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2012 IL App (3d) 100619-UB

Modified Order filed July 10, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0619
v.)	Circuit No. 06-CF-1278
)	
VINCENT JOHNSON,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge, Presiding.

Justice Wright delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition alleged the gist of a claim, and the trial court's order summarily dismissing the postconviction petition is reversed.
- ¶ 2 Defendant, Vincent Johnson, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)). He was sentenced to a total of 70 years in prison. Defendant filed a postconviction petition, which the trial court summarily dismissed. On appeal, defendant argues the trial court erred by

dismissing his petition. We reverse and remand.

¶ 3

FACTS

¶ 4 On June 28, 2006, defendant was charged by indictment with two counts of first degree murder for the shooting death of DeJuan Rimmer and one count of aggravated discharge of a firearm. On July 9, 2007, defendant's case proceeded to a bench trial. Eric Peterson testified that on the day of the murder, he had a confrontation with defendant in an alley off of Hobbs Street in Joliet. At the time of the confrontation, defendant showed Peterson a black pistol. Peterson walked away from defendant and headed towards Stephen Hinton's home. A few minutes later, Peterson saw defendant fire a shot towards him and two additional shots into the alley. On cross-examination, Peterson stated he saw the victim and a person known as "Big Al" in the alley. After the shooting, Peterson returned to the alley and saw the victim with blood coming through his shirt. He did not see a weapon located near the victim.

¶ 5 Hinton testified that he, Peterson, and the victim walked to the alley on Hobbs Street for the purpose of fighting with defendant but defendant pulled out a black, small-caliber handgun, causing Hinton and Peterson to retreat by walking back toward Hinton's house. However, the victim stayed in the alley. When Hinton heard arguing in the alley, he saw defendant turn towards Hinton, fire one shot, and watched defendant fire two more shots into the alley. Hinton did not observe a weapon near the victim either before or after the shooting. On cross-examination, Hinton testified that individuals known as "Big Al" and "Wilbo" were in the car which brought defendant to the scene. However, he did not see either of them in the alley with defendant.

¶ 6 At the close of the State's case, the parties stipulated that: (1) the victim was killed by a

single gunshot wound; (2) three .380-caliber shell casings were recovered from the alley on May 20, 2006; (3) a nine-millimeter shell casing was found by a resident on May 21, 2006; (4) the .380 casings were fired from the same weapon, but the nine-millimeter casing was fired from a different weapon; and (5) the bullet recovered from the victim was consistent with either a .380-caliber or a nine-millimeter cartridge.

¶ 7 Darryl Davis testified for the defense. He explained that at the time of the shooting, he was talking to Peterson and did not see Hinton. When Davis heard the first gunshots, he and Peterson ran. Peterson was running in front of Davis, but did not look back. Davis heard a total of three shots and said the first gunshot sounded "small," and the second shot sounded "larger."

¶ 8 The trial court found defendant guilty of first degree murder and aggravated discharge of a firearm. Defendant was sentenced to 70 years in prison. On direct appeal, we affirmed defendant's convictions and sentences. *People v. Johnson*, No. 3-07-0941 (2009) (unpublished order under Supreme Court Rule 23).

¶ 9 On May 19, 2010, defendant filed a *pro se* postconviction petition raising six contentions of error. Only two of those errors are involved in this appeal. Defendant claims he received ineffective assistance of trial counsel on two grounds. First, he contends trial counsel failed to investigate witnesses who could have testified that defendant acted in self-defense. Second, defendant asserts his attorney was ineffective because counsel failed to investigate witnesses who could have established defendant had an unreasonable belief of self-defense, thereby rendering him guilty of second degree murder.

¶ 10 In support of these assertions, defendant claims Larry Knight would have testified he saw the victim point a black gun at defendant and fire the first shot. Knight's prospective testimony

was supported by an affidavit attached to the postconviction petition. Defendant also attached an affidavit from Darius Travis, who similarly claimed he saw the victim fire one shot at defendant before hearing three more shots.

¶ 11 Defendant alleged, in the alternative, he had new evidence demonstrating actual innocence, as supported by the affidavits of "Larry Knight, Darius Travis, Wilburt Moore (Wilbo), Alexander Moore (Big Al), stating they saw [the victim] shoot in the direction of [defendant]." Defendant argues the new evidence proves he was not the initial aggressor and acted in self-defense because he was walking away when the victim fired the first shot.

