2017 IL App (1st) 151506-U

No. 1-15-1506

Order filed September 5, 2017

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	No. 08 CR 23073
v.	)	
	)	Honorable Stanley J. Sacks,
BLAKE GORDON,	)	Judge, presiding.
	)	
Defendant-Appellant.	)	

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

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's *pro se* postconviction petition at the first stage of proceedings under the Post-Conviction Hearing Act because defendant's claim that he was denied the effective assistance of counsel when trial counsel did not present certain "character" witnesses at sentencing lacked an arguable basis in fact and law.

¶ 2 Defendant Blake Gordon 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 2014)). On appeal, defendant contends the circuit court erred in dismissing his petition because his claim had an arguable basis in law and fact. Specifically, defendant claims that he was denied the

effective assistance of counsel because trial counsel failed to investigate and present the testimony of certain witnesses who would have provided "character evidence" at sentencing. We affirm.

¶ 3 Following a jury trial, defendant Blake Gordon was found guilty of first degree murder and attempted first degree murder. He was sentenced to 50 years in prison for the murder conviction and to a consecutive 10-year sentence for the attempted first degree murder conviction.

¶ 4 The evidence at defendant's trial established, through, *inter alia,* the testimony of Tracy Smith and Andrew Lucas, that defendant fired numerous gunshots at a vehicle containing rival gang members Smith, Dominique Conyers, and Victor Barton. Conyers died as a result of the shooting and Barton was injured. Although defendant testified that he acted in self defense after seeing someone in the backseat of the vehicle point a silver and black gun in his direction, the jury found defendant guilty of the first degree murder of Conyers and the attempted first degree murder of Barton.

¶ 5 A presentence investigation report (PSI) was then prepared. The PSI indicated that defendant was raised by his mother, and was himself the parent of two children. Although he graduated from grade school, defendant tested at the fourth-grade level. Defendant had attempted suicide approximately 10 times and tried to hang himself with bed sheets in December 2010. Defendant did not drink alcohol and had completed a drug rehabilitation program while incarcerated. He belonged to the Mafia Insane Vice Lords gang, and enjoyed spending his free time with his children.

¶ 6 At sentencing, Tanya Miller, Conyers's mother, read a victim impact statement. Miller stated that she never imagined that she would "outlive" her son, and that even after two years, the "thought" that she would never see him again was "still outrageously painful." Miller further stated that at the time of his death, Conyers had "started to speak of the things he knew he needed to do to change his life" as he prepared for the birth of his first child. Miller stated that Conyers's son was being raised by a single mother and that Conyers would not be able to teach the boy "how to be a man." Miller dreaded the day that she had to tell the boy that his father was dead. Miller noted that defendant would have "the opportunity and pleasure" to see his children grow, but her family could only visit Conyers's "gravesite."

¶ 7 The State then argued in aggravation that defendant had three prior felony convictions and was on "parole" at the time of Conyers's death. The State further argued that defendant "love[d]" guns and that the sentence in this case should reflect that "this was a senseless gang-related murder that did not need to happen." The defense responded that with regard to defendant's prior convictions, one was for possession of a firearm and that he was sentenced to a concurrent sentence of boot camp for the other two. The defense further argued that defendant was a special education student and had only a fourth-grade "education level." The defense concluded that defendant was "standing on the porch when the other car went by" and asked for the minimum sentence "under the circumstances."

¶ 8 In sentencing defendant, the trial court stated that defendant was "still with us" and could see his family on visiting days, but that Conyers's family did not "have that same luxury." In other words, no matter what the trial court did with regard to defendant, Conyers could not be "replace[d]." The court noted that defendant was "a young guy" and that his family was also

affected. Ultimately, there were "two lives that are [being] wasted." The trial court then detailed defendant's criminal history which included juvenile adjudications and several gun-related convictions, and noted that defendant was on "parole" at the time of Conyers's death. The court concluded that it could not think of "one" reason why defendant "should be back on the street at all or at least anytime soon" because defendant had "chances upon chances to no avail." Considering the circumstances of the case, that is, defendant fired "a whole bunch of shots" into a vehicle "killing one guy and hitting a second guy," the court sentenced defendant to 50 years in prison for the first degree murder conviction and to a consecutive 10-year sentence for the attempted murder conviction. This judgment was affirmed on appeal. See *People v. Gordon*, 2014 IL App (1st) 110664-U.

¶ 9 In January 2015, defendant filed the instant *pro se* postconviction petition, alleging, *inter alia*, that the trial court erred in denying defendant's motion to suppress statements when he suffered intimidation, threats and physical abuse from the police, and that defendant was denied the effective assistance of counsel because trial counsel failed to call his family to give "character evidence" at sentencing. Attached to the petition in support were the affidavits of defendant's mother Shawn Gordon, his mother's fiancé William Poindexter, and his godmother Shirley Foster.

