 496. A defendant need only provide a limited amount of detail and his allegations are to be taken as true and liberally construed. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Nonetheless, broad conclusory allegations are not permitted even at the first stage of proceedings. *Delton*, 227 Ill. 2d at 258. A petition is frivolous or patently without merit, where lacking an arguable basis in law or fact. *People v. Cathey*, 2012 IL 111746, ¶ 17. Specifically, a petition lacks an arguable basis where it presents "an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Furthermore, a legal theory is indisputably meritless where completely contradicted by the record, whereas factual allegations are fanciful if delusional or fantastic. *Id*. at 16-17.

¶ 13 Moreover, the trial court may summarily dismiss a petition alleging that counsel was ineffective if it is not arguable that counsel's performance fell below an objective standard of reasonableness or that the defendant was prejudiced as a result. *Brown*, 236 Ill. 2d at 184. A defendant must show that (1) counsel's performance was deficient; and (2) a reasonable probability exists that the result would have been different but for counsel's errors. *Cathey*, 2012 IL 111746, ¶ 23. In addition, a defendant has a fundamental right to decide whether to testify.

People v. Madej, 177 Ill. 2d 116, 145-46 (1997), overruled on other grounds by *People v. Coleman*, 183 Ill. 2d 366 (1998). The defendant alone may waive that right and counsel is not entitled to make that decision as a matter of strategy. *Madej*, 177 Ill. 2d at 146. With that said, counsel "is free to engage in fair persuasion and to urge his considered professional opinion on his client." *People v. Brown*, 54 Ill. 2d 21, 24 (1973). Furthermore, it is well-settled that a postconviction petition must allege that the defendant contemporaneously asserted his right to testify. *People v. Enis*, 194 Ill. 2d 361, 399-400 (2001); *Brown*, 54 Ill. 2d at 24. Conversely, where a defendant expresses his desire to testify only prior to trial, and remains silent when defense counsel rests without presenting his testimony, the defendant is deemed to have acquiesced in counsel's opinion that he should not testify. *People v. Thompkins*, 161 Ill. 2d 148, 177 (1994). This rule recognizes that in hindsight, counsel's advice as to whether a defendant should testify will always appear to have been bad. *Id*. at 178.

¶ 14 Here, defendant's assertion that trial counsel denied him the right to testify is frivolous and patently without merit. We first observe that the petition, in conjunction with defendant's affidavit, alleged both that trial counsel said defendant "should" and that he "would" not testify, two very different allegations. In addition, the petition did not allege counsel said defendant *could not* testify or that some form of coercion was used. *Cf. People v. Von Perbandt*, 221 Ill. App. 3d 951, 953, 956 (1991) (remanding for second-stage proceedings where the petition alleged counsel told the defendant that he *could not* testify). At most, it appears counsel merely advised defendant. In addition, defendant's petition, even when liberally construed, did not allege that he ever told counsel that he wanted to testify, let alone that he voiced his desire when the time to testify arrived. While defendant alleged that he never told counsel that he did *not*

want to testify, this does not satisfy the requirement that a defendant contemporaneously assert his right.

¶ 15 Moreover, the record rebuts his suggestion that he did not understand his right to testify and that he would have testified had he understood that right. The trial court admonished defendant as follows:

"THE COURT: Your lawyers at sidebar indicated that they were prepared to rest, as they did before the jury, without your testimony and without calling any witnesses. I take it they discussed that with you?

DEFENDANT: Yes.

THE COURT: You were in agreement with what they had represented?

DEFENDANT: Yes.

THE COURT: You understand that you do have a right to testify before the jury?

DEFENDANT: Yes, Sir.

***

THE COURT: As far as testifying you understand that you would have the right to take the witness stand, your lawyers would ask you questions and then the State's Attorney's [*sic*] could also have the opportunity to interrogate you?

DEFENDANT: Yes.

THE COURT: And in deciding not to testify you did that after full consultation with your lawyers?

DEFENDANT: Yes.

THE COURT: Nobody promised you anything to cause you to make that decision?

DEFENDANT: No.

THE COURT: Or threatened you?

DEFENDANT: No.

THE COURT: You are doing this of your own free will?

DEFENDANT: Yes."

The record unequivocally shows that defendant himself decided to testify, albeit with advice from counsel. See *People v. Adams*, 338 Ill. App. 3d 471, 473, 476 (2003) (The defendant's postconviction petition was summarily dismissed where the defendant, after being admonished of his right to testify, responded that he had chosen to remain silent). Furthermore, defendant has not specified that counsel advised him of erroneous information, misled him or was in some other manner deficient. *Cf. People v. Lester*, 261 Ill. App. 3d 1075, 1079 (1994) (finding the postconviction petition sufficiently alleged that counsel misled the defendant into not testifying). Accordingly, defendant's claim was based on an indisputably meritless legal theory.

