2017 IL App (1st) 142338-U

FIRST DIVISION
July 24, 2017

No. 1-14-2338

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court of) Cook County, Criminal Division
Respondent-Appellee,	)
v.	) No. 06 CR 23798
ALAN WYMAN,	) Honorable Dennis J. Porter,) Judge Presiding
Petitioner-Appellant.	)

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it dismissed petitioner's postconviction petition wherein he attempted to make out a claim for ineffective assistance of counsel. The order assessing a frivolous-filing fee is vacated.

¶ 2 Petitioner Alan Wyman was convicted by a jury of aggravated kidnapping and two counts of aggravated sexual assault. He appealed his convictions, and on direct appeal we affirmed. *People v. Wyman*, 2013 IL App (1st) 102615-U. Petitioner filed a postconviction petition maintaining that his trial counsel was ineffective for failing to properly impeach the witnesses that presented evidence against him. The trial court dismissed the postconviction petition, and we affirm.

¶ 3 BACKGROUND

¶ 4 A more thorough recital of the background of the case is set forth in our judgment affirming petitioner's convictions. See *People v. Wyman*, 2013 IL App (1st) 102615-U (unpublished order under Supreme Court Rule 23). The facts set forth here, however, should be sufficient for the reader to understand the issues raised in this appeal and provide a basis for understanding our decision on the merits.

¶ 5 Alan Wyman was accused by a female, M.F., of sexual assault. The parties met and had hung out at petitioner's apartment on a few occasions. M.F. acknowledged that they had consensual sex the third time that she came to his apartment. When she was there the fourth time and was taking a shower, petitioner came into the shower and groped her and said that he wanted to have sex. She refused and pushed him away. Nothing further happened that night, and M.F. fell asleep on petitioner's couch. However, when she awoke, Wyman had laid her on his bed and was attaching cables around her ankles. Petitioner further restrained M.F. by putting a restraint around her neck and securing her wrists to the headboard or wall. She was also blindfolded and a golf ball or ball gag was put in her mouth. She testified that petitioner also punched her in the ribs and she believed her ribs had been broken.

¶ 6 M.F. testified that the physical and sexual assaults continued for a four-day period. She was repeatedly beaten, restrained with cables, and threatened with physical harm or death if she tried to escape. Petitioner also had a small room in the back of his closet that he made M.F. crawl into. She was sexually assaulted in that small room where she was attached to another set of cables. She was ordered to go into that room on several occasions. At one point, petitioner banged her head so hard against the floor that she lost consciousness.

¶ 7 During the fourth day at petitioner's apartment, petitioner left the premises. M.F. was still

tied to the bed, blindfolded and gagged. An individual then-unknown to M.F., Joseph Swain, came into the apartment looking for petitioner. M.F. heard someone in the apartment and was able to spit out the golf ball in her mouth and remove her blindfold and get the man's attention by yelling. She testified that she told Swain that petitioner had kidnapped and raped her and was going to kill her. Swain saw that M.F. was tied to the bed. However, he was freaked out and left, but did not call the police. Petitioner returned to his apartment and he drove M.F. to her ex-husband's son's house and then he drove off.

¶ 8 Near the location she was dropped off, M.F. approached a couple walking down the street and told them to call 911. Samuel Crockett, one of the individuals approached by M.F., testified that she was extremely distraught. When police arrived, Officer Robert Breen observed M.F. and believed her to be very distraught and it appeared to him that she had been crying for a while. M.F. was taken to the hospital. M.F. provided the police with one of the restraints that had been used to restrain her that she had put with her belongings before leaving petitioner's apartment.

¶ 9 Petitioner's side of the story was a bit different. He testified that the sexual contact with M.F. indeed occurred, but that it was consensual. He denied punching her and otherwise physically abusing her. Petitioner claimed that he had a girlfriend in the past that got him interested in bondage sex. They had outfitted his apartment with the cables and other restraint materials. He testified that he engaged in similar conduct with M.F.

