2017 IL App (1st) 152388-U

No. 1-15-2388

Order filed September 29, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 411
	)	
BONNIE SHELESNY,	)	Honorable
	)	Geary W. Kull,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition was proper where she failed to make an arguable claim of ineffective assistance of counsel.

¶ 2 Defendant Bonnie Shelesny, who pled guilty to one count of first degree murder and was sentenced to 35 years in the Illinois Department of Corrections (IDOC), appeals from the summary dismissal of her petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2014). On appeal, defendant contends that the trial court erred in

dismissing her petition, as it stated a gist of a constitutional claim that her trial counsel was ineffective for failing to file a motion to suppress the statement she made to the police. Defendant asserts that counsel's unreasonable performance prevented her from knowingly and intelligently pleading guilty, and claims that had her statement been suppressed, there was a reasonable probability she would have insisted on going to trial.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the June 2010 killing of Marilyn Fay in her home in Brookfield, Illinois. Following defendant's arrest, defendant was charged with 24 counts of first degree murder, two counts of home invasion, one count of armed robbery, one count of residential burglary, two counts of robbery, two counts of burglary, one count of possession of a stolen motor vehicle, two counts of unlawful use of a credit card, and two counts of possession of a controlled substance.

¶ 5 On July 20, 2012, defendant and her codefendant, Steven Kellmann, each pled guilty to one count of first degree murder. After admonishing defendant regarding the rights she was giving up by pleading guilty, the trial court asked for the factual basis for the plea. The parties thereafter stipulated as to what evidence would have been presented if the matter were to proceed to trial.

¶ 6 James Kellmann, the father of codefendant, would have testified that about 7 a.m. on June 14, 2010, he received a phone call from codefendant, who said he had killed someone and was going to jail for life. Linda Henning, codefendant's mother, would have testified that codefendant was at her home on the morning of June 14, 2010. At that time, codefendant reported that he had taken a bank card that had been "eaten" by an ATM, and that he had

"f***ed up and he had lost the ATM card last night and could not handle going back to prison." Henning would have further testified that when codefendant left her home at approximately 8:23 a.m., he was in the company of defendant. Although Henning did not observe defendant, she could hear her son talking with defendant, "a person that she was familiar with." About 1:55 p.m., Henning received a call from her son from a phone number she recognized as the victim's.

¶ 7 Brookfield police lieutenant Edward Petrak would have testified that about 3:15 p.m. on the day in question, he went to the victim's residence to conduct a well-being check at the location. He found that the exterior of the residence was secure, but that the landline telephone number was disconnected. Petrak spoke with two neighbors, John Berkowicz and his wife, who reported they had last observed the victim when she returned a wrench to them around 7 p.m. the night before. They gave Petrak a set of keys to the victim's residence. Petrak entered the victim's residence at 3:28 p.m. and discovered her body with a pillow covering her face. Petrak secured the scene and contacted detectives and evidence technicians.

¶ 8 John Berkowicz would have testified that when the victim returned his wrench, she was in the company of codefendant. He would have further testified that when he and Lieutenant Petrak looked in the victim's garage, they discovered her Jeep was not there.

¶ 9 Brookfield police officer James Burdett would have testified that in the course of his investigation, he learned that the victim's Jeep was parked in the 5300 block of South Nottingham in Chicago. He also learned that at approximately 5:50 p.m. on the day in question, defendant and codefendant were checked in at a room at the Rainbow Motel Pink Palace Fantasy Suites, which was located at 7050 West Archer in Chicago, about two blocks from the location of the victim's Jeep. Burdett learned that defendant and codefendant were taken into custody

outside the motel room and transported to the Brookfield police department. A search warrant was obtained, and the victim's cell phone, insurance card, and credit card were found in the motel room.

¶ 10 Officer Burdett would have testified that codefendant made a video- and audio-recorded confession on the day in question during which he admitted to "at various times" living in the victim's home; stealing her credit cards, Jeep, and cell phone; and using her cell phone. During his investigation, Burdett obtained records for the recovered credit card indicating it had been used at at least four locations, including a restaurant in Cicero and a home improvement store in Chicago. Burdett then found video footage from the restaurant and the home improvement store depicting defendant and codefendant using the credit card in various transactions.

