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2013 IL App (3d) 110313-U

Order filed May 31, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-11-0313
) Circuit No. 04-CF-67
)
RALPH DIXON,) Honorable
) Carla Alessio-Policandriotes,
Defendant-Appellant.) Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed as frivolous and patently without merit.

¶ 2 Following a jury trial, defendant, Ralph Dixon, was convicted of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (d)(1) (West 2002)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2002)). He was sentenced to consecutive terms of 16 and 4 years' imprisonment. Defendant appeals from the summary dismissal of his postconviction

petition, arguing he presented the gist of a constitutional claim. We affirm.

¶ 3

FACTS

¶ 4 On April 7, 2005, the State charged defendant by superseding indictment with aggravated criminal sexual assault (count I) and aggravated criminal sexual abuse (count II). Count I alleged that between February 1 and April 1, 2003, defendant, who was 17 years of age or older and a family member, committed an act of sexual penetration with E.N., who was at least 13 years of age but under 18 years of age, and in doing so, caused E.N. to become pregnant. 720 ILCS 5/12-14(a)(2), (d)(1) (West 2002). Count II alleged that between June 16 and June 18, 2003, defendant, who was at least five years older than E.N., knowingly committed an act of sexual penetration with E.N., when she was at least 13 years of age but under 17 years of age. 720 ILCS 5/12-16(d) (West 2002).

¶ 5 At trial, E.N. testified her family lived with defendant, her mother's boyfriend, in University Park and previously lived together in Chicago Heights. E.N. gave inconsistent testimony regarding the length of time she resided with defendant, but testified she lived with defendant from December 2001 until June 2003.

¶ 6 E.N. stated that on June 17, 2003, she was 13 years old and lived at her home in University Park. At that time, she was not feeling well and was diagnosed at the hospital as being four months pregnant. E.N. admitted telling a nurse and a police officer at the hospital that she had sexual intercourse with defendant once a month for approximately one year. E.N. terminated her pregnancy one week later. The parties stipulated that based on deoxyribonucleic acid (DNA) profiles developed from the aborted fetal tissue and DNA collected from E.N. and defendant, there was a 99% probability that defendant was the biological father of the aborted

fetus.

¶ 7 However, during trial, E.N. explained her pregnancy resulted from her own use of her mother's sex toys on the morning of June 17, 2003, and on prior occasions. She agreed that during an interview following her abortion, she admitted having sex with defendant, but stated her statement was false. She also testified she lied to the police when she told them she had sex with defendant.

¶ 8 The State then introduced a videotape of E.N.'s victim sensitive interview. The State played the entire interview for the jury as a prior inconsistent statement (725 ILCS 5/115-10.1 (West 2002)), except for the last minute, which included a conversation about the punishment of defendant.

¶ 9 A.N. testified that she was E.N.'s mother and intermittently dated defendant for 10 years. According to A.N., E.N. lived with defendant from December 2001 until January 2002; July 2002 until November 2002; and again from January 2003 until June 17, 2003.

¶ 10 Katherine Davis, a forensic scientist with the Illinois State Police, testified that in March 2005, she examined E.N.'s sexual assault kit, taken on June 18, 2003. She discovered semen to be present on the vaginal swab and indicated defendant could not be excluded as the source of the semen when analyzed in May 2005.

¶ 11 Defendant presented Dr. Lawrence Jacobs as an expert witness in the field of endocrinology and infertility. Jacobs testified it was medically possible for a 13-year-old girl to become pregnant from the use of sex toys.

¶ 12 Defendant testified he and A.N. had sexual intercourse on June 17, 2003, and that they used sex toys during the sexual encounter. Defendant said he was careless for not keeping the

sex toys away from E.N., but denied having sexual relations with E.N.

¶ 13 During deliberations, the jury submitted a question asking why the videotape of E.N.'s statement was incomplete. The trial court responded that the jury had heard all the evidence and should continue to deliberate. The jury found defendant guilty of both counts.

¶ 14 Defendant filed two posttrial motions, where he alleged, in part, he did not receive due process because of discovery violations and the trial court's ruling prohibiting the defense from introducing E.N.'s false allegation of sexual assault in an unrelated case. The trial court denied defendant's motions and sentenced defendant to consecutive terms of 16 and 4 years' imprisonment.

¶ 15 On direct appeal, defendant argued he: (1) was not proven guilty beyond a reasonable doubt; (2) was not present when fines and costs were imposed; and (3) did not receive presentence incarceration credit. This court affirmed defendant's conviction, but remanded for a correction of the fines and costs imposed. *People v. Dixon*, No. 3-08-0174 (2010) (unpublished order under Supreme Court Rule 23).

