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2013 IL App (3d) 110917-U

Order filed August 12, 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. 3-11-0917
)	Circuit No. 05-CF-2336
)	
JOHN HALL,)	Honorable
)	Carla Alessio-Policandriotes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing the defendant's postconviction petition at the first stage of proceedings.

¶ 2 The defendant, John Hall, appeals the first-stage dismissal of his postconviction petition.

On appeal, the defendant argues that the trial court erred when it summarily dismissed his postconviction petition. We affirm.

¶ 3

FACTS

¶ 4 The defendant was charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)), and one count each of arson (720 ILCS 5/20-1(a) (West 2008)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2008)). The case proceeded to a jury trial.

¶ 5 At trial, Heather Surdey testified that on July 1, 2005, between 9 and 10 p.m., the defendant called and told her to come to his apartment. When Surdey arrived at the apartment, she saw the victim, Rose Bailey, lying in the corner, crying and bleeding. Surdey told the defendant that she was going to take Bailey to the hospital. However, as Surdey attempted to help Bailey out of the apartment, the defendant grabbed Bailey and dragged her to the landing where Surdey was originally standing. As Surdey reapproached Bailey, the defendant grabbed an iron off the stove and struck Bailey in the head, nearly hitting Surdey. The defendant continued to beat Bailey for the next few hours. At one point, the defendant took Surdey into the bedroom, had sex with her, and locked her in the bedroom. While in the bedroom, Surdey heard the defendant drag Bailey to the bathroom. Thereafter, the defendant returned to the bedroom and had sex with Surdey a second time.

¶ 6 A few hours later, Surdey found Bailey lying in the bathtub. Surdey again suggested that the defendant allow her to take Bailey to the hospital. The defendant refused and told Surdey to go home, take a shower, change clothes, and return to his apartment with her dirty clothes. Surdey did as she was instructed. When she returned, Bailey was dead. The defendant told Surdey that Bailey died from choking on her own blood.

¶ 7 Later in the day, the defendant instructed Surdey to clean the blood off of the carpet, walls, and couch; however, the blood would not clean up, and the two left the apartment. Before returning to the apartment, Surdey purchased a gasoline can, and the defendant filled the can with gasoline.

¶ 8 At the apartment, the defendant placed Bailey's body in a garbage can and loaded it into Surdey's van. Surdey then drove to rural Bonfield where the defendant removed the garbage can from the van. While Surdey was waiting in the van, she saw flames come from the defendant's direction. The defendant returned to the van and directed Surdey to drive to a bar in Channahon to establish an alibi. Afterwards, the pair returned to the defendant's apartment where they unsuccessfully tried to clean up the blood.

¶ 9 On cross-examination, Surdey stated that the defendant had a cellular telephone in his apartment and noted that it "used to ring off the hook." However, on the night of the murder, she did not recall hearing the defendant's telephone ring, and she did not see the defendant have a conversation on his telephone. Surdey thought that the defendant might have turned his telephone off. Surdey also did not recall if the defendant had a landline telephone.

¶ 10 Lauren Watters testified that she received a telephone call from the defendant around 10 p.m. on July 1, 2005. Watters also spoke with Bailey on the telephone, and the defendant asked if she wanted to come over to get revenge on Bailey. Watters and her friends tried to drive to the defendant's apartment, but "hit a roadblock." Watters' friend felt that the roadblock was a sign that they should not go to the defendant's apartment, and they turned around. Watters called the defendant between 11 and 11:30 p.m. to tell him that she was not coming over.

¶ 11 Traci Hart testified that she was a subpoena specialist for U.S. Cellular. Hart authenticated the defendant's cellular telephone records for the period of June 30 to July 7, 2005. During the course of her testimony, Hart indicated that the defendant received or made several calls between July 1 and July 2, 2005. The State admitted the defendant's cellular telephone records into evidence. The records indicated that the defendant received a call at 11:10 p.m. from Watters.

¶ 12 During closing arguments, defense counsel argued that the only evidence that pointed to the defendant was Surdey's testimony. However, Surdey's testimony, counsel contended, was inconsistent in that she stated that she did not see or hear the defendant's telephone ring, but the cellular telephone records proffered by the State established that calls were made throughout the night.

¶ 13 Following deliberations, the jury found the defendant guilty of first degree murder, concealment of a homicidal death, and arson. The court sentenced the defendant to consecutive prison terms of 58 years for first degree murder, 12 years for arson, and 8 years for concealment of a homicidal death.

¶ 14 On direct appeal, we affirmed the defendant's conviction but reduced his sentences for arson and concealment to seven years and five years, respectively. *People v. Hall*, No. 3-08-0214 (2010) (unpublished order under Supreme Court Rule 23).