¶ 11 Officer Burdett would have testified that on December 1, 2010, defendant, who had been arrested, was placed in an interview room at the Brookfield police department. There, she was under constant video and audio surveillance. In a conversation with police in this room, defendant "admitted to participating in the murder of Marilyn Fay and participating in the stabbing and suffocating of Marilyn Fay."

¶ 12 Matthew Soria would have testified that on August 17, 2010, he and defendant were together at "Garden Grove," a forest area in Prospect Heights. Around 3:30 p.m., defendant told Soria that she and codefendant "had broke into a person's house that they used to live with for a while and that they had been kicked out of the house so they broke in." Defendant further told Soria that she and defendant "had broken in to get shit--quote, unquote--so they can sell it and also she stated during this conversation we killed them. I murdered a person."

¶ 13 The medical examiner who performed the victim's autopsy would have testified that her examination revealed four stab wounds, 19 aspects of evidence of blunt force injury, internal evidence of blunt force injury, and evidence of suffocation. It was the examiner's opinion that Fay died of multiple stab wounds and asphyxia due to assault, and that the manner of death was homicide.

¶ 14 After defendant reaffirmed her desire to plead guilty, the trial court found that she understood the nature of the charges against her, the possible penalties, and her rights under the law, found that she was pleading freely and voluntarily, and found a factual basis sufficient to support the plea. The trial court accepted the plea and found defendant guilty. In aggravation, the prosecutor noted that the State had been seeking a sentence of natural life imprisonment at the 402 conference and that "the sentence anticipated" showed mercy to defendant that was not shown to the victim. In mitigation, defense counsel noted defendant had a serious drug problem and that she had voluntarily "checked herself in" on a number of occasions to try to overcome the problem. Counsel also reminded the court it had heard "extensive mitigation" at the 402 conference, but did not describe the content of the mitigation. Defendant waived a presentence investigation and indicated that she did not want to speak before being sentenced.

¶ 15 After sentencing codefendant to 35 years in prison, the court stated to defendant, "And [defendant], I believe that you are as culpable, equally culpable, and the sentence for you will also be 35 years in the Illinois Department of Corrections." The trial court advised defendant how to perfect an appeal, and defendant indicated she understood.

¶ 16 Defendant did not file a motion to withdraw her guilty plea or take a direct appeal.

¶ 17 On March 30, 2015, defendant filed a *pro se* postconviction petition. In the 12-page petition, defendant alleged, relevant to the instant appeal, that her guilty plea was not knowingly, intelligently or voluntarily entered due to her trial counsel's incompetent legal advice. According to defendant, counsel advised her "that it did not matter that she was in the car shooting heroin when [codefendant] committed the murder of Marilyn Fay, in her home or that petitioner had no prior knowledge that [codefendant] was going to commit the murder." Defendant wrote, "Per defense counsel, because petitioner was with [codefendant] before and/or after the strangulation, that made her guilty of first degree murder. It was that advice that induced petitioner to plead guilty, and it is faulty." After reciting the statutory elements of first degree murder, defendant wrote, "Petitioner denies any such act" and "Petitioner hereby attests to her innocence." Defendant claimed that had counsel "correctly advised her that her conduct did not, in fact, constitute the crime of first degree murder," she would not have pled guilty but rather, would have invoked her right to trial by jury.

¶ 18 Defendant further alleged in her petition as follows:

> "On December 1, 2010 when petitioner was arrested at her place of employment *** petitioner asked for her attorney of record several times. When Det. [Burdett] started the videotaped interrogation petitioner again asked for her attorney of record. *** During the interrogation and without the benefit of petitioner's counsel, Det. [Burdett] coerced petitioner to confess to a crime that she had never been told the elements of in addition to having Det. [Burdett] and an unnamed State's Attorney encouraging petitioner to sign the confession without the benefit of her prescription eyeglasses or her attorney of record."

Defendant explained that she "offer[ed] this point as an example of her attorney's complete and total failure to act as an advocate for her in not even attempting to suppress the interrogation and/or the resulting confession as tainted due to the many constitutional and procedural defects."

