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2012 IL App (3d) 110055-U

Order filed November 30, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellee,	)	La Salle County, Illinois,
	)	
v.	)	Appeal No. 3-11-0055
	)	Circuit No. 06-CF-337
	)	
RUSSELL H. NOLAN, JR.,	)	Honorable
	)	H. Chris Ryan,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices O'Brien and Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) The circuit court's summary dismissal of defendant's petition for postconviction relief was proper where defendant failed to assert the gist of a *Brady* violation. (2) Defendant's postconviction counsel provided reasonable assistance.

¶ 2 At a bench trial, defendant, Russell H. Nolan, was convicted of two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2006)) and three counts of home invasion (720 ILCS 5/12-11(a)(1), (a)(2), (a)(6) (West 2006)). The trial court sentenced him to 32 years'

imprisonment. Defendant then appealed his conviction, arguing that: (1) the evidence was insufficient; (2) the circuit court improperly required him to prove his own innocence; and (3) he was denied a fair trial when the State repeatedly asked him to comment on the veracity of the State's witnesses. The appellate court affirmed the trial court's judgment (*People v. Nolan*, No. 3-07-0372 (2009) (unpublished order under Supreme Court Rule 23)), and the Illinois Supreme Court denied defendant's petition for leave to appeal.

¶ 3 Defendant then filed a petition for postconviction relief in the circuit court, claiming that his constitutional right to due process had been violated because the State had failed to disclose a handwritten statement by witness John Roberts, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In his petition, defendant claimed that because the statement was never disclosed, and the existence of the statement had still not been confirmed, he could not know whether the statement would have been exculpatory in nature or material to the defense. The trial court summarily dismissed the petition.

¶ 4 Defendant now appeals the summary dismissal of his petition on two grounds: (1) the trial court erred when it determined that no *Brady* violation had occurred; and (2) defendant's postconviction counsel failed to provide him with reasonable assistance.

¶ 5 **FACTS**

¶ 6 The alleged victim in this case is Kimberly Sue Nolan, who, at the time of the events in question, was married to defendant. At trial Kimberly testified that in June 2006 she was living in a home in Ottawa, Illinois, previously shared with defendant. Although still married to Kimberly, defendant no longer lived in the home and was under an order of protection prohibiting him from contacting Kimberly. On June 15, 2006, Kimberly and a friend, Laura

Pawson, went to a racetrack in Chicago where they met up with Kimberly's brother, John Roberts, and Kimberly's boyfriend, Jared Duncan. After the racetrack, the four returned to Kimberly's home. Kimberly and Duncan retired to Kimberly's bedroom, and Roberts and Pawson remained in the living room where they engaged in oral sex. Pawson left Kimberly's home at about 3:30 a.m., and Duncan left at 5:30 or 6 a.m. Sometime between 6 and 6:30 a.m., Kimberly drove Roberts to work in Amboy, which was about 30 to 45 minutes away. Kimberly then returned home and took a nap.

¶ 7 Kimberly testified that a noise woke her, and she saw defendant walk into her bedroom wearing purple latex gloves and holding a knife with a blue handle and a three-inch silver blade. Defendant was upset because when he approached the home, he thought he saw Kimberly through the window engaged in oral sex with another man. Kimberly denied that she had been sexually active with anyone that night. Defendant ordered Kimberly to remove her clothes and then, while holding the knife to Kimberly's neck, forcefully inserted his fingers and penis into her vagina. Defendant ejaculated onto Kimberly's stomach and wiped it off with a towel. Kimberly testified that she did not resist defendant because he was armed with a knife, and she could not recall whether she had said "no" during the encounter.

¶ 8 Kimberly testified that defendant then obsessed about Kimberly's other sexual partners. Kimberly showed defendant a photograph of Roberts and Pawson from the racetrack to convince defendant that he may have seen them having oral sex instead of Kimberly. Defendant then took Kimberly to the basement, where defendant claimed he was standing when he overheard her having sex earlier in the morning. Sometime later, Kimberly's telephone rang, and defendant ordered her to answer it. It was Kimberly's friend, Pawson. Kimberly told Pawson that

defendant was in her home wearing purple latex gloves, which tipped off Pawson to the fact that Kimberly might be in danger. After hearing Kimberly relay this information, defendant forced her to hang up the telephone.

