2015 IL App (4th) 140256-U

NO. 4-14-0256

FILED
December 29, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
MARIO S. ENGLISH, JR.,	)	No. 00CF55
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the summary dismissal of defendant's postconviction petition.

¶ 2 In May 2002, a jury found defendant, Mario S. English, Jr., guilty of armed robbery. In July 2002, the trial court sentenced him to 30 years in prison. This court affirmed defendant's conviction and sentence on direct appeal. In October 2011, defendant filed a *pro se* motion for fingerprints or forensic testing, which the trial court denied. This court affirmed the denial on appeal. In December 2013, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed.

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

¶ 4 I. BACKGROUND

¶ 5 In February 2000, the State charged defendant by information with one count of armed robbery (720 ILCS 5/18-2(a) (West 2000)), alleging he, Terry Legel, and William Raine committed the offense of armed robbery in that they or one for whose conduct they were legally responsible, while armed with a dangerous weapon, a gun, took property from the person or presence of Roger Hokamp by threatening the imminent use of force. Defendant pleaded not guilty.

¶ 6 In May 2002, the State indicated its intent to use evidence of seven other armed robberies to help identify defendant in the current robbery. The trial court allowed the State to use evidence of three of the armed robberies that closely matched the *modus operandi* of this robbery. At defendant's jury trial, the following evidence was presented.

¶ 7 Three employees of Cassano's restaurant in Quincy (James Schmalshof, Brian Postle, and Hokamp) testified two men, one of whom was armed with a gun, entered the restaurant through the back door after the restaurant had closed. The employees stated the intruders' faces were covered except for their eyes. According to the employees, the intruders ordered them to lie on the floor of the restaurant near the walk-in cooler. The intruders then collected the money in the restaurant, ordered the employees into the walk-in cooler, took the employees' money, and blocked the cooler door with a table. Another Cassano's employee arrived later that night, heard the other employees pounding on the wall of the walk-in cooler, and let them out.

¶ 8 The employees' descriptions of the intruders were not identical but were very similar. Schmalshof testified the first intruder appeared to be a male, approximately 19 years old, and about six feet tall with a slim build. He testified the second intruder was also a male, approximately 19 years old, 5 feet 11 inches tall, and a little stockier than the first intruder.

Postle testified the first intruder was probably between 5 feet 8 inches and 5 feet 10 inches tall with a slim build. Postle testified the second intruder was shorter than the first intruder and probably 5 feet 8 inches or 5 feet 9 inches tall with a slender build. Hokamp testified the first intruder was between 5 feet 10 inches and 6 feet tall. Hokamp testified the second intruder was a little shorter than the first intruder. Hokamp also testified he weighed 135 pounds and the two intruders' builds were fairly close to his, only a little heavier. The employees also testified the intruders' faces were covered and they were wearing gloves.

¶ 9 William Raine testified he knew defendant for approximately two months before the Cassano's robbery. Raine testified he is 5 feet 9 1/2 inches tall and weighed between 125 and 130 pounds in November 1999. Raine also testified he had prior felony convictions. According to Raine's testimony, he, Terry Legel, and defendant robbed Cassano's. Raine testified he went into the restaurant but could not remember for sure if defendant or Legel went in with him. He testified one person stayed with the car. According to Raine, he was not sure what they did with the employees once they were inside Cassano's or what he was wearing, but he testified they usually placed the employees in the walk-in cooler and wore T-shirt sleeves over their faces. Raine also testified they used a .380-caliber handgun.

¶ 10 Raine testified he participated in the robbery of Happy Joe's restaurant in Bettendorf, Iowa, in November 1999 with Legel, James Morgan, and defendant. According to Raine, they used the same .380-caliber handgun and he entered the restaurant with two of the others. According to Raine, they again used T-shirt sleeves to cover their faces and left the employees in the walk-in cooler.

¶ 11 Raine testified about a robbery he, Legel, Morgan, and defendant committed at a Lone Star Steakhouse in Corralville, Iowa, in November 1999. Raine testified he believed

Morgan stayed in the car and he, Legel, and defendant entered the restaurant. According to Raine, they again used the .380-caliber handgun during the robbery, wore T-shirt sleeves over their faces, and left the employees in the cooler.