¶ 16 On February 18, 2011, defendant filed a *pro se* postconviction petition, alleging: (1) his record on direct appeal was incomplete; (2) the State willfully misled the grand jury; (3) the trial court erred by prohibiting the use of E.N.'s false accusation of sexual assault in an unrelated case; and (4) ineffective assistance of appellate counsel. The trial court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant raises numerous claims of error to argue his postconviction petition should not have been summarily dismissed. The Post-Conviction Hearing Act provides for a

three-stage review process for the adjudication of postconviction petitions. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Hodges*, 234 Ill. 2d 1 (2009). 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). To state the gist of a constitutional claim, the defendant must plead some facts from which a valid claim can be discerned. *People v. Edwards*, 197 Ill. 2d 239 (2001). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 19 Initially, the State argues defendant forfeited several issues by failing to raise them on direct appeal or now assert ineffective assistance of appellate counsel regarding these issues. These issues include allegations that the State committed discovery violations and the trial court improperly excluded evidence of E.N.'s false accusation of sexual assault in an unrelated case. We note these issues were preserved in the posttrial motion, but were not addressed in the first appeal.

¶ 20 Issues that could have been raised on direct appeal but were not, are deemed forfeited. *People v. Petrenko*, 237 Ill. 2d 490 (2010). Defendant did not raise these issues in the direct appeal and does not challenge appellate counsel's decision to exclude these issues on direct appeal. Therefore, the failure to raise these issues on direct appeal or assert appellate counsel's ineffectiveness for failure to raise them in the previous appeal results in forfeiture of the issues. See *id.*

¶ 21 Defendant argues his postconviction petition stated the gist of a constitutional claim

based on a violation of due process in the record on direct appeal. Specifically, defendant claims the grand jury transcript, four police reports, handwritten statements from the victim and her sister, a report from the defense's expert, and a credit report of the victim's mother were missing from the trial court record in the direct appeal. In a related argument, defendant claims appellate counsel was ineffective for failing to raise this issue regarding the incomplete record on direct appeal.

¶ 22 Defendant's assertion that the grand jury transcript and two police reports from June 2003 were deleted from the record is contradicted by the record itself. Here, the record before this court contains correspondence from defendant's appellate counsel indicating the grand jury transcript and two police reports from June 2003 were included in the record on direct appeal. See *People v. Torres*, 228 Ill. 2d 382 (2008) (a petition contradicted by the record is frivolous and patently without merit).

¶ 23 Generally, a defendant is obligated to provide a sufficiently complete record for appellate review. *People v. Banks*, 378 Ill. App. 3d 856 (2007). However, the record on appeal consists of documents which were actually submitted to the trial court. In this case, certain documents were not tendered to the court as exhibits, including the handwritten statements of the victim, the handwritten statement of the victim's sister, and defendant's expert's report. Therefore, the omission of these items were inconsequential because those documents did not become part of the record on appeal.

¶ 24 A copy of a credit report from the victim's mother, bearing a record stamp from the trial court, is included in defendant's appendix. Having reviewed the copy of this report included in defendant's appendix, it documents the address of the victim's mother as living with defendant in

May 2002 and then changing to a post office box in November 2002. Thus, this report fails to support defendant's claim that the victim did not reside with him for at least one continuous year and would not have altered the outcome of this trial.

¶ 25 Based on the testimony presented at trial and defendant's failure to identify how the handwritten statements allegedly submitted to trial counsel, the additional police reports, the credit report, and his expert's report would have assisted him in disproving his cohabitation with the victim, we conclude defendant has not shown how trial counsel's inaction with respect to these items would have affected the outcome of this proceedings or constituted ineffective assistance of trial counsel that should have been recognized by appellate counsel for purposes of the direct appeal. See *Banks*, 378 Ill. App. 3d 856 (requiring defendant to show a colorable need for the missing portions of the record); *People v. Edwards*, 195 Ill. 2d 142 (2001) (holding that unless the underlying issue is meritorious, defendant is not prejudiced from appellate counsel's failure to raise it).

¶ 26 Next, defendant argues appellate counsel was ineffective for failing to raise several issues on direct appeal, including the failure to recognize and raise trial counsel's shortcomings. A postconviction petition alleging ineffective assistance of appellate counsel may not be summarily dismissed at the first stage if it is at least arguable that: (1) appellate counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Petrenko*, 237 Ill. 2d 490. Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003).

¶ 27 In addition to claiming the written statements made by the victim and her sister were missing from the record on direct appeal, defendant claims that his *trial* counsel was ineffective for withholding these statements from the trial court and the jury and alleges appellate counsel should have recognized this error. Even if defendant could show that counsel actually received these statements, he cannot show prejudice. Defendant alleges counsel destroyed Jacobs' credibility when he withheld the statements from the court, because Jacobs testified he reviewed them before rendering his opinion.

¶ 28 Defendant's claim is refuted by the record. When asked what statements he reviewed from the victim and her sister, Jacobs acknowledged he was referring to the statements that were made in the police reports. Based on this exchange, it appears Jacobs neither received, nor relied on separate written statements from the victim and her sister before formulating his opinion. From this clarification, Jacobs' credibility was not so undermined that there was a reasonable probability the outcome of defendant's trial would have been different. See *Petrenko*, 237 Ill. 2d 490.

