2012 IL App (1st) 112541-U

SECOND DIVISION
September 25, 2012

No. 1-11-2541

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 12674
	)	
MARCUS FOWLKES,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Murphy concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's claims that his trial counsel rendered ineffective assistance were rebutted by the record and not fully argued to this court, the circuit court's summary dismissal of his post-conviction petition is affirmed.

¶ 2 Defendant Marcus Fowlkes appeals from an order of the circuit court summarily dismissing his post-conviction petition as frivolous and patently without merit. On appeal, defendant contends the circuit court erred in dismissing his petition because it raised claims that he was deprived of his constitutional right to effective assistance of counsel. We affirm.

¶ 3 Following a 2009 jury trial, defendant was convicted of first degree murder for fatally shooting Kyle Myles following a verbal confrontation on the street. The trial court sentenced defendant to a term of 48 years' imprisonment.

¶ 4 On direct appeal, defendant argued that the State failed to prove beyond a reasonable doubt that he did not act in self-defense. Alternatively, defendant argued his conviction should be reduced to second degree murder because the evidence showed he had an unreasonable belief in his right to self-defense at the time he shot Kyle. Defendant also argued that, simultaneous with his unreasonable belief, he acted under serious provocation when he shot Kyle. In addition, defendant claimed the trial court made numerous inaccurate statements of fact which justified remanding his case for resentencing. This court rejected defendant's contentions and affirmed his conviction and sentence. *People v. Fowlkes*, No. 1-09-0829 (2010) (unpublished order under Supreme Court Rule 23). In doing so, we noted the trial court's statement that "the jury was instructed, as defendant had requested, on self-defense and the second degree murder mitigating factor of unreasonable belief in self-defense" but "defendant did not ask that the jury be instructed on the second degree murder mitigating factor of serious provocation." *Fowlkes*, No. 1-09-0829, order at 8-9.

¶ 5 On May 20, 2011, defendant, through privately retained counsel, filed the instant petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). Defendant alleged he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to call defendant's father to testify that he overheard a man threaten defendant with death three days before the shooting. Defendant also claimed trial counsel was ineffective because he failed to present a jury instruction which would have allowed the jury to find him guilty of second degree murder based on provocation. Defendant further

argued that appellate counsel rendered ineffective assistance on direct appeal when he failed to raise trial counsel's ineffectiveness for not requesting the jury instruction.

¶ 6 Attached to defendant's petition is an affidavit from post-conviction counsel stating that he was retained by defendant's family to file the instant petition. Counsel averred that he read the briefs filed in defendant's direct appeal and this court's order, but had not yet read the entire trial record. Counsel also stated that his investigator obtained a statement from William Fowlkes, a witness who did not testify at trial, and that Fowlkes' affidavit was attached. In that affidavit, Fowlkes stated that he is defendant's father and hired trial counsel to represent defendant. Fowlkes told trial counsel that a few days before the shooting, he overheard a conversation between defendant and an unnamed "man and his son," who were in a car. Fowlkes averred that he heard the man tell defendant "[y]ou're dead," and the man and his son then drove away. Fowlkes stated that he was present at defendant's trial, available to testify, but was not called to testify. Also attached to defendant's petition is a copy of this court's order affirming defendant's conviction on direct appeal. There is no affidavit attesting to the veracity of the allegations in defendant's petition.

¶ 7 The circuit court found that the evidence at trial did not support defendant's contention that he was in fear of his life when he shot Kyle. The court found that defendant was not threatened with deadly force at the time of the shooting, and defendant's actions were grossly disproportionate to any provocation by Kyle. In rejecting defendant's claim that counsel was ineffective for failing to ask for a jury instruction on serious provocation, the court stated that defendant's actions did not constitute second degree murder; therefore, by law, defendant was not entitled to a jury instruction for that offense. Accordingly, the court concluded that trial counsel was not ineffective for failing to request the jury instruction on second degree murder based on provocation. In addition, the court found that trial counsel was not ineffective for failing to call

William Fowlkes as a witness. The court noted that the jury was aware of the alleged death threat from defendant's testimony, and thus, there was no reasonable probability that the verdict would have been different if Fowlkes had testified. Based on these findings, the court further found that appellate counsel was not ineffective for failing to argue on direct appeal that trial counsel was ineffective. The circuit court concluded that the allegations raised by defendant were frivolous and patently without merit, and summarily dismissed his post-conviction petition.