¶ 10 Petitioner testified that M.F. contacted him and asked if she could stay at his place because she had been on the street for a few days. M.F. admitted that she was addicted to drugs and had been recently evicted from her apartment. She was using drugs during the period she met petitioner, but she testified that she stopped using drugs as of December 10, 2006 and had not used them since. Cellphone records confirmed that the parties exchanged multiple phone

calls. A few days after the parties had consensual sex, petitioner claims that he decided that he wanted to do something for his birthday. He testified that he called M.F. and offered her $500 to stay at his house for a few days and engage in bondage sex at his discretion. He admitted that he had engaged prostitutes before because, as he put it, he had become lonely in his late 40s and did not have a real social network.

¶ 11 Petitioner went on to describe the sexual incidences in similar ways that M.F. described them, albeit while maintaining that everything was consensual and that he did not punch her or bang her head against the ground. He claimed that when Swain came to his house and saw M.F., Swain was freaked out at the beginning, but petitioner explained that M.F. was a prostitute and that there was no need to call police. Petitioner claims that shortly after Swain visited the house was when things went wrong because he and M.F. had a dispute over money and M.F. believed he had invited Swain over to have sex with her. Because M.F. was without a residence, petitioner asked her where she wanted to go and he dropped her off at her ex-husband's son's house which was just four blocks away.

¶ 12 The police searched petitioner's apartment after he gave consent. The police seized a variety of things including: handwritten notes and lists, black clothing and sunglasses, zip ties, tools, a stun gun, a magnetic license plate, multiple backpacks, and a briefcase modified with a false bottom. On a second inspection of petitioner's apartment, the police recorded their observations that metal bars were secured to the outside of certain windows and wood was used to cover windows as well.

¶ 13 Petitioner's DNA was found in M.F.'s vaginal swabs. She was anxious and crying while she was at the hospital, and she told the doctors that she had been abused and raped for three days. The doctor that treated M.F. noted that there were scratches on her neck, wrist, ankles,

lower back, and buttocks. Her vital signs were normal and there were no signs of physical trauma, such as broken ribs or head contusions, just soreness that she reported.

¶ 14 The State also presented the testimony of T.T., an "other crimes" witness. T.T.'s interactions with petitioner were about a year before his interactions with M.F. T.T. testified that she was looking for work and defendant indicated that he may have a job for her. Petitioner told T.T. that he had employment applications at his apartment. She claims that once she was inside the apartment, petitioner began to choke her and punch her in the stomach. He then used plastic cuffs to bind her hands and feet. He blindfolded her and tried to put a ball gag in her mouth. He then undid the zip ties around her feet, walked her to the bedroom, and secured her to the bed with cables. While she was restrained he put his mouth on her vagina and then he raped her.

¶ 15 T.T. begged to be let go and said that she needed to pick up her kids from school. She promised she would not call the police because she was a prostitute. Petitioner drove her to the Christopher House school. When T.T. went into the school, she had the receptionist call the police. Petitioner was gone by the time police arrived. At the hospital, T.T.'s vaginal swab was positive for petitioner's DNA.

¶ 16 Petitioner testified about his interactions with T.T. He agreed that they met and discussed her desire for employment. Petitioner testified that he asked her out and they went out on multiple dates. He claims that after one lunch date, they went back to his apartment and, while they were kissing, he asked if he could tie her to the bed. She was not interested, but she agreed after she was offered $30. Petitioner testified that T.T. became angry after sex, indicating that petitioner had taken advantage of her. He claimed that when he drove her to her children's school she was still mad and said she would call the police if he was still there when she came back. Petitioner also claims he received two phone calls and messages on his answering machine

from T.T. the following week, one seeking a return call, but he did not call her back.

