2012 IL App (4th) 110163-U

Filed 3/30/12

NO. 4-11-0163

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
BRANDON D. KELLY,	)	No. 09CF1087
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices McCullough and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's postconviction petition failed to state the gist of a constitutional claim, the trial court did not err in summarily dismissing the petition.

¶ 2 In September 2009, a jury found defendant, Brandon D. Kelly, guilty of one count of unlawful possession with intent to deliver a controlled substance. In October 2009, the trial court sentenced him to 25 years in prison. This court affirmed the trial court's judgment. In January 2011, defendant filed a *pro se* petition for postconviction relief. In February 2011, the trial court dismissed the petition, finding it frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2009, the State charged defendant with one count of unlawful possession

with intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2008)), alleging he knowingly and unlawfully possessed with the intent to deliver 1 gram but less than 15 grams of a substance containing cocaine. Defendant pleaded not guilty.

¶ 6 In August 2009, defendant expressed dissatisfaction with his court-appointed attorney. Defendant wanted his attorney to call his girlfriend, Brianna Holloway, to testify to a conversation between him and a police officer. Defendant also claimed Holloway would testify that she was responsible for the drugs at issue in this case. Holloway was represented by a different public defender. For this reason, defendant's counsel only asked her one question—whether she recalled a conversation between defendant and a police officer. She did not recall the conversation. Counsel did not believe Holloway would be a helpful witness. Defendant then told the trial court Holloway would testify the drugs were hers and defendant had nothing to do with them. The court instructed defense counsel to speak with Holloway again and ask her about any testimony she might give if she testified.

¶ 7 At the next hearing in September 2009, defense counsel stated defendant was still unhappy with his refusal to call Holloway as a witness. Counsel stated he spoke with Holloway and concluded she would not be a benefit to defendant's case. Noting trial strategy is a matter left up to counsel, the trial court informed defendant he could proceed to trial with his attorney or he could represent himself. After a recess, defendant decided to represent himself.

¶ 8 After defense counsel was discharged, defendant indicated he wanted Holloway called as a witness. The trial court directed the circuit clerk to prepare a subpoena. The court also explained to defendant that he would need a writ to subpoena her to testify but no delay would be given for him to do so.

¶ 9 Thereafter, defendant's jury trial commenced. Champaign police sergeant Dennis Baltzell testified he participated in the execution of a search warrant on June 26, 2009, at an apartment located at 705 West Clark in Champaign. While conducting surveillance on the apartment, Baltzell observed defendant exit with a bag of trash, which he deposited into a Dumpster. Baltzell approached and took defendant into custody. Baltzell then observed Holloway returning to the apartment. She was also taken into custody.

¶ 10 Officers searched the apartment and found crack cocaine, approximately $600 in cash in a change purse, and a digital scale. On a dresser, officers found identification cards for defendant and Holloway. Based on the packaging of the cocaine, Sergeant Baltzell believed the cocaine was packaged for sale. Officers also found a receipt from Gasoline Alley with defendant's name on it on a desk in the living room.

¶ 11 Champaign police officer Kevin Olmstead testified he interviewed defendant in the apartment after reading him his *Miranda* rights. Defendant stated he had been living at the apartment with his girlfriend for approximately two or three months. He admitted possessing several grams of crack cocaine in a bedroom dresser. He stated he sold crack cocaine to help pay the bills. Although Holloway knew defendant was selling crack cocaine, he stated she was not involved.

¶ 12 On cross-examination, Olmstead testified officers had purchased crack cocaine from defendant on a prior occasion and that was part of the probable cause for the search warrant. Olmstead also stated Robert Porter, who was detained outside the apartment, said he was there to see defendant and buy crack cocaine from him.

¶ 13 After the State presented evidence in its case in chief, defendant testified on his

own behalf. He stated he kept the Gasoline Alley receipt in his wallet with his identification. He stated he went to the apartment on a regular basis and was "engaged in a relationship with the woman who lives at the apartment." He did not have any clothing or belongings at the apartment, as he stayed at 208 East Hill.