¶ 12 Raine also testified he participated in the robbery of Ganzo's restaurant in Davenport, Iowa, with Chad Dennison, Legel, and defendant. Raine testified he believed defendant stayed with the car during the robbery. According to Raine, they once again used the same .380-caliber handgun, wore T-shirt sleeves as masks, and left the employees in the cooler.

¶ 13 Chad Dennison testified he also had prior felony convictions. According to his testimony, he did not take part in the Cassano's robbery but did take part in the robbery of Ganzo's restaurant in Davenport, Iowa, with Raine, Legel, and defendant. Dennison testified he, Raine, and Legel went inside the restaurant and defendant stayed with the car. According to Dennison, he had the manager of the restaurant open the safe, and then they placed the employees in the cooler.

¶ 14 Dennison testified a .380-caliber Bersa handgun was used in the robbery. Dennison also testified he was present when defendant purchased this weapon in late September or early October 1999. According to Dennison, defendant purchased the gun for approximately $120 at an individual's house in Rock Island.

¶ 15 According to Dennison, in late November 1999, the police stopped defendant and Dennison in a vehicle defendant was driving. Dennison testified defendant handed Dennison the handgun and told him to run. Dennison testified he ran and dropped the handgun while being pursued by the police. The police then recovered the handgun.

¶ 16 Dennison testified he originally told the police he had no knowledge of any armed robberies committed by himself or defendant. Dennison testified he was then taken to the police

station, where he stayed from 11 a.m. to about 1 a.m. the next day. After the police told him what his possible punishment might be for the crimes, Dennison gave a statement. Dennison testified after he gave the statement, he was not charged in the Ganzo's robbery. Dennison testified his second statement to the police and his testimony in court were what really happened.

¶ 17 Terry Legel testified he is 5 feet 9 inches tall and weighed about 185 pounds in November 1999. Legel is defendant's cousin. Legel also testified he had prior felony convictions. According to Legel, he robbed Cassano's with Raine and Fernando Duarte. However, Legel admitted telling Detective Bill Thomas of the Davenport, Iowa, police department defendant participated in the robbery, not Fernando Duarte.

¶ 18 According to Legel, he made the decision to rob Cassano's. Duarte stayed with the car, and Legel and Raine went in the restaurant. Legel testified he had a .380-caliber Bersa handgun, which belonged to him, Dennison, and defendant. Legel testified he and Raine were both wearing the same type of clothing and T-shirt sleeves over their faces.

¶ 19 According to Legel, he and Raine entered the restaurant and ordered the employees to lie on the floor. Legel testified he watched the employees while Raine collected the money. Legel also testified they disabled the phones in the restaurant. Legel testified he and Raine ordered the employees into the walk-in cooler, shut the door, and placed a big stainless-steel table in front of the door. Legel testified he told Detective Thomas in December 1999 he was driving the car and Raine and defendant went inside the restaurant.

¶ 20 Legel testified he took part in the robbery of the Lone Star Steakhouse in Corralville, Iowa, in November 1999, with Jimmy Morgan, Raine, and defendant. Legel testified he and defendant went in the front door and Raine waited at the back door. Legel testified he had the .380-caliber Bersa handgun, the same gun he used during the Cassano's robbery, and

Raine had a pellet gun. Morgan stayed in the car. Legel testified they ordered all the employees to lie on the floor and collected the money. They ordered the employees into either a cooler or a freezer, shut the door, ripped out the telephones, and left. Legel testified he, Raine, and defendant all had shirt sleeves covering their faces, gloves, and hooded sweatshirts.

¶ 21 Legel testified he was involved in the Happy Joe's Restaurant robbery in Bettendorf, Iowa, with Raine, Morgan, and Duarte. Legel admitted telling Detective Thomas in December 1999 that defendant, not Duarte, was involved in the Happy Joe's Restaurant robbery. Legel testified he, Raine, and Duarte went inside the restaurant, and Morgan stayed in the car. Legel testified they were all dressed the same way, with T-shirt sleeves over their faces and hooded sweatshirts. Legel testified they made the female employee open the safe and then put the employee in the cooler. Legel testified he was armed with the .380-caliber Bersa handgun.

