2014 IL App (3d) 120806-U

Order filed October 22, 2014

Modified upon denial of rehearing November 25, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Respondent-Appellee,	)	
	)	Appeal No. 3-12-0806
v.	)	Circuit No. 99-CF-229
	)	
JAVAR HOLLINS,	)	Honorable Clark E. Erickson,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Petitioner's *pro se* petition for postconviction relief contained an arguable basis in law and fact sufficient to proceed to second-stage proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)).

¶ 2 Petitioner, Javar Hollins, was convicted on two counts of first degree murder (720 ILCS 5/9-1(a)(1 to 3) (West 1998)), one count of armed robbery (720 ILCS 5/18-2(a) (West 1998)), and one count of unlawful use of a weapon (UUW) (720 ILCS 5/24-1(a)(4) (West 1998)). He

was sentenced to life imprisonment for first degree murder plus concurrent terms of 30 years' and 5 years' imprisonment for armed robbery and UUW, respectively. After the convictions were affirmed on direct appeal (*People v. Hollins*, No. 3-09-0126 (2011) (unpublished order under Supreme Court Rule 23)), petitioner filed a *pro se* petition for postconviction relief, arguing, *inter alia*, that appellate counsel was ineffective for failing to argue that the State failed to prove the *corpus delicti* of armed robbery. The trial court summarily dismissed the petition, and petitioner appeals. We reverse and remand.

¶ 3 FACTS

¶ 4 Petitioner was charged by indictment with six counts of first degree murder (720 ILCS 5/9-1(a)(1 to 3) (West 1998)), one count of armed robbery (720 ILCS 5/18-2(a) (West 1998)), and one count of unlawful use of a weapon (720 ILCS 5/24-1(a)(4) (West 1998)). The charges stemmed from the events of March 18, 1999, which resulted in the deaths of Lazerick Martin and Michael Cox. After this court reversed the convictions entered after petitioner's first jury trial (see *People v. Hollins*, 366 Ill. App. 3d 533 (2006)), the matter proceeded to a second jury trial, commencing on November 18, 2008.

¶ 5 It emerged at trial that Martin's body was found in the kitchen of an apartment at 203 South Elm Avenue at approximately 10 p.m., with bullet wounds to his leg and head. Cox's body was found nearby in a car, with bullet wounds to his arm and chest. Spent .38-caliber casings and shotgun shells were found in the kitchen where Martin's body was found, as well as in the driveway where Cox's car was parked.

¶ 6 Sergeant Samuel Miller and Detective Randy Hartman, from the Kankakee police department, testified for the State. Miller and Hartman were assigned to investigate the deaths of Martin and Cox. Both testified that on April 1, 1999, they found petitioner at the Avis motel

(Avis) in Kankakee and brought him in for questioning. Petitioner accompanied the officers voluntarily, and was read *Miranda* warnings upon reaching the police station. Petitioner then provided a statement concerning the events of March 18, which Hartman transcribed and petitioner signed.

¶ 7 Petitioner told the officers that on March 18, 1999, he learned from Dana Dixon that $1,500 and some drugs had disappeared from Dixon's room at the Days Inn motel in Kankakee. Petitioner then went to Dixon's room at the Avis around 7 p.m., meeting Dixon, Joe Mason, and Terrell Geiger. Dixon paged Martin and arranged to meet him in order to buy drugs. A number of the men, not including petitioner, then left the room, not returning until approximately 10 p.m. Upon returning, Geiger informed petitioner that three of the men had gone to Delawayne Tate's apartment, and that Martin had arrived there while Cox waited outside in the car. Mason forced Martin at gunpoint to give him his jewelry, money, and drugs. Mason shot Martin in the leg, and Geiger then shot Martin in the head. Upon leaving the apartment, Mason shot Cox with a shotgun.

¶ 8 Miller and Hartman brought petitioner back to the station the following day in order to resolve inconsistencies in petitioner's statement. This time petitioner admitted that he had acted as a lookout when Martin and Cox were shot. Petitioner told the officers that Martin and Cox were not supposed to get killed, but that "it was supposed to be a robbery." Petitioner heard two gunshots while outside, then looked in the apartment and saw Martin on the ground. Geiger then ran out of the apartment and shot Cox. Petitioner was arrested after providing this statement.