¶ 14 Following closing arguments, the jury found defendant guilty. In October 2009, the trial court conducted a hearing on posttrial motions and sentencing. Defendant appeared *pro se*. The court denied the posttrial motion. Thereafter, the court sentenced him to 25 years in prison. Defendant appealed, and this court affirmed the trial court's judgment. *People v. Kelly*, No. 4-09-0835 (Jan. 31, 2011) (unpublished order under Supreme Court Rule 23).

¶ 15 In January 2011, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2010)). Defendant alleged, *inter alia*, he was denied the effective assistance of counsel when his attorney failed to inform him of decisions about the case and conduct a reasonable investigation. Defendant also alleged the trial court prevented him from calling a "materially favorable witness." Defendant attached an affidavit from Holloway to his petition. In the affidavit, Holloway stated the drugs in the apartment were hers alone, as was the $600. She also stated defendant did not live with her at the apartment but visited frequently.

¶ 16 In February 2011, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. The court pointed out defendant's attorney indicated he interviewed Holloway on two separate occasions and believed she would not benefit defendant's case. Considering Holloway's affidavit to the contrary, the court stated "either Ms. Holloway lied to [defense counsel] or she is lying in her attached affidavit." Moreover, the decision to call a

witness is left to the attorney's discretion. As to the court denying defendant's right to call a favorable witness, the court noted defendant elected to proceed *pro se* and was warned he would not get any extra time and would be responsible for any writs. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition at the first stage. We disagree.

¶ 19 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 20 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is

completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 21 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2010).

¶ 22 Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010). "Although the trial court's reasons for dismissing a petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment." *People v. Jones*, 399 Ill. App. 3d 341, 359, 927 N.E.2d 710, 724-25 (2010).

¶ 23 In its written order, the trial court states the initial allegations in defendant's postconviction petition dealt "with his claims that his counsel didn't call a specific witness, Brianna Holloway, to testify on his behalf." The court considered Holloway's affidavit and concluded she was either lying therein or to defense counsel. On appeal, the appellate defender claims defendant's petition set forth his "overarching complaint" that "he was not able to call Brianna to testify on his behalf." In support, the appellate defender cites a case holding defense counsel's failure to subpoena a witness who would contradict the State's case or provide exonerating testimony demonstrates ineffective assistance of counsel. See *People v. Makiel*, 358

Ill. App. 3d 102, 108, 830 N.E.2d 731, 739-40 (2005).

¶ 24 We note, however, defendant did not allege defense counsel was ineffective for failing to call Holloway. A careful look at his petition reveals he alleged counsel was ineffective for not conducting an investigation into the allegations made by the State's witnesses who testified against him. Defendant could not allege his counsel was ineffective for not calling Holloway at trial because he himself made the decision to proceed *pro se*. See *People v. Simpson*, 204 Ill. 2d 536, 565, 792 N.E.2d 265, 285 (2001) ("a person proceeding *pro se* may not later complain that he received ineffective assistance of counsel"); *People v. O'Neal*, 62 Ill. App. 3d 146, 150, 379 N.E.2d 12, 15 (1978) (noting that once a defendant has waived his right to counsel, "he cannot now be heard to complain that his *pro se* representation prevented him from receiving effective representation of counsel or a fair trial").

¶ 25 The issue involving Holloway's absence at trial was set forth in a claim that the trial court violated defendant's "compulsory process right" by preventing him from calling her to testify. However, on this particular matter, the appellate defender does not address the issue, cite any case law to demonstrate error on the part of the court, or make any argument whatsoever that the court erred in this regard.

> " 'A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error.' " *People v. Williams*, 385 Ill. App. 3d

359, 368, 895 N.E.2d 961, 968 (2008) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993)).

By failing to develop his argument in his brief, defendant has forfeited review of this issue on appeal.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 28 Affirmed.