¶ 16 We are unpersuaded by defendant's reliance on *People v. Brown*, 336 Ill. App. 3d 711 (2002), *Von Perbandt*, 211 Ill. App. 3d 951, and *People v. Dredge*, 148 Ill. App. 3d 911 (1986). Defendant correctly represents that the postconviction petitions in those cases were remanded for further proceedings on the defendants' claims that trial counsel usurped their right to testify. *Brown*, 336 Ill. App. 3d at 715, 722; *Von Perbandt*, 221 Ill. App. 3d at 953, 955-56; *People v. Dredge*, 148 Ill. App. 3d 911, 913-14 (1986). Those cases failed to recognize, however, that conclusory allegations are not permitted under the Act. *Brown*, 336 Ill. App. 3d at 719-20; *Von Perbandt*, 221 Ill. App. 3d at 953, 955-56; *Dredge*, 148 Ill. App. 3d at 913. Furthermore, those cases failed to apply the rule that a petition must allege the defendant contemporaneously asserted his right to testify. *Brown*, 336 Ill. App. 3d at 719-20; *Von Perbandt*, 221 Ill. App. 3d at

953, 955-56; *Dredge*, 148 Ill. App. 3d at 913. As a result, we decline to follow those cases. See *People v. Youngblood*, 389 Ill. App. 3d 209, 219 (2009) (declining to follow *Dredge*); *People v. Hernandez*, 351 Ill. App. 3d 28, 34 (2004) (finding *Dredge* to be suspect). Because defendant's allegations did not support an arguable finding that trial counsel was deficient, we need not consider whether defendant's allegations could arguably establish resulting prejudice.

¶ 17 Next, we reject defendant's assertion that the State improperly indoctrinated the jury during *voir dire* and that appellate counsel was ineffective for failing to raise that issue on direct appeal. During *voir dire*, the following colloquy ensued:

> "MR. BRASSIL [Assistant State's Attorney]: I anticipate at the close of this case the Court may instruct you in regards to legal responsibility or accountability. Simply put, in certain circumstances when persons join together in either the planning or the commission of an offense, when they either aid, abet or agree to aid one another.
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> MS. THOMPSON [defense attorney]: Objection to the form of this question.
>
> THE COURT: Overruled. It is proper.
>
> MR. BRASSIL: When they join together and agree or attempt to aid one another either in the planning or commission of an offense, they may be held responsible for the results of that offense and they may be held responsible when someone dies. If the Court instructs in regards to that law, will you follow it?
>
> Juror: Yes."

The State similarly questioned the other jurors.

¶ 18 *Voir dire* should not be used to pre-educate and indoctrinate prospective jurors regarding a particular theory or to impanel a jury with a certain disposition. *People v. Klimawicze*, 352 Ill. App. 3d 13 (2004); *People v. Kendricks*, 121 Ill. App. 3d 442, 448-49 (1984). Similarly,

"Questions shall not directly or indirectly concern matters of law or instructions." ILCS S. Ct. 431(a) (eff. July 1, 2012); see also ILCS S. Ct. R. 234 (eff. May 1, 1997). With that said, the trial court must allow the parties to ask questions with the potential to filter out partial jurors. *People v. Rinehart*, 2012 IL 111719, ¶ 16. In addition, prosecutors are permitted to inquire into jurors' possible biases. *People v. Mapp*, 283 Ill. App. 3d 979, 987 (1996). Because no precise test exists for determining which questions will accomplish that goal, the trial court's decision as to the manner and scope of questioning will not be reversed absent an abuse of discretion. *Rinehart*, 2012 IL 111719, ¶ 16.

¶ 19 Notwithstanding defendant's contention, supreme court and appellate court case law preclude a finding that the trial court abused its discretion by permitting the State to ask the question at issue here. In *People v. Davis*, 95 Ill. 2d 1, 17-18 (1983), the prosecutor stated, "[t]he Court will instruct you about this, this aspect of the law, that a person can be held accountable and responsible for the acts of another." The prosecutor then asked prospective jurors if they could follow that law. Our supreme court found that this inquiry did not constitute an attempt by the prosecutor to instruct the jury as to the law; rather, the prosecutor inquired whether they could follow the law. *Id.* at 18. The court held, "[w]e do not agree that the quoted comment improperly concerned the law of accountability." *Id.* Following *Davis*, the appellate court has repeatedly found that error does not occur where the State briefly recites accountability principles and then asks potential jurors whether they can follow the law related to those principles, as those questions are relevant to jurors' bias or misperception. *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 98; *Klimawicze*, 352 Ill. App. 3d at 26; *Mapp*, 283 Ill. App. 3d at 989; *People v. Johnson*, 276 Ill. App. 3d 656, 658-59 (1995). Furthermore, this court has stated

that we must look at each specific inquiry to be sure that it did not exceed the bounds of acceptability. *Valladares*, 2013 IL App (1st) 112010, ¶ 99.

¶ 20 Here, the prosecutor's question regarding accountability was not meaningfully distinguishable from the inquiry found to be proper in *Davis*. In addition, the challenged inquiry stated only that the court *may* instruct the jury regarding accountability and asked whether the jury would follow that law *if* it was so instructed, making it more benign than the comment in *Davis*. Furthermore, the prosecutor did not offer his personal opinion, misrepresent legal principles or hint at the specific evidence it planned to present. *Cf. Mapp*, 283 Ill. App. 3d at 989 (finding that the State went beyond searching for misperception of accountability principles where the prosecutor offered his personal opinion, muddled legal principles, and provided inappropriate previews of the evidence). We categorically reject defendant's suggestion that the prosecutor improperly introduced the jurors to the fact that one of the witnesses died, as the jurors were well aware that defendant was charged with murder. In light of *Davis* and its progeny, defendant's claim that trial court abused its discretion by permitting the State to question jurors regarding accountability is based on an indisputably meritless legal theory and we cannot fault appellate counsel for deciding not to raise it on direct appeal, notwithstanding the trial court's suggestion that the challenged inquiry may have been error.

¶ 21 For the foregoing reasons, we affirm the trial court's judgment.

¶ 22 Affirmed.