¶ 9 After his arrest but prior to trial, petitioner sent a letter to Bill Dickenson, the original assistant State's Attorney on petitioner's case. In the letter, petitioner told Dickenson that "[m]y conscience won't be able to rest until I tell what really happened." Petitioner wrote that while he

did not shoot Martin or Cox, he was on the scene when it happened. Petitioner went to the Avis, meeting Dixon, Mason, Geiger, Terry Taylor and Jimmy Murray. Mason planned to rob someone, and petitioner left with Dixon, Mason, and Murray to meet Martin. When Martin arrived at the apartment, Mason took two ounces of cocaine and "some money" from him, then shot him in the leg and head. Mason and Dixon then shot Cox.

¶ 10 Petitioner wrote in the letter that as the group fled the scene, they hid the guns used in the shootings—a shotgun and a .38-caliber pistol—in a backyard under a bench. Mason then told petitioner and Geiger to hide the guns somewhere else. Petitioner retrieved the shotgun, unloaded it, and hid it under a dumpster. The next day, Dixon threw the .38-caliber pistol into the river.

¶ 11 At trial, petitioner's testimony was largely consistent with his original statement to Miller and Hartman. Petitioner testified that while he was at the Avis on the night of March 18, Dixon and Mason "were basically saying that since they got robbed, you know, they had to get the money back; because they owed somebody money for the drugs." Petitioner did not join the group that left to meet Martin, never went near the scene of the murders, and only found out what happened after Geiger told him. Petitioner testified that his second statement to Miller and Hartman had been the result of intense interrogation, and that his letter to Dickenson was only written as an attempt to secure a favorable plea bargain.

¶ 12 Cleveland Ivy testified for the State. At the outset of his testimony, Ivy admitted that he was currently serving a seven-year sentence in the custody of the Department of Corrections on a conviction for delivery of a controlled substance, and had five previous felony convictions. Ivy, who testified that Cox was his first cousin, stated that he was in the Avis motel room on the night of March 18, 1999. Ivy testified that petitioner went into the bathroom with Dixon and Mason,

at which point Ivy, from outside the bathroom, heard Dixon say, "[w]e're going to stick up [Martin]."

¶ 13 On cross-examination, defense counsel impeached Ivy's testimony by introducing his previous grand jury testimony. Referring to the meeting in the bathroom that Ivy overheard, defense counsel read the following from the grand jury transcript:

> "[Q]uestion, you couldn't really make out what they were saying, but you heard them laughing? Answer, yes. Did the three of them come out of the bathroom? Answer, right. What did Dana Dixon say when he came out of the bathroom? We're going to get [Martin] tonight. Question, we're going to get [Martin] tonight? Answer, right."

Ivy confirmed that those were his answers to those questions. Ivy also admitted that he was angry with Mason, which was part of the reason he approached the Kankakee police in May of 1999 to give a statement about the murders.

¶ 14 Lieutenant Robin Passwater of the Kankakee police department testified that Taylor provided a statement to him regarding the events of March 18, 1999. Passwater read the statement, in which Taylor averred that he was in the Avis motel room on the night of March 18. Taylor told Passwater that he saw petitioner and Mason at the Avis together sometime between 8 and 9 p.m. Petitioner and Mason returned later, and petitioner told Taylor that "[petitioner] was popping somebody on Merchant." Taylor later accompanied petitioner as petitioner retrieved a shotgun from a backyard, then hid it under a dumpster on Merchant Street.

¶ 15 A number of other Kankakee police officers also testified for the State. Officer Keith Mallindine testified that while on patrol on the night of March 18, 1999, he responded to a report of shots fired. Upon arriving at the scene, Mallindine saw Martin's body on the floor with two gunshot wounds. Sergeant Kenneth Lowman testified that he found a pager and a cellular

telephone on Martin's body. Finally, Officer Joseph Baptist testified that while on patrol on March 22, 1999, he found a shotgun underneath a dumpster on Merchant Street.

¶ 16 The jury found petitioner guilty on two counts of first degree murder, one count of armed robbery, and one count of UUW. The court sentenced petitioner to life imprisonment for first degree murder and concurrent terms of 30 years' and 5 years' imprisonment for armed robbery and UUW, respectively.

¶ 17 Petitioner's convictions were affirmed on direct appeal. *Hollins*, No. 3-09-0126. On June 26, 2012, petitioner filed a *pro se* petition for postconviction relief. The trial court summarily dismissed the petition, and petitioner now appeals.

¶ 18 ANALYSIS

¶ 19 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) establishes a three-stage process for adjudications of postconviction proceedings. At the first stage, a trial court shall summarily dismiss a petition for relief if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). We review a trial court's first-stage dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239 (2001).

¶ 20 A petition is frivolous or patently without merit if it lacks an arguable basis in law or fact. *People v. Alcozer*, 241 Ill. 2d 248 (2011). A petition lacks an arguable basis in law or fact if it "is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009).