¶ 17 Important to these postconviction proceedings, T.T. described how she arrived at petitioner's apartment. She testified that she was persuaded to come to petitioner's apartment by a promise of potential employment, but that she did not have transportation to get there. Petitioner picked her up at Claremont and Devon Avenues in Chicago and drove her down Western Avenue until they parked on a side street, walked to the back entrance of a building, and went to the second floor apartment. T.T. stated that, while in transit to petitioner's apartment down Western, they passed a police station and a bowling alley.

¶ 18 The jury found petitioner guilty of two counts of sexual assault and aggravated kidnapping.

¶ 19 On direct appeal, petitioner argued that: (1) the trial court erred when it prohibited him from calling an expert to explain the nature of the bondage equipment in his apartment and explain how the scratches and minor injuries the women had were consistent with consensual bondage sex; (2) that items found in his home such as tools like an axe, saw, and stun gun were prejudicial because they had nothing to do with the case; (3) that the court erred by allowing nearly all of the State's 146 exhibits to go to the jury room during deliberations; (4) that the prosecutors made improper inflammatory remarks during closing arguments; and (5) there was a violation of the Illinois Supreme Court Rule that requires the trial judge to make sure that the jurors understand and accept certain principles considered inherent in a fair trial (See Ill. S. Ct. R. 431(b)).

¶ 20 We affirmed petitioner's convictions. *People v. Wyman*, 2013 IL App (1st) 102615-U, ¶ 104 (leave to appeal denied at 996 N.E. 2d 22, Sep. 25, 2013). While we explained that certain evidence against petitioner should not have been admitted, the preserved errors were harmless

and the unpreserved errors did not amount to plain error. We found that the evidence was not closely balanced and petitioner was not deprived of a fair trial.

¶ 21 Petitioner filed a pro se postconviction petition. In it, he argues that his trial counsel was ineffective for two reasons. The first basis on which petitioner claims he is entitled to postconviction relief is that his trial counsel should have presented the testimony of Susan Nelson. While he was in jail awaiting trial, petitioner received an unsolicited letter from a then-unknown person named Susan Nelson. The letter had a return address. In the letter, Nelson apparently indicated that she knew M.F., that M.F. continued to use drugs, that M.F. was not suffering any mental anguish from her encounter with petitioner, and that M.F. was not honest. Petitioner alleges that he told his trial counsel about the letter right away and then gave it to his counsel at the next case management conference.

¶ 22 Petitioner alleges that he and his trial counsel discussed the letter. They both agreed that Nelson might not eventually make a good witness, but they thought it was a good idea to follow up. Petitioner alleges that whenever he asked his trial counsel about Nelson leading up to trial, his attorney said that he was "working on it." Because he feared that Nelson might slip away and because he felt that his attorney was being inattentive to the matter, petitioner wrote to Nelson and asked for her to reach out to his attorney. She never wrote back. Just before trial, petitioner allegedly asked his attorney about Nelson again, and his attorney apparently informed him that she had moved to somewhere in California and could not be located.

¶ 23 Petitioner maintains that, because M.F. was a drug addict and had credibility issues, his trial counsel should have pursued and obtained the putative impeachment evidence from Nelson. Petitioner alleges that he discussed the matter with his attorney in a phone conversation after he was convicted in which trial counsel stated that Nelson was "a flaming idiot who wouldn't have

stood up on the witness stand." Nonetheless, petitioner maintains that he is entitled to postconviction relief on the basis that it was objectively unreasonable to not investigate Susan Nelson's account. No letter from Nelson is attached to the petition.

¶ 24 The second basis on which petitioner claims he is entitled to postconviction relief is that his trial counsel should have impeached T.T. with a map because her testimony about riding in petitioner's car referenced landmarks that were not on the route that she testified they traversed. She testified that they passed a bowling alley and police station on Western Avenue, but those landmarks are not on the path between where she said petitioner picked her up and his apartment where they ended up. Petitioner admits that he was with T.T. in his vehicle, just that they did not pass a bowling alley or the police station as she testified they did. He points out that there are many, in his opinion, prominent landmarks near his apartment that she could have, but did not, identify in her testimony. Petitioner maintains that a map could have easily been shown to T.T. on cross-examination and that it would have demonstrated "the total implausibility of her story."