¶ 22 Legel testified he participated in the robbery of Ganzo's Restaurant with Raine, Dennison, and Duarte. Again, Legel admitted telling Detective Thomas in December 1999 that defendant, not Duarte, took part in the robbery. Legel testified he, Raine, and Dennison entered the business and Duarte stayed in the car. Legel admitted he told Detective Thomas defendant stayed in the car. Legel testified he, Raine, and Dennison all wore T-shirt sleeves over their faces and hooded sweatshirts. Legel testified he and Dennison went in the front door and Raine stayed at the back door. Legel testified he had the .380-caliber Bersa handgun and Raine had a pellet gun. They ordered the employees to lie on the floor, disabled the phones, collected the money, and ordered the employees into the walk-in cooler. Legel testified they secured the cooler door by piling bags of food in front of it.

¶ 23 On cross-examination, Legel testified Detective Thomas grabbed him around the neck and slammed him into a corner before he gave his statement to Detective Thomas. Legel

also testified Detective Thomas told him if he cooperated things would be a lot easier on Legel. Legel testified the statement he gave Detective Thomas was not true as defendant was not involved in three out of the four robberies, including Cassano's. On redirect, Legel testified Fernando Duarte's name never came up in the interview.

¶ 24 Detective Thomas testified he interviewed Legel on December 2, 1999. Detective Thomas denied threatening Legel, grabbing him by the throat, or doing anything else physically to him. Detective Thomas also testified he spoke with defendant in December 1999. Detective Thomas testified defendant said he did not want to give the police a statement, and when Detective Thomas finished his investigation, Detective Thomas would find out defendant was not the one making the decisions in the group and defendant basically did what he was told.

¶ 25 Following closing arguments, the jury found defendant guilty of armed robbery. In July 2002, the trial court sentenced him to 30 years in prison, to be served consecutively to his sentence of 20 years from Rock Island County. In December 2004, this court affirmed defendant's conviction and sentence on direct appeal. *People v. English*, No. 4-02-0737 (Dec. 23, 2004) (unpublished order under Supreme Court Rule 23).

¶ 26 In October 2011, defendant filed a *pro se* motion for fingerprints or forensic testing on a handgun under section 116-3 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/116-3 (West 2010)). In a December 2011 written order, the trial court *sua sponte* denied defendant's motion, which the court characterized as a postconviction petition. This court affirmed the denial of the motion. *People v. English*, 2013 IL App (4th) 120044, ¶ 1, 987 N.E.2d 1058.

¶ 27 In December 2013, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), setting forth a claim of actual

innocence. According to the petition, defendant claimed an affidavit from Anthony English "clearly shows he is the one who really did the Cassano's armed robbery." To the petition, defendant attached Anthony's unnotarized affidavit, which stated as follows:

> "i am the one who did these (armed or attempted robberies) [at] burger king in moline, happy Joes in Kewanee, cassanos in quincy, and candle light standard in iowa. i'm coming forward with truth. i told people Just blame [defendant] and not me. When im called to testify, i can give statements that nobody else would know except the person who did the robberies. [Defendant] didn't tell me he stole anything from von maur at northpark in iowa. i lied to the detective i spoke with because another det. named thomas threatened harm to me and pushed my face into a t.v. screen showing terry Legel giving statements. a blue sweater wasn't even stolen the video proves that and it proves [defendant] didn't say he stole a blue sweater."

Defendant argued the statute of limitations should be excused where he did not receive Anthony's affidavit until October 2, 2012, he did not know Anthony committed the robbery, and the evidence could not have been discovered sooner through due diligence.

¶ 28 In March 2014, the trial court summarily dismissed the petition. The court noted defendant had not filed a motion for leave to file a successive postconviction petition but stated the petition on file did allege a form of actual innocence. In dismissing the petition, the court stated, in part, as follows:

> "The witness that now allegedly has come forward saying that he is

> the person that committed the crime is the brother of the defendant. The defendant was convicted at trial. The witness was available at trial, but was not called to testify. The fact that he has now come forward is not a sufficient reason to allow the matter to proceed to the second stage of proceedings."