¶ 9 Shortly thereafter, Kimberly's neighbor, Shane Decker, knocked on the door. Defendant absconded to the basement. Kimberly answered the door and let Decker in. Kimberly noticed the latex gloves on her jewelry box and gave them to Decker to keep. Defendant returned from the basement carrying a black bag. As he left the home he said to Kimberly, "[B]y the way, I owe you a window." Kimberly later noticed that a basement window was broken.

Approximately 30 minutes later, Roberts arrived at the home. Kimberly testified that she could not remember whether she had spoken to Roberts on the telephone before he arrived at her home. Roberts called the police, who arrived and took Kimberly to the hospital.

¶ 10 Registered nurse, Janis Ryan, testified to the examination she performed that day on Kimberly. She stated that Kimberly was shaking, crying, and upset when she arrived at the hospital. On cross-examination Ryan admitted she had not included that information in her report. Ryan also stated that Kimberly had told her that the gloves defendant was wearing were green, not purple. Kimberly answered "no" to Ryan's question concerning whether she was in a relationship in which she had been physically, financially, or emotionally hurt or threatened. Kimberly answered "yes" to whether she felt safe returning home. Ryan did not find any injuries to Kimberly's vagina or cervix.

¶ 11 Deoxyribonucleic acid (DNA) samples were taken from the latex gloves and from a vaginal swab at the hospital. The DNA profile from the vaginal swab matched defendant. The DNA profile from the latex gloves showed a mixture of at least three people. One of the profiles

from the gloves matched defendant, and another profile could not exclude Kimberly.

¶ 12 La Salle County Deputy Sheriff Eric Yacko testified that he responded to Kimberly's house on the morning of June 16, 2006. When he arrived, Kimberly was sitting on the ground, holding herself. She had a flutter in her voice and appeared to have been crying. Kimberly gave a statement to Yacko which essentially tracked her trial testimony, but included some differences. Kimberly told Yacko that she had shown defendant the picture from the racetrack *before* the assault occurred, as opposed to after; that she had been crying and screaming at the defendant to stop during the assault; that defendant did not brandish the knife until after she had her clothes off; and that defendant had dropped the latex gloves near the front door and not on top of her jewelry box.

¶ 13 Yacko was involved in defendant's arrest and testified to statements made by defendant. Defendant told Yacko that he went to Kimberly's home around 3 a.m. and saw a person whom he thought was Kimberly performing oral sex on a man in the living room. Defendant said this made him angry, so he broke a window and left. He stated that he returned at 7 a.m. to confront Kimberly about the other man. Defendant did not mention anything about a sexual encounter between Kimberly and defendant. During the arrest, Yacko also recovered a black bag from defendant's vehicle, which contained a folding knife with a blue handle.

¶ 14 Defendant later gave a statement to Investigator Mark Greene, which differed from the earlier account given to Yacko. Defendant told Greene that he saw a woman performing oral sex in Kimberly's living room, which "pissed him off." He then moved around to the side of the house where he heard sounds of people having sex coming from inside, which "really pissed him off." Defendant said that he remained near the house until all the guests left so that he could

confront Kimberly. After Kimberly left to drop off Duncan, defendant broke the basement window and entered the home. When Kimberly returned, defendant confronted her in the bedroom. Defendant did not mention anything about a sexual encounter with Kimberly until asked about it, at which point he stated that he had consensual sex with Kimberly. Defendant added that "he didn't think he needed to ask her and that he just took it."

¶ 15 At trial, defendant's story changed again. He testified that he first arrived at Kimberly's home earlier in the night when nobody was home. Defendant took a nap on the pool deck while waiting for Kimberly to return. When he awoke he saw Kimberly and another man through the kitchen window. This distressed defendant, and he walked away from the home temporarily. He then returned to the home and saw a man and woman engaged in oral sex in the living room. This disturbed defendant, who then walked around the back of the house to sit down.