¶ 10 In her affidavit, Shawn averred that she and her daughter were willing to testify on defendant's behalf but were not given the opportunity. Shawn further averred that defendant was raised in a single-parent household, was supportive during her recovery from "addiction" and was a father-of-two who wanted to nurture his children. Poindexter averred that he wanted to tell the court that defendant needed the "opportunity" to be a father and that defendant's family

suffered without defendant. Foster averred that once defendant knew he was going to be a father, he "began to change his life" by going back to school and getting a job. The circuit court dismissed the petition as frivolous and patently without merit in a written order.

¶ 11 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 2014). 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). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Id*. at 11-12. 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. A petition lacks an arguable basis in law when it is grounded in "an indisputably meritless legal theory," for example, a legal theory which is completely contradicted by the record. *Id*. at 16. A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation," such as one that is "fantastic or delusional." *Id*. at 16-17. This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 12 On appeal, defendant contends that he was denied the effective assistance of counsel because trial counsel failed to investigate and present the testimony of certain witnesses who could have provided mitigation evidence at sentencing. Defendant argues that these witnesses would have testified regarding defendant's "rough childhood in a single-parent home" and that defendant had "undergone changes for the better when he became a father" which could have resulted in a lesser sentence.

¶ 13 The State responds that even if trial counsel had presented the testimony of defendant's family members at sentencing, defendant cannot establish that he would have received a lesser-sentence had those witnesses testified considering the circumstances of the instant case. Specifically, the fact that defendant fired multiple gunshots into a vehicle containing rival gang members killing one person and injuring another.

¶ 14 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." *Id.* at 17.

¶ 15 The "failure to offer evidence in mitigation does not, in and of itself, demonstrate deficient performance." *People v. Orange*, 168 Ill. 2d 138, 167-68 (1995). Furthermore, "[e]ven where counsel's performance is deficient due to the failure to investigate mitigating evidence and present it to the [fact finder], the defendant must still demonstrate prejudice to sustain a claim." *People v. Pulliam*, 206 Ill. 2d 218, 239 (2002). Counsel's "[f]ailure to call or investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel." *People v. Jarnagan*, 154 Ill. App. 3d 187, 194 (1987).

¶ 16 The record reveals that at sentencing trial counsel argued in mitigation, *inter alia*, that defendant was a special education student who tested at the fourth-grade level. Thus, this is not a case where trial counsel made no arguments in mitigation at sentencing. Rather, in the case at

bar, defendant argues that trial counsel should have presented live witnesses to present "character evidence," presumably to counteract Conyers's mother reading her victim impact statement into the record, and argues that his mother, *de facto* stepfather and godmother would have been willing to testify upon his behalf. The gist of these affidavits is that defendant was raised by a single mother, had begun to make positive changes to his life since becoming a parent, and was needed to parent his children.

¶ 17 However, the PSI contained similar information about defendant, including that he was raised by a single mother, and that he had two children with whom he enjoyed spending time. Thus, as the PSI was considered by the trial court at sentencing, the additional testimony of defendant's family members would have been cumulative and defendant cannot therefore establish prejudice. See *People v. Simon*, 2014 IL App (1st) 130567, ¶ 71 (rejecting defendant's claim that he was denied the effective assistance of counsel when trial counsel did not present certain evidence in mitigation at sentencing, that is, the testimony of nine family members, when the PSI detailed defendant's good relationship with his family and his employment history because the testimony from family members would have been "essentially cumulative"); *People v. Griffin*, 178 Ill. 2d 65, 88 (1997) (finding no prejudice where testimony from defendant's family members as to his troubled childhood would have been cumulative because that information was already in the PSI).

¶ 18 "Additionally, 'we must assess prejudice in a realistic manner based on the totality of the evidence. Accordingly, it is improper to focus solely on the potential mitigating evidence.' " *Simon*, 2014 IL App (1st) 130567, ¶ 72, quoting (*People v. Coleman*, 168 Ill. 2d 509, 538 (1995)). Rather, a reviewing court must also consider the nature and amount of evidence in

aggravation. *Id*. Here, the trial court noted that defendant had prior gun-related convictions and was on "parole" at the time of the instant offense. The court further noted that defendant had "chances upon chances" to change his behavior but did not. In sentencing defendant, the court noted the circumstances of the offense, that is, defendant fired "a whole bunch of shots" into a vehicle driving down the street, killing one person and injuring another. Given this evidence in aggravation, "[t]he failure of defendant's trial counsel to place more information from defendant's past onto the scale probably would not have tipped it in defendant's favor." See *People v. Easley*, 192 Ill. 2d 307, 341 (2000). Accordingly, we cannot find an arguable basis for a claim of ineffective assistance of counsel. See *People v. Phyfiher*, 361 Ill. App. 3d 881, 886-87 (2005) ("Defendant cannot make out a claim of ineffectiveness where the testimony he claims should have been offered was cumulative to evidence already in the record."). Consequently, summary dismissal of defendant's *pro se* postconviction petition was proper.

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

¶ 20 Affirmed.