¶ 29 Next, defendant argues his due process rights were violated when the State presented false and misleading testimony to the grand jury. In general, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury. *People v. DiVincenzo*, 183 Ill. 2d 239 (1998). A defendant may challenge an indictment that is procured through prosecutorial misconduct, but to warrant dismissal, it must rise to the level of a deprivation of due process or a miscarriage of justice. *Id.* The presentation of deceptive or inaccurate evidence may violate a defendant's due process rights and justify dismissal if defendant can show that the misconduct affected the grand jury's deliberations. *Id.* Accordingly, a defendant's due process

rights may be violated if the State uses known perjured or false testimony. *Id.* A witness's testimony constitutes perjury only if the witness knowingly makes a false statement. *People v. Pulgar*, 323 Ill. App. 3d 1001 (2001).

¶ 30 In the instant case, defendant contends Sergeant Gregory Box perjured himself at the grand jury hearing when he falsely testified that: (1) he investigated the instant case; (2) defendant had a sexual relationship with E.N.; (3) defendant and E.N. lived together for over a year; (4) defendant and E.N.'s mother shared a live-in relationship for nearly 10 years; and (5) there was a DNA match between defendant and semen taken from E.N.'s vagina. Defendant previously challenged his indictment in a motion in arrest of judgment, where he argued many of the same issues he raises herein. Based on the trial court's review of the grand jury proceedings, the court did not find that Box knowingly made any false statements. See *id.* We agree.

¶ 31 At the grand jury hearing in this case, Box testified he investigated a crime in regards to defendant. Although Box did not interview E.N. and her mother, he was involved in the investigation when he took a DNA sample from E.N. and later collected evidence from E.N.'s mother.

¶ 32 Additionally, Box's testimony regarding E.N.'s sexual relationship and living situation was not fabricated, as it was supported by police reports from June 2003. The reports revealed E.N.'s mother had been dating defendant for approximately 0 years. They also revealed E.N. reported having sex with defendant approximately once a month for the last year. Even if there were some discrepancies between the reports and Box's testimony, they were minor and would not have affected the grand jury's deliberation. Moreover, although there was evidence that E.N. may have been impregnated through her use of sex toys, and that E.N. might not have lived with

defendant for one continuous year, the State was not required to present such evidence to the grand jury. See *Pulgar*, 323 Ill. App. 3d 1001 (stating that the State is not obligated to present exculpatory information to a grand jury).

¶ 33 Defendant's contention that Box falsified evidence regarding a match to defendant's DNA is also without merit. Davis testified that a DNA analysis was not performed on the semen from E.N.'s sexual assault kit until May 2005, approximately one month after the grand jury hearing. Contrary to defendant's assertion, however, Box only testified that semen was located in the vagina of E.N., not that it matched defendant's DNA. Box did testify that following E.N.'s abortion, a DNA test of the fetal tissue showed there was a 99% probability that defendant was the biological father of the aborted fetus. As Davis only testified regarding the results of the sexual assault kit, her testimony does not support a finding that Box's testimony regarding the fetal tissue test was falsified or incorrect.

¶ 34 Lastly, defendant argues he was prejudiced when the State played a videotape of the victim sensitive interview as a prior inconsistent statement (725 ILCS 5/115-10.1 (West 2006)). Defendant's main arguments are that: (1) it was error to play the majority of the victim's interview for the jury; and (2) if it was proper to play the entire videotape, he was prejudiced when the State did not play the last minute of the video dealing with sentencing defendant.

¶ 35 Defendant acknowledges that the videotaped interview was properly admitted as a prior inconsistent statement, but argues certain unidentified portions played before the jury were unfairly prejudicial. Without his identifying the portions of the videotape that unfairly prejudiced him, we find no error arose from the admission of all but the last minute of this videotape discussing punishment, because the victim stated during her testimony before the jury that the

statements she made in the videotaped interview were false. See, e.g., *People v. Fields*, 285 Ill. App. 3d 1020 (1996) (allowing admission of prior statements in their entirety under section 115-10.1 when statements were sufficiently inconsistent with witnesses' testimony at trial). Moreover, defendant's claim of prejudice when the State did not play the last minute of the videotape is also without merit. See *People v. Radovick*, 275 Ill. App. 3d 809 (1995) (holding that wholly irrelevant and unfairly prejudicial evidence contained in a prior inconsistent statement should be excluded).

¶ 36 Upon review of the record and defendant's petition, we conclude many of the issues were without merit due to the absence of allegations regarding prejudice. Consequently, we hold the trial court properly dismissed defendant's postconviction petition, where the allegations in his petition were directly contradicted by the record or failed to demonstrate the gist of a constitutional claim.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 39 Affirmed.