¶ 19 Defendant attached an affidavit to her petition which she concluded with the statement, "Lastly, at this time, I assert my innocence of the charge of first degree murder."

¶ 20 On April 17, 2015, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. This court allowed late notice of appeal on September 9, 2015.

¶ 21 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 22 A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Hodges*, 234 Ill. 2d at

16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 23 On appeal, defendant contends that her petition presented an arguable claim that plea counsel was ineffective for failing to file a motion to suppress her statement to the police, and that this failure prevented her from knowingly and intelligently pleading guilty. Defendant asserts that counsel's inaction was unreasonable because, taking as true her allegation that she requested an attorney prior to making the inculpatory statement, a motion to suppress would have been successful. She argues that she was prejudiced by counsel's failure since, had her statement been suppressed, there was a reasonable probability she would have insisted on going to trial.

¶ 24 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "a petition alleging ineffective assistance may not be summarily dismissed 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.

¶ 25 In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, an attorney's conduct is considered deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *People v. Hall*, 217 Ill. 2d 324, 335 (2005).

Prejudice exists if there is a reasonable probability that absent counsel's errors, the defendant would have pled not guilty and insisted on going to trial. *People v. Hughes*, 2012 IL 112817, ¶ 63; *Hall*, 217 Ill. 2d at 335. A bare allegation that the defendant would have pled not guilty and insisted on trial is not enough to establish prejudice. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 335. Rather, such a claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 335-36; *People v. McCoy*, 2014 IL App (2d) 100424-B, ¶ 16 (applying *Hall* in an appeal from a first-stage postconviction dismissal). The question of prejudice depends in large part on predicting whether the defendant likely would have been successful at trial. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 336.

¶ 26 In the instant case, we need not determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness. This is because defendant has not presented an arguable claim of prejudice. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, this court is not required to address whether counsel's performance was objectively reasonable). Defendant has not identified a plausible defense that she would have used at a trial, and although she stated in her petition that "Petitioner hereby attests to her innocence" and in her affidavit that "I assert my innocence of the charge," those statements are completely conclusory and devoid of supporting facts.

¶ 27 Further, defendant's claim of prejudice is without arguable merit because even if counsel had managed to suppress her statement to the police, we cannot find it likely that she would have been successful at trial. Defendant stipulated to the summary of the evidence that was presented

as the factual basis for her plea. "A stipulation is conclusive as to all matters necessarily included in it, [citation] and no proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence [citation]. Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated." (Internal quotation marks omitted). *People v. Woods*, 214 Ill. 2d 455, 469 (2005). The stipulated evidence in the instant case, omitting defendant's statement to the police, indicated that she was with codefendant at his mother's house the morning of the victim's murder; that she and codefendant were checked in at a motel together the evening of the murder; that the victim's cell phone, insurance card, and credit card were found in the motel room; that video footage from a restaurant and a store depicted defendant using the victim's credit card; and that defendant told Matthew Soria that she and codefendant "had broke into a person's house that they used to live with for a while," that they "had broken in to get shit--quote, unquote--so they can sell it," and "we killed them. I murdered a person."

¶ 28 Thus, the factual basis in the record directly contradicts defendant's conclusory claim of "innocence" in her postconviction petition. The stipulated evidence, even without defendant's statement to the police, would have been sufficient for a rational trier of fact to find her guilty beyond a reasonable doubt either as a principal or under a theory of accountability. See 720 ILCS 5/5-4(c) (West 2010) (defining accountability). That defendant does not understand the theory of accountability--evidenced by her postconviction claim that counsel gave her "faulty" advice that "because petitioner was with [codefendant] before and/or after the strangulation, that made her guilty of first degree murder"--does not mean she has articulated a plausible claim of actual innocence. We are mindful that defendant's petition includes a statement suggesting she

"was in the car shooting heroin when [codefendant] committed the murder of Marilyn Fay." However, such a scenario is contradicted by the record, as the stipulated evidence places her inside the victim's home, actively participating in the murder, and moreover, even if defendant was in a vehicle at the moment of the victim's death, that would not release her of accountability for codefendant's actions. For all these reasons, defendant has failed to show that it is arguable she suffered prejudice as a result of counsel's alleged deficiencies.