This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Initially, we must determine whether defendant's December 2013 postconviction petition constituted his first or second attempt at seeking postconviction relief. Defendant argues the petition is not a successive petition and must be evaluated under the standards applicable to first-stage proceedings. The State contends defendant failed to file a motion for leave to file a successive postconviction petition despite the trial court construing his motion for forensic testing as a postconviction petition.

¶ 31 In October 2011, defendant filed a *pro se* motion for forensic testing under section 116-3 of the Procedure Code (725 ILCS 5/116-3 (West 2010)). In its December 2011 ruling, the trial court indicated defendant filed a motion for forensic testing of a weapon presented at trial. The court ultimately found "defendant's motion lacks the necessary allegations to allow progression to the second stage of a post conviction petition." However, the court did not provide notice to defendant that it was considering his motion for forensic testing as a postconviction petition, thus prohibiting the court from considering it as a postconviction petition. See *People v. Shellstrom*, 216 Ill. 2d 45, 57, 833 N.E.2d 863, 870 (2005) (requiring the trial court to notify the *pro se* litigant of a recharacterization of the pleading, to warn the litigant that the recharacterization means any subsequent postconviction petition will be subject to the

restrictions on successive postconviction petitions, and to provide the litigant an opportunity to withdraw the pleading or amend it to include postconviction claims). We also note this court did not treat the appeal from the denial of the motion for forensic testing as one involving postconviction proceedings. *English*, 2013 IL App (4th) 120044, ¶¶ 14-24, 987 N.E.2d 1058.

¶ 32 In December 2013, defendant filed his *pro se* postconviction petition based on a claim of actual innocence. In March 2014, the trial court stated defendant had not filed for leave to file a subsequent postconviction petition but summarily dismissed the petition, finding the attached affidavit was "not a sufficient reason to allow the matter to proceed to the second stage of proceedings." Based on a review of the record, we agree with defendant that his December 2013 petition constituted his first postconviction petition and we will review it as such.

¶ 33 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. 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).

¶ 34 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. 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 2012). 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.

¶ 35 To support a claim of actual innocence, "the evidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.' " *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 950 (2009) (quoting *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004)).

> "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *People v. Coleman*, 2013 IL 113307, ¶ 96, 996 N.E.2d 617.

¶ 36 "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 2012). 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 2012). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394. Moreover, we may affirm the dismissal of a postconviction petition on any basis supported by the record. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 32, 987 N.E.2d 1051.

¶ 37 In the case *sub judice*, defendant failed to state the gist of a claim of actual innocence because Anthony's affidavit was not of "such conclusive character that it would probably change the result on retrial." *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829. The affidavit does not contain specific facts supporting defendant's claim that Anthony was "the one who really did the Cassano[']s armed robbery." Instead, Anthony's affidavit is general and devoid of factual detail. Anthony claims he committed four "armed or attempted robberies," one of which was the Cassano's in Quincy. However, the affidavit does not contain the date of the Cassano's robbery. Anthony does not even state defendant was not present during the armed robbery. The affidavit claims Anthony could testify to details that "nobody else would know except the person who did the robberies" but does not contain any details concerning the Cassano's robbery. The affidavit also states Anthony told "people" to blame defendant for the robberies rather than him. However, the affidavit does not specify whether any of the "people" Anthony told to blame defendant were witnesses at defendant's trial. The remainder of the affidavit concerns matters unrelated to the armed robbery at Cassano's.

¶ 38 Here, defendant has set forth only a single conclusory allegation in his petition that Anthony "is the one who really did the Cassano[']s robbery." See *People v. Delton*, 227 Ill. 2d 247, 258, 882 N.E.2d 516, 522 (2008) (stating broad, conclusory allegations are not allowed

under the Act). Moreover, the attached affidavit does not support his claim of actual innocence. As defendant has not alleged sufficient facts to meet even the low standard at the first stage of postconviction proceedings, we find the trial court did not err in dismissing his petition.

¶ 39 III. CONCLUSION

¶ 40 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.

¶ 41 Affirmed.