

2014 IL App (1st) 130853-U
No. 1-13-0853
November 25, 2014

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 06 CR 17520
)	
DARNELL LANE,)	The Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court should consider all factual assertions in the postconviction petition and supporting affidavits to determine whether the postconviction petitioner has stated the gist of a constitutional claim. The defendant's assertion that his counsel failed to tell him he could request a second degree murder instruction, together with facts supporting an inference that the defendant could have presented evidence to support a second degree murder instruction, sufficed to state the gist of a claim for ineffective assistance of counsel.

¶ 2 A jury found the defendant, Darnell Lane, guilty of murder. Lane filed a postconviction petition in which he alleged that his counsel failed to inform him of the possibility of seeking a second degree murder instruction, even though counsel knew that the statements Lane

made to police could support a second degree murder instruction. The trial court dismissed the petition as frivolous. In this appeal, we find that Lane sufficiently stated the gist of a claim for ineffective assistance of counsel. Accordingly, we reverse the dismissal of the postconviction petition and remand for further postconviction proceedings.

¶ 3

BACKGROUND

¶ 4

Shortly after 1 a.m. on July 2, 2006, Charles Young was standing on a sidewalk when gunshots rang out. Two bullets struck and killed Young. A police officer found a cell phone near Young's body. Police officers who heard the shots arrested Lane near the scene. Lane made a videorecorded statement to police about the shooting. A grand jury indicted Lane for murder. Lane's attorney decided not to move to suppress Lane's statement.

¶ 5

At the jury trial, Richard Sims testified that he heard that Lane and Young had argued. Around 1 a.m. on July 2, 2006, he heard two shots and he dropped to the ground. He saw a man dressed in black take off running with a gun in his hand.

¶ 6

Sims admitted that he spoke with police after the shooting on July 2, 2006, and he told police that, shortly before the shooting, he saw Young and Lane argue until two men pulled them apart. Sims also admitted that he testified to the grand jury that he heard Lane swear at Young, and he heard Young call Lane a "scary bitch." Sims testified at trial that he had only relayed to police and the grand jury accounts he had heard from others. He did not see or hear an argument between Lane and Young that night.

¶ 7

Tatiana Mason testified that she arrived at the murder scene shortly after the shooting. She did not see Lane there. The prosecution confronted Mason with a statement she signed at the police station. Mason testified that she did not remember what she told police.

According to the signed statement, Mason told police that around 1 a.m. on July 2, 2006, she saw Lane, wearing a black shirt and black pants, lift his arm and point it at Young. She heard two shots fired from where Lane stood. According to Mason's testimony to the grand jury, when Mason saw Lane lift his arm, she "knew what was going to happen because they had had a fight. *** [Lane was] fixin' to shoot."

¶ 8 Officer Keim testified that he chased Lane as Lane ran from the murder scene. Keim saw Lane place some object under a van, and Lane removed his black shirt shortly before Keim caught up to him and arrested him. Officer Chris Hackett retrieved a handgun from underneath the van where Lane had placed something. An expert testified that ballistics testing proved that the gun Hackett retrieved fired the bullets that killed Young.

¶ 9 Neither the prosecution nor defense counsel presented evidence of the videorecorded statement Lane made to police. Lane did not testify. In closing, defense counsel argued only that the State failed to prove Lane guilty beyond a reasonable doubt.

¶ 10 The jury found Lane guilty of first degree murder committed by personally discharging a firearm. At the sentencing hearing, the prosecutor pointed out that Lane, in the videorecorded statement he made to police, "did admit shooting the victim after an argument, and he made some statements about how the victim swung at him." The trial court sentenced Lane to the minimum term, 45 years in prison. 730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(iii) (West 2006). This court affirmed the judgment. *People v. Lane*, No. 1-09-3274 (2012) (unpublished order under Supreme Court Rule 23).

¶ 11 Lane filed a postconviction petition in November 2012. Lane alleged that he received ineffective assistance of counsel, in part because "Defense counsel presented what he

characterized as a 'self-defense' defense without putting forth readily available evidence." Lane explained that "trial counsel was allegedly presenting theories of self-defense, and strategically did not move to suppress Mr. Lane's statement because it supported self-defense." Lane alleged that he "was severely prejudiced by the failure to request the lesser included instruction." In an affidavit attached to the petition, Lane said, "Had I known that any lesser included instructions such as involuntary manslaughter or second-degree murder could have been given, I would have sought such an instruction." The trial court dismissed the petition as frivolous. Lane now appeals.