¶ 16 After sitting for a while, defendant decided that he wanted some photo albums from inside the home, so he broke the basement window and entered. He found the albums in the basement and then he lay down and took a nap. When he awoke, defendant went upstairs into the garage where he found a pair of latex gloves, which he then picked up and began squeezing as a stress reliever. He went into Kimberly's bedroom and saw her lying in bed alone. Defendant questioned her about what he saw through the living room window. Kimberly explained that she was not the woman who had been performing oral sex earlier in the night. Defendant sat down next to Kimberly, and they began talking. Defendant began rubbing Kimberly's leg, which progressed to kissing and then consensual sex. Defendant denied carrying a knife.

¶ 17 Roberts testified that he was at work when he received a telephone call from Pawson alerting him that defendant was in Kimberly's home. Roberts was aware of the order of

protection and knew that defendant was not allowed in the home. Roberts called Kimberly's cellular telephone several times before finally getting through to her, at which point Kimberly told him that defendant was in the home. During the telephone conversation, Kimberly did not give Roberts any details about what had happened between her and defendant. Roberts testified that the conversation was unusual because Kimberly was not as talkative as usual. Roberts told Kimberly to go to Decker's house, but Kimberly replied that she was not able to. Roberts then hung up and called Decker, asking him to go to Kimberly's to check on her.

¶ 18 Roberts then left work for Kimberly's house. On his way, he called defendant and asked him what had happened. Defendant stated that nothing had happened and hung up the phone. Roberts arrived at Kimberly's house about 30 minutes later. When he arrived, defendant had already left, and Kimberly and Decker were sitting on the porch. Kimberly looked "shook up." Kimberly told Roberts that defendant had assaulted her, and Roberts called the police. Police arrived and took Kimberly to the hospital for treatment and testing. The police asked Roberts to call defendant again and attempt to arrange a place where the police could find him. Roberts called defendant and arranged a meeting at the Tyson plant. Defendant and Roberts did not talk about anything that had transpired between defendant and Kimberly. During his testimony, Roberts never mentioned giving a written statement, and was not asked about a written statement on cross-examination.

¶ 19 The trial court found the defendant guilty on all charges. In announcing its ruling, the trial court found that the evidence did not indicate that Kimberly had fabricated the sexual assault. The court found defendant's testimony less credible than that of the State's witnesses. The defendant had been evasive when asked about the discrepancies between his statements to

the police and the testimony he gave at trial. Kimberly, although showing some animosity toward the defendant and being evasive at times during her testimony, was more credible than the defendant. The trial court sentenced defendant to 32 years' imprisonment. The judgment was affirmed on direct appeal.

¶ 20 Defendant then filed the current petition, alleging that a *Brady* violation had occurred because a handwritten statement of Roberts existed and was never disclosed to the defense. Defendant argued that he could not have known about the statement's existence at the time of trial and was unaware of whether the statement would have been exculpatory or material.

¶ 21 Attached to defendant's petition were five supporting documents that attempted to prove the existence of the written statement. One document was the police report of the officer who took Kimberly to the hospital, which stated, "I transported [Kimberly] to Ottawa Hospital while [Roberts] and [Decker] did written statements for the Investigators." Another document was the transcript of a recorded conversation between two voices allegedly belonging to Decker and Laura Rich, a friend of defendant's sister, in which Decker stated that Roberts gave a written statement to police. Decker gave a written statement of his own to police, but was not in the same area as Roberts and did not actually witness Roberts giving a written statement. At trial, investigators testified to an oral statement given by Roberts, but not a written statement.

¶ 22 In addition to the police report and transcript, counsel also attached an affidavit from postconviction counsel describing her reasons for suspecting that a statement by Roberts existed and her efforts in attempting to locate that statement, an affidavit from defendant in which he states that he did not witness Roberts write a statement, and an affidavit from defendant's sister, Deborah Clark, explaining that Rich had informed her about the conversation with Decker.

¶ 23 The trial court summarily dismissed the petition, finding that it was frivolous and patently without merit. The trial court found that nothing in defendant's supporting documents established that Roberts had given a statement or that such a statement would have been material.

¶ 24 Defendant now appeals the trial court's decision.

¶ 25 ANALYSIS

¶ 26 I. *Brady* Claim

¶ 27 Defendant claims that his petition for postconviction relief sufficiently raised a constitutional deprivation because a written statement by Roberts was never disclosed to the defense, in violation of the rule established in *Brady*, 373 U.S. 83. Defendant argues that because he established the gist of a constitutional claim, the trial court erred in summarily dismissing his petition.