¶ 21 Petitioner does not challenge the trial court's dismissal of eight of the nine claims set forth in his petition. Petitioner's only contention on appeal is that the trial court erred in dismissing his claim that appellate counsel was ineffective for failing to argue that the State did

not prove the *corpus delecti* of armed robbery.

¶ 22 To *prevail* on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). However, to advance to the second stage of proceedings under the Act, a petitioner is not required to prove ineffective assistance by this standard. *People v. Cathey*, 2012 IL 111746. To avoid summary dismissal, a petitioner must only show that "(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." *Id*. ¶ 23.

¶ 23 Where a defendant contends that the ineffectiveness of counsel stems from counsel's failure to raise certain claims, both prongs of the *Strickland* test hinge on the merit of the underlying issue. See *People v. Barrow*, 195 Ill. 2d 506 (2001). While it is not generally unreasonable for appellate counsel to refrain from raising issues he or she believes meritless, the first prong of the test will be satisfied if counsel's "appraisal of the merits is patently wrong." *People v. Johnson*, 154 Ill. 2d 227, 236 (1993). Similarly, a defendant cannot be prejudiced by counsel's failure to raise a claim that is not meritorious. *Barrow*, 195 Ill. 2d 506. With these rules in mind, we turn to petitioner's argument that the State failed to prove the *corpus delicti* of armed robbery.

¶ 24 The *corpus delicti* of a crime has two components: (1) proof of the occurrence of the harm, and (2) that the harm was caused by criminal conduct. *People v. Marcotte*, 337 Ill. App. 3d 798 (2003). *Corpus delicti* may not be proven by a defendant's confession alone. *People v. Phillips*, 215 Ill. 2d 554 (2005). "The defendant's statement must be corroborated with

independent evidence which tends to show that the offense occurred." *Marcotte*, 337 Ill. App. 3d at 803. Importantly, it is not required that this independent evidence be sufficient to prove the existence of the crime beyond a reasonable doubt. *Phillips*, 215 Ill. 2d 554. Instead, once the defendant's confession is corroborated, the confession and the independent corroborative evidence may be considered together in determining whether the crime has been proven beyond a reasonable doubt. *Id*.

¶ 25 In *People v. Sargent*, 239 Ill. 2d 166 (2010), our supreme court clarified the precise requirements of corroboration by independent evidence as it relates to proving the *corpus delicti*. The court held that independent evidence must corroborate the existence of the crime itself:

> "While acknowledging that this court has, itself, made statements in several cases to the effect that 'if there is corroborating evidence that tends to confirm the circumstances related in the confession, both can be considered in determining whether the *corpus delicti* is sufficiently proved in a given case,' we have specifically held that such statements do 'not obviate the requirement that either some independent evidence or the corroborating evidence tend to establish that a crime occurred.' " *Id*. at 184 (quoting *People v. Willingham*, 89 Ill. 2d 352, 360 (1982)).

¶ 26 The State contends that the standard announced in *Sargent* was "relaxed" following our supreme court's decision in *People v. Lara*, 2012 IL 112370. In *Lara*, the defendant was charged with two counts of predatory criminal sexual assault (PCSA), an offense which requires the State to prove the element of penetration. The defendant confessed to committing the charged offenses, and the State sought to corroborate that confession through the testimony of the child victim (J.O.), as well as the child's out-of-court interview statements. The detective who interviewed J.O. relayed that J.O. stated that defendant put his hand "on her vagina." *Id.* ¶ 9.

J.O. only felt defendant touch her "on the outside." *Id*. At trial, J.O. was not asked whether defendant touched her on the inside or outside. The jury convicted defendant on both counts of PCSA.

¶ 27 On appeal, the appellate court reversed both convictions. The court reasoned that the only element distinguishing PCSA from the lesser felony of aggravated criminal sexual abuse was the element of penetration, and that element had not been corroborated. On appeal, the supreme court addressed the issue of whether corroboration was necessary as to each element of a charged offense in order to satisfy the *corpus delicti* rule.

¶ 28 The supreme court began its analysis by discussing *Sargent*. Though citing *Sargent* with approval, the court found the facts of the case before as distinguishable, noting: "[*Sargent*] does not fully resolve the specific issue before this court" and "the court[] in *Sargent* *** did not speak to the same type of circumstances at issue here." *Id*. ¶¶ 24, 25. Ultimately, the court concluded that "*Sargent* may be properly read to support the general rule that corroboration is not compulsory for each element of every alleged offense." *Id*. ¶ 26. The court held that J.O.'s corroboration was sufficient to sustain a conviction on charges of PCSA, despite the fact that the particular element of penetration was not corroborated.

