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2012 IL App (3d) 110306-U

Order filed September 26, 2012

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 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0306
)	Circuit No. 06-CF-891
)	
CARZELL SCOTT,)	Honorable
)	Carla Alessio-Policandriotes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition stated the gist of a constitutional claim.

¶ 2 Defendant, Carzell Scott, was convicted of home invasion (720 ILCS 5/12-11(a)(3) (West 2006)) and sentenced to 41 years' imprisonment. His conviction and sentence were affirmed on appeal (*People v. Scott*, No. 3-07-0313 (2009) (unpublished order under Supreme Court Rule 23)). Thereafter, defendant filed a postconviction petition which was summarily dismissed by the trial court at the first stage. Defendant appeals, arguing that his petition should not have been

dismissed because it stated the gist of a constitutional claim. We reverse and remand.

¶ 3

FACTS

¶ 4 Following an April 15, 2006, incident, defendant and a codefendant, Kerwin Doss, were each charged with one count of home invasion (720 ILCS 5/12-11(a)(3) (West 2006)). They were tried separately. During defendant's trial, witnesses testified that defendant had entered a home without authority and, with the use of a gun, had taken money and a wallet. The witnesses also identified Doss as the driver of the vehicle involved in the crime.

¶ 5 Doss testified that he was present at the address where the home invasion occurred, but defendant was not there. Doss denied committing the crime. He claimed that while he was at the residence, a man he knows only as "Black" jumped off the porch and into Doss' car and instructed him to drive away. Doss dropped the man off a few blocks away and then picked up defendant. Thereafter, Doss and defendant were questioned by the police.

¶ 6 After the close of the evidence, the trial court held a jury instruction conference.

Defendant objected to the court's use of Illinois Pattern Jury Instruction, Criminal, No. 3.17 (4th ed. 2000) (hereinafter IPI Criminal No. 3.17), which concerns the testimony of an accomplice. He argued that the instruction only applied if the codefendant witness, Doss, claimed to have been involved in the crime with defendant. The trial court overruled defendant's objection and gave the jury the instruction. The jury found defendant guilty of home invasion. Thereafter, defendant filed a motion for a new trial which included the argument that the trial court erred by instructing the jury pursuant to IPI Criminal No. 3.17. The trial court denied defendant's motion and sentenced him to 41 years' imprisonment.

¶ 7 Defendant unsuccessfully appealed his conviction and sentence. *People v. Scott*, No. 3-

07-0313. On appeal, appellate counsel did not argue that the court erred in instructing the jury pursuant to IPI Criminal No. 3.17.

¶ 8 On February 14, 2011, defendant filed a *pro se* postconviction petition. The petition alleged numerous violations of defendant's constitutional rights, including ineffective assistance of trial and appellate counsel. Defendant argued that trial counsel was ineffective for failing to investigate a potential witness. The petition also alleged that appellate counsel was ineffective for failing to argue that the court erred in instructing the jury pursuant to IPI Criminal No. 3.17.

¶ 9 On March 9, 2011, the trial court summarily dismissed defendant's petition as being frivolous and patently without merit. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant argues that his postconviction petition stated the gist of a constitutional claim when it alleged that counsel failed to: (1) investigate and call a witness; and (2) raise on direct appeal that the trial court erred in instructing the jury pursuant to IPI Criminal No. 3.17. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing Act (Act) provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2010). At the first stage, the trial court must independently determine whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345 (2010). A petition is frivolous or patently without merit if its allegations, when taken as true, fail to present the gist of a constitutional claim. *People v. Brooks*, 233 Ill. 2d 146 (2009). Our supreme court has viewed the threshold at the first stage of the proceeding to be low; thus, a petitioner need only present a limited amount of detail in the petition and need not make legal argument or cite to legal

authority. *People v. Delton*, 227 Ill. 2d 247 (2008). A trial court's dismissal of a postconviction petition as frivolous or patently without merit is reviewed *de novo*. *Morris*, 236 Ill. 2d 345.

¶ 12 Here, defendant's postconviction petition alleged that appellate counsel was ineffective for failing to argue on appeal that the trial court erred in instructing the jury pursuant to IPI Criminal No. 3.17. That instruction reads, "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution." In this case, the witness in question, Doss, did not say that he was involved in the commission of the crime with defendant; in fact, he claimed that neither he nor defendant committed the crime. Therefore, there is a valid argument that the court may have erred in using IPI Criminal No. 3.17. While the State cites a number of cases where a similar argument was ultimately unsuccessful, these cases present factual distinctions from the present case, and none of the cases involved the dismissal of a petition at the first stage of a postconviction proceeding. The Act dictates that a postconviction petition pass the first stage if it merely states the gist of a constitutional claim. Defendant's petition has met this low standard and should not have been summarily dismissed by the trial court.

¶ 13 Having concluded that the entire petition should be sent back for further proceedings, we decline to address defendant's alternative argument regarding ineffective assistance of trial counsel, as it has been rendered moot.

¶ 14 **CONCLUSION**

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

¶ 16 Reversed and remanded.