¶ 15 On October 11, 2011, the defendant filed a postconviction petition. The petition argued, in relevant part, that the defendant was denied due process of law where the State knowingly used false testimony to obtain his conviction, trial counsel was ineffective for failing to object to the State's use of false testimony, and appellate counsel was ineffective for failing to argue on

direct appeal that trial counsel was ineffective. The petition alleged that Surdey testified that she thought the defendant had turned his cellular telephone off and she did not recall hearing it ring on the night of the murder. The State knew that Surdey's testimony was false because the defendant's cellular telephone records showed that he received several calls that evening and Watters testified that she had called the defendant. In support of this argument, the defendant attached his telephone records to the petition. The records showed that the defendant received several calls between 11:10 p.m. on July 1, 2005, and 3:05 a.m. on July 2, 2005.

¶ 16 On November 18, 2011, the trial court summarily dismissed the defendant's petition. The defendant appeals.

¶ 17 ANALYSIS

¶ 18 The defendant argues that the trial court erroneously dismissed his postconviction petition at the first stage of proceedings because he asserted nonfrivolous claims that his right to due process was violated when the State failed to correct the false testimony of its only eyewitness and trial counsel and appellate counsel were ineffective for failing to raise this issue.

¶ 19 The Post-Conviction Hearing Act provides a three-stage process for the adjudication of postconviction petitions. *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). A *pro se* defendant need only allege enough facts to establish a claim that is arguably constitutional and is supported by attached affidavits, records, or other evidence. 725 ILCS 5/122-2 (West 2010); *Hodges*, 234 Ill. 2d 1. In recognition of this low threshold, our supreme court has referred to this pleading standard as the "gist" of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. A petition may be summarily dismissed at the first

stage if it has no arguable basis either in law or in fact. *People v. Tate*, 2012 IL 112214. We will uphold the dismissal of a petition when the record contradicts a defendant's allegations. *People v. Rogers*, 197 Ill. 2d 216 (2001). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 20 Generally, a postconviction proceeding cannot be used to review issues that were or could have been raised on direct appeal. *People v. Barrow*, 195 Ill. 2d 506 (2001). However, in the instant case, the defendant has not waived review of his postconviction petition because he argues that the deficient performance of his trial and appellate counsel resulted in the waiver of his due process argument. See *People v. Fair*, 193 Ill. 2d 256 (2000) (ineffective assistance is a recognized exception to the waiver doctrine in postconviction proceedings).

¶ 21 At the first stage of postconviction proceedings, 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." (Emphasis in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17). First-stage postconviction petitions that allege ineffective assistance of counsel are judged by a lower pleading standard than such petitions at the second stage of proceedings. *Id.*

¶ 22 The defendant argues that the performance of his trial and appellate attorneys was deficient because they failed to raise the issue of his due process violation. Further, the defendant contends that the attorneys' inaction prejudiced the defendant because the false testimony was elicited from the State's only eyewitness and correcting her testimony would have altered the outcome of the case.

¶ 23 The State's knowing use of perjured testimony to obtain a criminal conviction violates a defendant's right to due process. *Barrow*, 195 Ill. 2d 506. A conviction obtained by the knowing use of perjured testimony or uncorrected false testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. *People v. Olinger*, 176 Ill. 2d 326 (1997). A defendant's conviction must be set aside even when the false testimony only concerns the witness' credibility. *Id.* A new trial is required if the false testimony could, in any reasonable likelihood, have affected the judgment of the jury. *Giglio v. United States*, 405 U.S. 150 (1972).

¶ 24 In the instant case, the defendant has not established the gist of a due process violation or ineffective assistance of counsel claim. The defendant's petition fails for several reasons. The gravamen of the defendant's claim is that the State failed to correct Surdey's allegedly false testimony. Surdey testified that she did not know if the defendant's cellular telephone rang and she thought that it might have been turned off. Surdey's statements were not necessarily false as they left open the possibility that the defendant's telephone rang and she did not hear it. Moreover, the State corrected this testimony with the testimony of Watters and the defendant's cellular telephone records, both of which indicated that the defendant received a telephone call around 11 p.m. on the night of the murder. Alternatively, this inconsistency did not result in prejudice to the defendant, as it allowed defense counsel to argue to the jury that Surdey was not a credible witness. As a result, defense counsel was not ineffective for failing to object to the State's alleged failure to correct Surdey's testimony. Therefore, the defendant's postconviction petition did not allege the gist of a claim of a due process violation or ineffective assistance of counsel.

¶ 25

CONCLUSION

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

¶ 27 Affirmed.