¶ 29 The court proceeded to examine its previous decisions regarding the *corpus delicti* rule, concluding that "[v]iewed together, these precedents also establish that corroboration is sufficient to satisfy the *corpus delicti* rule if the evidence, or reasonable inferences based on it, tends to support the commission of a crime that is at least closely related to the charged offense." *Id*. ¶ 45. In an excerpt heavily relied upon by the State here, the court also wrote that "[t]he independent evidence need not precisely align with the details of the confession on each element of the charged offense, or indeed to any particular element of the charged offense." *Id*. ¶ 51.

¶ 30 In the present case, a number of the circumstances found in petitioner's previous confessions were corroborated at trial. Taylor's statement, in particular, was corroborative of petitioner's version of events relayed in his letter to Dickenson. This includes the statement that petitioner left and returned to the Avis with Mason and that Taylor accompanied petitioner in retrieving the shotgun and subsequently hiding it under a dumpster. Officer Baptist's testimony that he found the shotgun under a dumpster is also corroborative. While this evidence does generally corroborate the circumstances in relation to petitioner's confession, it does not tend to establish that an armed robbery occurred at any point.

¶ 31 The lone piece of evidence offered at trial that might tend to establish that an armed robbery was committed was Ivy's testimony that he heard Mason say "[w]e're going to stick up [Martin]."[1] While the corroborating evidence need not establish the commission of a crime beyond a reasonable doubt, it is arguable that this lone comment, by itself, is not sufficient to corroborate petitioner's confession to the point that the confession is admissible to prove *corpus delicti*.

[1] The State suggests that Sergeant Lowman's testimony that he recovered a pager and cellular telephone from the body of Martin corroborates that an armed robbery took place, apparently because that would imply drugs or money were not found on Martin. However, the record shows that Lowman was shown the pager and cellular telephone and asked to identify them, leading to his testimony regarding numbers found in Martin's phone. Lowman was not asked to list the evidence found on Martin's person. Indeed, the presence of the pager and cellular telephone—items of at least some perceived value—might even tend to indicate that there was no robbery.

¶ 32 In *Marcotte*, 337 Ill. App. 3d 798, this court examined the corroborative effect of a hearsay statement. We found that where hearsay is admitted at trial, the probative value of such hearsay may range from being given full weight to being given no weight at all. *Id*. In that case, we concluded, "[t]here is nothing in the record to indicate that the statement of a police officer that he was investigating a phone call received by a state agency should be given less than its full probative weight." *Id*. at 803.

¶ 33 In the present case, however, there are a number of reasons why Ivy's testimony might not be given its full probative weight. First, Ivy was related to one of the victims in the case, and he admitted that he had some animosity toward Mason that motivated him to approach the police about the murders. Second, Ivy, with six felony convictions to his name, stands as the antithesis to the police officer at question in *Marcotte*. Finally, Ivy's testimony was immediately impeached. Not only did Ivy agree that he had previously testified to having difficulty hearing what was being said in the bathroom; he also agreed that he had previously testified that Mason said only that he was going to "get" Martin, as opposed to sticking him up.

¶ 34 The supreme court's holding in *Lara*, 2012 IL 112370, is of no help to the State in the matter at hand. In *Lara*, the court held that corroboration of an offense similar or related to the offense charged is sufficient to satisfy the *corpus delicti* rule. No corroborative evidence here suggested that some related offense was committed, nor does the State argue so. Instead, the State contends that, after *Lara*, corroborating evidence need only corroborate the general circumstances of a confession. However, we find that—at most—*Lara* stands for the proposition that the analysis of corroborating evidence should not be a strict, element-based process. The *Lara* court did not obviate the ultimate basis of the *corpus delicti* rule, that independent evidence

tending to show that *some* crime has been committed is necessary before a defendant's confession may be used to establish the *corpus delicti*.

¶ 35 Given the dearth of independent evidence corroborating the *corpus delicti* of armed robbery in this case, we find it at least arguable that counsel was unreasonable for failing to argue on appeal that the State failed to prove *corpus delicti*, and arguable that petitioner was thereby prejudiced. As petitioner has thus satisfied the stage-one pleading standard under the Act, we reverse the trial court's summary dismissal of the petition and remand for further proceedings at the second stage.

¶ 36 CONCLUSION

¶ 37 The judgment of the circuit court of Kankakee County is reversed, and the cause is remanded for further proceedings.

¶ 38 Reversed and remanded.