¶ 8 On appeal, defendant contends the circuit court erred in dismissing his petition because it raised claims that he was deprived of his constitutional right to effective assistance of counsel. Defendant first contends trial counsel was ineffective when he did not call defendant's father as a witness. Defendant cites to case law where the court has found that counsel's failure to present an available witness to corroborate a defense constitutes ineffective assistance.

¶ 9 We review the circuit court's summary dismissal of defendant's post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *Coleman*, 183 Ill. 2d at 378-79. Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 10 As a threshold matter, we note that section 122-1(b) of the Act provides that a post-conviction proceeding is commenced when a prisoner files a petition that is "verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). The defendant's affidavit verifies that the allegations in his petition are being brought truthfully and in good faith. *People v. Collins*, 202

Ill. 2d 59, 67 (2002). Where a post-conviction petition does not comply with the pleading requirements of the Act, summary dismissal of the petition by the circuit court is proper. *People v. Delton*, 227 Ill. 2d 247, 258 (2008); *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011).

¶ 11 Here, the record reveals that defendant did not provide an affidavit verifying the truthfulness of the allegations in his petition as required by section 122-1(b) of the Act. Defendant's failure to meet the pleading requirements of the Act was "fatal" to his post-conviction petition and alone justified the circuit court's summary dismissal of his petition. *Delton*, 227 Ill. 2d at 255; *Collins*, 202 Ill. 2d at 66.

¶ 12 Claims of ineffective assistance of counsel are evaluated using the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Graham*, 206 Ill. 2d at 476. If defendant cannot prove he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Id.* The decision of whether to call a witness to testify on defendant's behalf is a matter of trial strategy that rests in counsel's discretion, and such decisions are generally immune from claims of ineffective assistance of counsel due to the strong presumption that they reflect sound strategy, not incompetence. *People v. Enis*, 194 Ill. 2d 361, 378 (2000).

¶ 13 In this case, we find that the record rebuts defendant's claim that trial counsel rendered ineffective assistance when he failed to call defendant's father, William Fowlkes, as a witness. In his affidavit, Fowlkes stated he would have testified that a few days before the shooting, he

overheard a conversation between defendant and an unidentified "man and his son," and he heard the man tell defendant "[y]ou're dead." As reflected in our order affirming defendant's conviction, this evidence was already presented to the jury through the testimony of two people directly involved in the earlier confrontation – defendant and his companion, Cassandra Welch. Welch testified that as she and defendant were in defendant's minivan, a man blocked the minivan with his car. The man and a boy engaged in a fight with defendant, during which Welch heard the man tell defendant "you're dead." *Fowlkes*, No. 1-09-0829, order at 6. Defendant also testified that the boy's father said to defendant "you're dead." *Fowlkes*, No. 1-09-0829, order at 7. Substantially similar testimony from defendant's father would not have added anything to the case, and thus, would not have changed the outcome of the trial. Therefore, defendant was not prejudiced by counsel's decision not to call Fowlkes as a witness, and counsel's decision did not constitute ineffective assistance.

¶ 14 Defendant also contends trial counsel was ineffective when he failed to submit a jury instruction which would have given the jury the option of finding him guilty of second degree murder. In his brief to this court, defendant merely states that this claim was alleged in his petition, and presents no argument whatsoever, nor does he provide any citations to relevant legal authority in support of his claim.

¶ 15 The reviewing court is entitled to a cohesive argument of the issue presented, supported by relevant authority; this court is not a repository into which an appellant may foist the burden of argument and research, nor is it the function or obligation of this court to act as an advocate. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 29. Defendant's bald contention that he raised this claim in his post-conviction petition does not meet the standard of Supreme Court Rule 341(h)(7) (eff. July 1, 2008), and thus, is forfeited in this appeal. *Id.*; *People v. Fair*, 193 Ill. 2d 256, 269 (2000).

¶ 16 For these reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's post-conviction petition as frivolous and patently without merit.

¶ 17 Affirmed.