2017 IL App (2d) 150423-U
No. 2-15-0423
Order filed August 3, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CLARENCE E. PERRY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 12-CF-1714 Honorable George Bridges, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that appellate counsel had been ineffective for failing to argue that the State presented false testimony to the grand jury: defendant did not demonstrate that the testimony at issue was even arguably false and, in any event, defendant did not provide the entirety of the grand-jury testimony and thus we could not determine that the grand jury, even arguably, would not have indicted him absent that testimony.

¶ 2 Defendant, Clarence E. Perry, appeals the trial court's order summarily dismissing his postconviction petition. He contends that he stated the gist of a meritorious claim that his

appellate counsel was ineffective for not arguing that the State knowingly used false or misleading testimony to obtain the indictment. We affirm.

¶ 3 Following a bench trial, defendant was convicted of two counts of online theft by deception (720 ILCS 5/16-40(b) (West 2012)). At that trial, Tannie Wilson testified that he owned Wilson Maintenance Company. In April and May 2012, he received two invoices from Grainger Corp. totaling more than $10,000 for merchandise that he did not order. Both invoices listed the purchaser as Cheryl Curry. The shipping address was a Smartstop storage facility, and the e-mail address was in the name of Edward Johnson. Wilson recognized neither name.

¶ 4 After receiving the first invoice, Wilson called Grainger. Kenneth Boyd, Grainger's loss-prevention specialist, discovered that the order was placed from Grainger's website. With his suspicions thus aroused, Boyd noticed that, when the second order came in, the shipping address was the same storage facility in Cicero as the first order. Both orders listed the name Cheryl Curry and the e-mail address edwardjohnson491@yahoo.com. The Internet protocol (IP) address on both forms was 99.179.146.37.

¶ 5 Boyd contacted Lincolnshire detective Adam Hyde. They placed a tracking device on one of the boxes shipped with the second order. Hyde later recovered that device from a box found in the basement of a Maywood address that Hyde knew was the residence of defendant's brother, Elgin Perry.

¶ 6 An employee of the storage facility provided Hyde with information about a rented storage locker, as well as Cheryl Curry's phone number. Curry said that she picked up the packages for a person she knew as "Snag." From a photographic array, she identified defendant as "Snag."

¶ 7 Hyde also requested business records from AT&T regarding the IP address 99.179.146.37. Based on the information he received, he obtained a search warrant for 2007 12th Avenue in Maywood. He executed the warrant with Dean Kharasch, cybercrimes investigator for the Lake County State's Attorney's office. While there, Kharasch discovered a U-verse wireless router and an HP laptop. Kharasch learned that the home's Internet signal was an unsecured wireless signal, meaning that it was not password-protected. The IP address for the laptop was 99.179.146.37.

¶ 8 Kharasch testified that the wireless account had been accessed at one time or another by at least 20 different devices. The homeowner, Jennifer Jackson, recognized only two of those devices, the laptop and a wireless printer. The other devices that accessed the network had been used outside the residence. Another indicator that "outside subjects" were using the wireless connection without the Jackson's authority came from Hyde, who told Kharasch that someone had told him that "a subject by the nickname of 'Snag' would sit in a vehicle down the street using this witness's wireless connection."

¶ 9 In the search-warrant application, Hyde wrote that, while at the residence, the next-door neighbors approached him and said that "Snag," whom they identified as defendant, frequented the area. Driving a cream-colored Buick, he would park halfway down the block from the house. According to the neighbors, "He sits in the car doing something, and then drives away."

¶ 10 On cross-examination, defendant asked Hyde whether "[t]his phantom someone came up to you and told you that Snag sometimes parks on the block and sits in his car and does something that they don't know, is that correct?" Hyde replied, "A gentleman does do that. And a group of gentlemen said that to us, yes."

¶ 11 A consensual search of Elgin Perry's house revealed that it had no Internet connection. However, an office was set up in the basement with a computer, some other equipment, and two cell phones. Hyde returned to Elgin Perry's house later to attempt to speak with defendant. As Hyde approached, defendant stood up and ran, jumped the fence behind the house, and ran into an apartment complex.

¶ 12 A former Grainger branch manager testified that defendant worked for the company for two or three months during the summer of 2005. During that time, he could have had access to customer account information.

¶ 13 Curry testified that she met defendant through a mutual friend. Defendant asked her if she would be willing to rent a storage locker. She and defendant drove to the facility and she went in and paid the rent. A week later, she returned to the facility to pick up packages that Grainger had sent there. She brought them back to Maywood, and defendant put them in a garage. Approximately a week later, she picked up more packages from the same location. defendant once again took the packages and put them in the garage.

¶ 14 The parties stipulated to defendant's conviction of computer fraud, which was introduced to show common design and knowledge. The earlier case involved defendant using customer account numbers to place fraudulent online orders with Grainger. The orders were then shipped to a storage locker, which was opened in another person's name.

¶ 15 The court found defendant guilty on both counts and sentenced him to concurrent 12-year prison terms. On direct appeal, defendant argued that the trial court erred in denying a motion to dismiss for improper venue. This court affirmed. *People v. Perry*, 2014 IL App (2d) 130397-U.

¶ 16 Defendant then filed a postconviction petition in which he contended, *inter alia*, that appellate counsel was ineffective for failing to argue that his due process rights were violated

when the prosecutor presented false or misleading evidence to the grand jury. The court summarily dismissed the petition, and defendant timely appeals.