¶ 29 In her opening and reply briefs, defendant relies heavily upon this court's decision in *People v. Kellerman*, 342 Ill. App. 3d 1019 (2003). In *Kellerman*, the defendant agreed to plead guilty to arson in exchange for the State's recommendation of a 12-year prison sentence. *Kellerman*, 342 Ill. App. 3d at 1022. As a factual basis for the plea, the prosecutor stated that the Bolingbrook fire department extinguished a fire at a residence on June 30, 1999; that following the police investigation of the fire, the defendant was arrested for arson and was advised of his *Miranda* rights; and that in a tape-recorded statement, the defendant admitted to the police that he had set the house on fire. *Kellerman*, 342 Ill. App. 3d at 1022. During the ensuing sentencing hearing, defense counsel stated that she had listened "to a tape where he made statements" to the police. *Kellerman*, 342 Ill. App. 3d at 1022. The trial court sentenced the defendant to 12 years in the IDOC. *Kellerman*, 342 Ill. App. 3d at 1022. The defendant did not file a postplea motion or a direct appeal. *Kellerman*, 342 Ill. App. 3d at 1022.

¶ 30 In a *pro se* postconviction petition, the defendant alleged that during his interrogation, the police told him "the State's Attorney was on a phone ready to offer [him] a negotiated plea of three or four years in exchange for a confession," and that the tape of his confession would support this contention. *Kellerman*, 342 Ill. App. 3d at 1023. The defendant claimed that when he

told his trial counsel about the police offer being recorded on the tape, counsel told him that "no police was able to make any negotiations" and that the defendant should accept the State's offer of 12 years' imprisonment because "it was the best offer he would receive." *Kellerman*, 342 Ill. App. 3d at 1023. The defendant contended that because of his attorney's ineffectiveness, his guilty plea was involuntary and he should be allowed to withdraw his plea. *Kellerman*, 342 Ill. App. 3d at 1023. The trial court summarily dismissed the petition. *Kellerman*, 342 Ill. App. 3d at 1023.

¶ 31 On appeal, the defendant argued his petition stated the gist of a constitutional claim of ineffective assistance of counsel and should not have been dismissed. *Kellerman*, 342 Ill. App. 3d at 1027. This court agreed and reversed the trial court. *Kellerman*, 342 Ill. App. 3d at 1028. We explained that, taking the defendant's allegation regarding the offer of a three- or four-year prison term as true, such a police statement was an inducement for the defendant to confess in exchange for the specific benefit of a State's Attorney's negotiated plea agreement, and therefore, the defendant's confession was involuntarily given and inadmissible at trial. *Kellerman*, 342 Ill. App. 3d at 1027-28. We reasoned that if the defendant's confession was involuntarily given, then his trial counsel's performance fell below an objective standard of performance and his trial was prejudiced by his counsel's failure to challenge the admissibility of his confession. *Kellerman*, 342 Ill. App. 3d at 1028.

¶ 32 *Kellerman* is readily distinguishable from the instant case. In *Kellerman*, the only evidence against the defendant set forth in the factual basis for the guilty plea was the defendant's own tape-recorded statement to the police. *Kellerman*, 342 Ill. App. 3d at 1022. Thus, had the defendant's attorney successfully suppressed the statement, the State would not

have had any evidence against him and the result of a trial would have been different. In this way, the *Kellerman* defendant established prejudice due to his counsel's failure to challenge the admissibility of the confession. See *Kellerman*, 342 Ill. App. 3d at 1028. Here, in contrast, even if trial counsel had challenged the admissibility of defendant's confession to the police and been successful in suppressing it, ample evidence remained to prove her guilt. Therefore, no prejudice exists. Accordingly, *Kellerman* does not alter our disposition.

¶ 33 Based on the allegations raised in the postconviction petition, it is not arguable that defendant was prejudiced by her attorney's performance. Accordingly, summary dismissal of the petition was proper.

¶ 34 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 35 Affirmed.