¶ 12 On July 30, 2010, the trial court summarily dismissed defendant's postconviction petition. The affidavits from Wilburt and Alexander were not attached to defendant's original postconviction petition.

¶ 13 The court found defendant's ineffective assistance of counsel claim was based on matters of trial strategy and counsel had conducted a "meaningful adversarial testing of the State's prosecution." In the court's view, a self-defense claim would have been inconsistent with this trial strategy. The court concluded that the allegations in the petition were frivolous and patently without merit.

¶ 14 Defendant filed a notice of appeal in August 2010. In September 2010, defendant filed a motion to reconsider the dismissal of his postconviction petition. That motion included Alexander and Wilburt's affidavits which were referenced in his petition. Alexander averred he saw the victim pull out a black gun that looked like a nine-millimeter. Wilburt averred he saw the victim pull a black gun from his waist and shoot towards defendant. After the gunfire ended, he saw Peterson remove a gun from the victim's hand.

¶ 16 Defendant argues the trial court erred by dismissing his postconviction petition because he stated the gist of a claim regarding the ineffective assistance of trial counsel or, in the alternative, a claim of actual innocence.

¶ 17 The State contends defendant did not submit a properly notarized verification by affidavit with his petition, as required by section 122-1(b) of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1(b) (West 2010). We note the trial court ruled on the merits of defendant's petition and did not cite a verification deficiency as grounds for its dismissal. Furthermore, a trial court may not summarily dismiss a *pro se* postconviction petition merely because the petition is not verified with a notarized affidavit. *People v. Henderson*, 2011 IL App (1st) 090923. To do so would unfairly prejudice a *pro se* defendant who does not have the benefit of the assistance of counsel. See *People v. Hodges*, 234 Ill. 2d 1 (2009) (where defendants are acting *pro se*, courts should review their petitions with a lenient eye).

¶ 18 The Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *Hodges*, 234 Ill. 2d 1. At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 19 At the first stage of postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an

objective standard of reasonableness and defendant was prejudiced. *Hodges*, 234 Ill. 2d 1.

¶ 20 Here, we find defendant's postconviction petition set forth sufficient facts to show trial counsel was arguably ineffective. Defendant alleged trial counsel failed to investigate witnesses who would have supported a self-defense or second degree murder theory. Defendant's petition identified each of these witnesses and provided affidavits for witnesses Travis and Knight. Both Travis and Knight averred they saw the victim shoot first. Although the affidavits of Wilburt and Alexander were not filed contemporaneously with defendant's petition, they were cited in defendant's postconviction arguments. At the summary review stage of defendant's petition, the court is to measure a petition's substantive worth rather than its procedural compliance. See *People v. Bocclair*, 202 Ill. 2d 89 (2002). Thus, we consider the affidavits of Wilburt and Alexander. We note that Wilburt averred that he, too, saw the victim shoot first.

¶ 21 It is also significant that defense counsel elicited testimony from the State's witnesses that they saw Wilburt and Alexander at the scene. Nonetheless, the record does not indicate counsel investigated calling these witnesses to testify. Additionally, we note trial counsel stipulated that three .380-caliber shell casings and one nine-millimeter shell casing were recovered from the scene. These stipulations were consistent with Alexander's affidavit which stated he saw the victim pull out a gun which looked like a nine-millimeter. The combined evidence arguably would have supported the theory that defendant acted in self-defense or under the unreasonable belief his actions were justified, *i.e.*, second degree murder. See 720 ILCS 5/7-1 (West 2006); see also 720 ILCS 5/9-2(a) (West 2006).

¶ 22 We find it was at least arguable that trial counsel's failure to investigate these witnesses fell below an objective standard of reasonableness and prejudiced defendant. Therefore,

defendant has presented the gist of a constitutional claim sufficient to proceed to the second stage of the postconviction process.

¶ 23 We do not address defendant's argument of actual innocence, as our determination of the previous issue has rendered that question moot.

¶ 24 CONCLUSION

¶ 25 We reverse the judgment of the circuit court of Will County and remand the cause for further postconviction proceedings.

¶ 26 Reversed and remanded.