¶ 17 Defendant contends that the court should not have dismissed his petition summarily, because it stated at least the gist of a claim that appellate counsel was ineffective. He points out that Hyde told the grand jury that neighbors said they saw defendant in the neighborhood of the 12th Avenue home doing something "on a laptop," while in his application for a search warrant and at trial, he related that the neighbors merely saw defendant "doing something." Defendant contends that, given the low threshold presented by the "gist" standard at the first stage of postconviction review, it is at least arguable that, had the grand jurors not been told that defendant was seen with a laptop, they might not have indicted him for crimes of computer fraud, and, thus, appellate counsel was ineffective for not arguing this issue.

¶ 18 We begin our analysis of this issue with a brief review of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). A proceeding under the Act is not an appeal of a defendant's underlying conviction. Rather, it is a collateral attack on the judgment. The purpose of the proceeding is to resolve allegations that constitutional violations occurred at trial, when those allegations have not been, and could not have been, adjudicated previously. To be entitled to postconviction relief, the defendant bears the burden of establishing a substantial deprivation of federal or state constitutional rights. *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

¶ 19 A proceeding under the Act may consist of three stages. At the first stage, the court independently reviews the petition to decide if it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the court reaches this conclusion, it must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition is considered "frivolous or patently without merit only if the allegations in the petition, taken as true and

liberally construed, fail to present the 'gist of a constitutional claim.' " *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). The "gist" standard is " 'a low threshold.' " *Id*. (quoting *Gaultney*, 174 Ill. 2d at 418)). To set forth the "gist" of a constitutional claim, a petition "need only present a limited amount of detail" (*Gaultney*, 174 Ill. 2d at 418) and, thus, need not set forth the claim in its entirety. The petition need not include "legal arguments or [citations] to legal authority." *Id.*

¶ 20 However, the recognition of a low threshold does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged violation. Section 122-2 also provides that "[t]he 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 2016). "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

¶ 21 A claim of ineffective assistance of appellate counsel is cognizable in a postconviction petition. To successfully state such a claim, a defendant must show that the failure to raise an issue was objectively unreasonable and that the decision prejudiced the defendant. *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000). Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues that, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issue is meritorious, the defendant has suffered no prejudice from counsel's failure to raise it on appeal. *Id.*

¶ 22 Defendant argues that appellate counsel should have argued that the prosecution presented misleading evidence to the grand jury. We disagree. Initially, Hyde's statements are

not fundamentally inconsistent. "Doing something on a laptop" is "doing something," so the statements are consistent. Defendant's entire argument, then, is based on the fact that Hyde omitted the detail "on a laptop" from the search-warrant application. Why he did so is unknown. Perhaps he simply forgot. However, his failure to include this detail in the warrant application does not even arguably show that the reference in his grand-jury testimony to a laptop was invented.

¶ 23 Defendant makes much of the fact that Hyde did not testify at trial that the neighbors told him that defendant was using a laptop. However, as the State points out, the prosecutor did not ask Hyde about the statement at all on direct examination (perhaps because it was hearsay). Hyde's only mention of it consisted of answering on cross-examination defendant's leading questions, which in turn were based on the warrant application.

¶ 24 Interestingly, Kharasch testified that Hyde told him that neighbors said that Snag "would sit in a vehicle down the street using this witness's wireless connection." From this version of the statement, it is at least inferable that the neighbors did in fact tell Hyde that they saw defendant with a computer. Alternatively, if what the neighbors told Hyde was that they saw defendant using Williams's wireless connection, it was reasonable for Hyde to infer that he was using a laptop to do so.

¶ 25 In any event, even assuming that Hyde's statement about the laptop was utterly false, the ultimate question is to what extent the statement influenced the grand jury's deliberations. " 'The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence.' " *People v. Oliver*, 368 Ill. App. 3d 690, 694 (2006) (quoting *People v. DiVincenzo,* 183 Ill. 2d 239, 257 (1998)). However, to permit the dismissal of an

indictment, the denial of due process must be unequivocally clear and the prejudice must be actual and substantial. *Id.* at 694-95.

¶ 26 In *Oliver*, on which defendant relies, we said that "it seems fairly self-evident" that a due-process violation based on prosecutorial misconduct before a grand jury is actually prejudicial only if without it the grand jury would not have returned an indictment. *Id.* at 696-97. We cannot make that critical determination here, because we do not know what other evidence the grand jury heard. Defendant's petition includes only the page containing the allegedly offending statement. Without knowing the rest of the evidence that the grand jury heard, we cannot assess the impact of Hyde's statement on the jury's deliberations. The State argues that, if the evidence was similar to that presented at trial, the grand jury had ample other evidence on which to base an indictment. However, this requires us to speculate, and we need not do so.

¶ 27 As noted, the Act requires that a 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 2016). Defendant argues that, to state the gist of a claim, it need only be "arguable" that the alleged violation prejudiced him. However, the "arguable" claim must still have factual support. A reasonably clever defendant can always construct a hypothetical argument, but the purpose of the evidentiary-support requirement is to demonstrate that the critical allegations underlying the argument can be independently corroborated. *Hodges*, 234 Ill. 2d at 10. Thus, the record does not demonstrate that any alleged violation prejudiced defendant, *i.e.*, that the grand jury would not have indicted him but for the challenged statement.

¶ 28 The judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 29 Affirmed.