¶ 25 Petitioner alleges that his trial counsel agreed that the map would be useful. So petitioner drew up a map and told his attorney to enlarge it for use at trial. However, when trial came around, trial counsel instead used a Google Earth satellite image rather than the map drawn up by petitioner that he wanted to be used. Then, trial counsel did not use the image to cross-examine T.T., but instead used it to have petitioner identify the landmarks on the Google Earth image when he testified on his own behalf.

¶ 26 ANALYSIS

¶ 27 The Postconviction Hearing Act (725 ILCS 5/122-1 *et seq*.) provides a process by which a criminal defendant may challenge his or her conviction by filing a petition in the circuit court. 725 ILCS 5/122–1 (West 2012). The Act provides for a three-stage process for adjudicating

postconviction petitions. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the court independently assesses the merit of the petition. 725 ILCS 5/122-2.1 (West 2012). If the court finds the petition to be "frivolous" or "patently without merit," the court shall dismiss the petition. 725 ILCS 5/122.1(a)(2) (West 2012). At the first stage of postconviction proceedings, the circuit court must take the factual allegations in the petition as true, unless those allegations are contradicted by the record. *People v. Coleman,* 183 Ill. 2d 366, 382 (1998). The standard of review of either first-stage or second-stage dismissal is *de novo*. *People v. Boyd*, 347 Ill. App. 3d 321, 327 (2004).

¶ 28 We analyze questions of ineffective assistance by considering the entire record. *People v. Hommerson*, 399 Ill. App. 3d 405, 415 (2010). The only relevant questions are whether defendant received adequate representation so that he received a fair trial and whether prejudicial error resulted from his counsel's errors, if there were even any errors. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). At the first stage of postconviction proceedings under the Post-Conviction Hearing Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 29 On petitioner's claim that he is entitled to relief for his attorney's failure to follow up with Susan Nelson about her letter, the first impediment he faces is that he has not attached the letter to his petition. Likewise, petitioner has not provided an affidavit from Nelson or anyone else, but has only supplied self-serving statements about what Nelson's purported testimony might have been.

¶ 30 The Illinois Code of Criminal Procedure requires that "the petition shall have attached

thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). Petitioner, however, maintains that his petition should advance because he has explained the absence of evidence—he gave the letter to his attorney and no longer possesses it. The Illinois Supreme Court has held that without an affidavit from a putative witness, "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Petitioner has provided zero corroboration for his allegations. Nor has the petitioner given the court any reason to believe that the affidavits would be forthcoming. *People v. Harris*, 224 Ill. 2d 115, 142 (2007).

¶ 31 Looking beyond the fact that there is no actual evidence to support petitioner's allegations of error relating to Nelson, when petitioner's allegations about her letter are taken as true, they still do not rise to the level of making out a claim that there was an objectively unreasonable error by trial counsel or any resulting prejudice. Petitioner admits that he still does not know if Nelson has anything helpful to offer at all. He admits that both he and his trial counsel believed Nelson was probably not trustworthy and that she could have even been detrimental to the defense. Petitioner cannot, even now, allege that Nelson has anything positive to say on his behalf. His claims are based on pure speculation. Petitioner himself describes Nelson's accusations as being at a level of "almost comical pettiness." And he admits in his petition that his trial counsel believed Nelson to be "a flaming idiot who wouldn't have stood up on the witness stand."