¶ 12

ANALYSIS

¶ 13

The trial court dismissed the postconviction petition at the first stage of postconviction proceedings. See 725 ILCS 5/122-2.1(a)(2) (West 2012). The trial court should dismiss a postconviction petition at this stage only if the petition "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). When the court dismisses the petition at the first stage of postconviction proceedings, this court must accept as true all factual assertions in the postconviction petition and supporting affidavits, unless the record on appeal disproves the assertions. *People v. Towns*, 182 Ill. 2d 491, 503 (1998); *People v. Brown*, 236 Ill. 2d 175, 189 (2010). When a postconviction defendant asserts a claim of ineffective assistance of counsel, the appellate court must determine whether "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 14 The State argues that the trial court correctly dismissed the petition, because Lane did not assert, in the main body of his postconviction petition, that his counsel failed to inform him of the possibility of requesting an instruction on second degree murder, and that he would have requested such an instruction had he known about the possibility. The State points out that Lane made the crucial assertions only in his affidavit, which he attached to the petition. The State cites no case in which the appellate court affirmed the dismissal of a postconviction petition because crucial factual assertions appeared only in the affidavits appended to the petition, and not in the main body of the petition. In one case the State cites, the court expressly noted that the postconviction petition considered together with the supporting affidavit did not make sufficient factual assertions to state the gist of a claim for a deprivation of a constitutional right. *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 22. The appellate court in other cases has reversed the dismissal of postconviction petitions on the basis of facts found only in the affidavits supporting the postconviction petitions. See *People v. Barkes*, 399 Ill. App. 3d 980, 982, 988 (2010); *People v. Nix*, 150 Ill. App. 3d 48, 49, 51 (1986). Like the *Barkes* court and the *Nix* court, we review the postconviction petition and the supporting affidavits together to determine whether Lane has stated the gist of a constitutional claim.

¶ 15 The record on appeal confirms Lane's assertions in his petition and his supporting affidavit that defense counsel did not move to suppress the videorecorded statement Lane made to police. The record also confirms that the statements Lane made to police could arguably present the basis for contending that Lane acted in self-defense, or that when he shot Young, he unreasonably believed that he needed to shoot in self-defense. The record

does not contradict Lane's assertions that his attorney failed to explain the possibility of seeking an instruction on second degree murder.

¶ 16 We find that, arguably, defense counsel provided unreasonable assistance when he failed to inform Lane that he could request an instruction on second degree murder, and when counsel failed to introduce available evidence that could support an instruction on second degree murder. See *People v. DuPree*, 397 Ill. App. 3d 719, 736-37 (2010).

¶ 17 Next, we must determine whether defense counsel's conduct might, arguably, have prejudiced Lane. *Hodges*, 234 Ill. 2d at 17. The prosecution produced convincing evidence that, after an argument, Lane shot Young. Because defense counsel did not tell Lane about the possibility of seeking a second degree murder instruction, Lane did not testify or present any other evidence of facts like those he asserted in his statement to police. The postconviction petition and the record on appeal indicate that defense counsel chose not to move to suppress the statement, and the prosecution chose not to present the statement at trial, because the statement could support a finding that Lane acted in self-defense, or in an unreasonable belief that he needed to shoot Young in self-defense. If Lane testified at trial to facts like the facts asserted in the statement to police, defense counsel could have used that testimony and other evidence in the record to argue for a second degree murder instruction. Most notably, police found a cell phone near Young's body. Police have, in other instances, notoriously mistaken cell phones or pagers for deadly weapons. See Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, N.Y. Times, Feb. 5, 1999, <http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.htm> (last accessed Nov. 7, 2014).

¶ 18 We find that if Lane's attorney had met his duty to advise Lane about the possibility of requesting an instruction on second degree murder, Lane could arguably have presented enough evidence to justify the instruction and persuade the jury to find him guilty of second degree murder. Accordingly, we find that Lane has made a sufficient showing of prejudice to warrant the appointment of counsel to assist Lane with his postconviction petition and for advancing the petition to the second stage of postconviction proceedings. See *DuPree*, 397 Ill. App. 3d at 736-37.

¶ 19 CONCLUSION

¶ 20 Lane's uncontradicted allegation that counsel failed to inform him about the possibility of requesting an instruction on second degree murder, together with a record that supports the conclusion that defense counsel could have adduced evidence to support the instruction, sufficed to state the gist of a claim that Lane did not receive effective assistance of counsel. Accordingly, we reverse the dismissal of Lane's postconviction petition and remand for further postconviction proceedings.

¶ 21 Reversed and remanded.