¶ 28 The standard of review for summary dismissals of postconviction petitions for relief is *de novo*. *People v. Hodges*, 234 Ill. 2d 1 (2009).

¶ 29 The Post-Conviction Hearing Act (the Act) allows criminal defendants to challenge convictions resulting from a substantial denial of their constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, a judge may summarily dismiss a petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2006). A petition is considered frivolous or patently without merit if the allegations in the petition, taken as true and liberally construed, fail to state even the gist of a constitutional claim. *People v. Collins*, 202 Ill. 2d 59 (2002).

¶ 30 In the present case, defendant asserts that he was denied his constitutional right to due process because the State failed to disclose potentially exculpatory evidence in violation of the

rule set out in *Brady*, 373 U.S. 83. To establish a *Brady* violation, a defendant must show that the State failed to disclose evidence that was both favorable to the accused and "material either to guilt or to punishment[.]" *Id.* at 87; *People v. Miller*, 203 Ill. 2d 433 (2002). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *People v. Hickey*, 204 Ill. 2d 585 (2001). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. Under this standard, the defendant must show that " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *People v. Coleman*, 183 Ill. 2d 366, 393 (1998) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

¶ 31 In the present case, defendant has not established even the gist of a *Brady* claim. His petition does not establish that Roberts gave a statement. In addition, even if we assume that Roberts had given a written statement, the petition does not establish that the statement would have been material or exculpatory. Nor does the petition establish that disclosure of the written statement would have created a reasonable probability that the outcome of the proceedings would have been different. In finding defendant guilty, the trial court relied on extensive evidence including the testimony of Kimberly and the investigating officers, Kimberly's identification of defendant, and the physical evidence found at the scene and in defendant's vehicle. Defendant has not established a reasonable probability that Roberts's written statement existed or that it would have changed the trial court's decision.

¶ 32 Defendant has not presented the gist of a constitutional claim, and, therefore, the circuit court did not err in summarily dismissing defendant's petition for postconviction relief.

¶ 33

## II. Ineffective Assistance of Counsel

¶ 34 Defendant also claims that the circuit court's denial of his petition resulted from the unreasonable assistance of his postconviction counsel. Review of the effectiveness of counsel is *de novo*. *People v. Johnson*, 338 Ill. App. 3d 1004 (2003).

¶ 35 The right to counsel in postconviction proceedings is entirely statutory. *People v. Lander*, 215 Ill. 2d 577 (2005). The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) guarantees that postconviction counsel will provide a "reasonable" level of assistance, which is a less stringent standard than that demanded by the constitution. *People v. Pendleton*, 223 Ill. 2d 458 (2006). To ensure that postconviction counsel's performance is reasonable, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes specific duties on counsel. Counsel must: (1) consult with the defendant concerning the deprivation of his constitutional rights; (2) examine the trial record; and (3) make amendments to a petition filed *pro se* that are necessary for an adequate presentation of the defendant's contentions. An adequate petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010).

¶ 36 Defendant claims that his postconviction counsel did not provide reasonable assistance because she failed to attach to the amended petition a copy of Roberts's written statement to police or an affidavit describing the statement's content, resulting in an inadequate petition. We disagree.

¶ 37 Postconviction counsel could not attach Roberts's written statement because it is not known whether the statement exists. Counsel was informed about the possible existence of a statement from the recorded conversation that occurred between Decker and Rich. Counsel

attempted to contact Decker about the statement, but he never returned her calls. Postconviction counsel also contacted trial counsel, who stated that he had never received a written statement from police. Postconviction counsel made a reasonable effort to secure the written statement of Roberts.

¶ 38 Postconviction counsel acted reasonably in attaching other documents to the petition in lieu of the statement by Roberts. She attached the police incident report that referenced a written statement; a transcript of the conversation between Decker and Rich, in which Decker claims that Roberts made a statement; an affidavit of counsel explaining her efforts to track down Roberts's statement; an affidavit from defendant stating that he never saw Roberts write a statement; and an affidavit from Clark explaining that Rich had alerted her to the possibility of a written statement. These supporting documents, along with the petition itself, sufficiently explained why the written statement of Roberts was not attached. Postconviction counsel provided reasonable performance.

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 41 Affirmed.