¶ 32 Petitioner has also not shown arguable prejudice from not having Nelson's testimony. Petitioner's allegations relating to Nelson are not related to the crime in any way. M.F.'s supposed drug use was not a significant issue in the case. M.F. testified that the last time she

used drugs was December 10, 2006. The relevant events in the case took place at the end of September 2006, so she already admitted she used drugs during the period that this incident happened and in the months afterwards. As we explained on direct appeal, the physical evidence and strong confluence of unrebutted testimony resulted in the evidence being overwhelming. *People v. Wyman*, 2013 IL App (1st) 102615-U, ¶ 70, ¶ 90. Without prejudice, there is no relief for ineffective assistance of counsel. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 19.

¶ 33 The uncontradicted evidence showed that petitioner had bondage sex with both M.F. and T.T. They both had physical injuries. Petitioner concedes those things. The question for the jury was whether there was consent for the sex and the restraint. The testimony of petitioner's friend, Joe Swain, was that, upon arriving at petitioner's apartment, he found M.F. tied to the bed, crying for help, and that she was scared and frantic. Swain himself was freaked out. Then, immediately after M.F. was out of the presence of petitioner, she confronted the first people she saw on the street, including Samuel Crockett, and begged for help. Those passersby were initially reluctant to help until they noticed how extremely distraught she was. The medical personnel similarly noted that M.F. was very distraught. She had even kept one of the restraints to provide to police. T.T.'s testimony provided evidence of a similar course of events. The details of the means and methods provided a strong nexus of inculpatory evidence. The jury found that there was not consent, and petitioner fails to make out a claim that not having the putative testimony of Nelson arguably prejudiced his defense.

¶ 34 Petitioner's other claim of error is that his trial counsel was ineffective for failing to try to impeach T.T. with a map. T.T. testified about the route that they drove when defendant picked her up, but she testified that she saw landmarks that would not have been along that route. At the outset, we should note that trial counsel did use a satellite image map to elicit testimony from

petitioner on this subject, but petitioner maintains it should have been done during the cross-examination of T.T. and with a different kind of map. In his petition, he maintained that trial counsel should have used a hand-drawn map that he prepared, but on appeal he argues that counsel should have used a Google Maps image.

¶ 35 As the State points out, the transcript of T.T.'s cross-examination reveals that she was questioned about her observations of the areas she and petitioner traveled. There was, however, never any dispute about whether petitioner and T.T. were in the car together and at his apartment together. Petitioner maintains that cross-examining T.T. with the map would have revealed "the total implausibility of her story." We disagree. Petitioner also was able to present to the jury his version of their travels with a map and rebut anything offered by T.T. Her limited, putatively inaccurate remarks about their route would not be sufficient to substantiate a claim for postconviction relief.

¶ 36 There were mounds of evidence in this case (with more than 140 prosecution exhibits and days of testimony) and the fact that trial counsel used a different kind of map than the one petitioner wanted to use is insufficient to entitle him to relief for ineffective assistance of counsel. Petitioner has not even shown that counsel's representation was objectively unreasonable in regard to the map, let alone in light of all of the adversarial testing the State's case received. And, as set forth above, petitioner cannot make a showing of prejudice so he is not entitled to go forward on a claim for ineffective assistance of counsel (supra ¶ 33).

¶ 37 Petitioner also argues that the court erred when it assessed a frivolous-filing fee and ordered funds removed from petitioner's prison trust account. We agree with petitioner. While not meeting the standard required for postconviction relief as a matter of law, petitioner's claims were not frivolous. The petition does not meet any of the statutory conditions for the assessment

of the fee. See 735 ILCS 5/22-105 (West 2012). In addition, the State does not even specifically respond to petitioner's argument that the petition was not frivolous and only focuses on whether the court is permitted to order that the fee be deducted from a prisoner's trust account. We, therefore, vacate the $105 fee and order the Illinois Department of Corrections to refund the money removed from petitioner's prison trust account to satisfy the fee, if any.

¶ 38 CONCLUSION

¶ 39 Accordingly, we affirm the order dismissing petitioner's postconviction petition and vacate the order assessing a frivolous-filing fee.

¶ 40 Affirmed as modified.