

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).

2016 IL App (3d) 140677-U

Order filed August 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0677
TOBIAS L. SEIBER,)	Circuit No. 10-CF-1242
Defendant-Appellant.)	Honorable David A. Brown, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition was frivolous and patently without merit.

¶ 2 Defendant, Tobias L. Seiber, appeals from the first-stage summary dismissal of his postconviction petition, arguing his claim that counsel was ineffective was neither frivolous nor patently without merit. We affirm

¶ 3 **FACTS**

¶ 4 On January 4, 2011, the State charged defendant by indictment with aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2010)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The aggravated battery indictment alleged that defendant shot Taurean Gregory with a handgun on December 10, 2010.

¶ 5 At trial, Gregory testified that in the early morning hours of December 10, 2010, he had been drinking and smoking cannabis with his friend, Juan Nesbit. Gregory had known Nesbit for six or seven years. Nesbit decided to leave to talk to a woman, and Gregory went with. Nesbit drove a green Dodge Stratus to the area of Russell and Frink Streets, parking westbound on Russell Street, just in front of an alley. Nesbit left the car while Gregory remained in the car and began playing on his iPad. Sometime later, defendant knocked on the window of the car and told Gregory that he wanted to talk. Gregory testified that he and defendant were friends and had known each other for 11 years. He did not expect to see defendant at that location.

¶ 6 Gregory got out of the car and walked into the alley with defendant. Defendant was a couple steps in front of Gregory on his right side. Gregory was not paying attention to defendant, instead focusing on maintaining his balance on the icy pavement. When Gregory and defendant had proceeded approximately 15 to 20 feet into the alley, Gregory heard a gunshot. Gregory testified: “everything got light, and everything got dark, and I took off running.” He testified that he ran because he thought someone was shooting at them. Gregory believed that the initial gunshot struck him in the chin.

¶ 7 Upon running out of the alley, Gregory ran westbound on Russell Street. He testified that while he was running, he heard gunshots and saw bullets striking in front of him. Gregory

testified that he was shot in the lower back. Describing the sensation, Gregory testified: “[it] kind of took me off my feet, felt like I was flying for a second.”

¶ 8 The impact threw Gregory hands first onto the pavement. He was unable to stand up, but he did roll over onto his back. After doing so, he saw defendant approaching. Gregory saw that defendant was holding a revolver. Gregory reached up and grabbed defendant around the midsection, but defendant struck Gregory in the head with the revolver. Gregory described the ensuing struggle:

“We continue wrestling. And I actually got my hand on the gun and he screamed for help. And I’m trying to look around and see who else is out here, but nobody else came, and just kept saying ‘let me go, let me go.’ And I got no—once I got my hand on the gun, I seen what kind of gun it was. I don’t know how many shots were fired. I was just hoping all the bullets were gone and I let go.”

Defendant eventually disengaged from Gregory and began running back toward the alley.

¶ 9 Gregory spoke to an officer on the scene, telling him that he did not know who had shot him. At trial, Gregory testified that the reason he did not initially name defendant was that he feared retaliation against his grandmother or sister. Once he was in the hospital, and he was notified that his grandmother and sister were on their way, Gregory relayed the full version of events to the police. In recounting his injuries, Gregory referred to the wound on his chin as a “graze wound.” The bullet that struck his lower back did not exit. Instead, the bullet struck his pelvis and shattered. Doctors were unable to remove the remains of the bullet.

¶ 10 On cross-examination, defense counsel questioned Gregory concerning differences between his trial testimony and prior recitations of his story. At trial, Gregory explained that none of his three prior criminal convictions—felony obstruction of justice, felony theft, and misdemeanor obstruction of justice—involved guns or were at all related to the present incident. He agreed that he never actually saw defendant shoot him.

¶ 11 Dustin Barnett of the Peoria police department testified that he responded to a call of shots fired in the early morning hours of December 10, 2010. The call provided that a possible suspect was a young black male wearing a black jacket and riding in a white station wagon. When Barnett located the suspect vehicle, he observed that the driver of the vehicle had refused to stop for other officers. Barnett joined in the pursuit of the vehicle.

¶ 12 When the vehicle eventually came to a stop, the driver exited the vehicle and ran eastbound. The passenger, a black male wearing a black jacket, ran southbound through an alley. Barnett pursued the passenger on foot, but was unable to reach him.

¶ 13 Jacob Beck of the Peoria police department testified that he also responded to the shots fired call on the date in question. Upon learning that the occupants of the white station wagon were fleeing on foot, Beck exited his squad car and proceeded on foot. Eventually, the black male wearing a black jacket ran at him. The suspect slipped on some ice and Beck took him into custody. Beck identified the man as defendant. After defendant was transported to the police station, Beck removed defendant's jacket before placing him in an interview room. Beck identified People's exhibit No. 2 as a photograph of the black jacket defendant was wearing. The jacket is a zip-up, with front pockets and a hood similar to those on a hooded sweatshirt.

¶ 14 Officer Conor Wowra testified that he investigated the scene of the shooting on the night in question. He observed a trail of blood leading to the sidewalk in front of a brick apartment

building on Russell Street, near the corner of Russell and Frink Streets. There was a significantly larger puddle of blood on the sidewalk itself. Wowra identified photographs of the blood.

¶ 15 Officer Scott Bowers testified that he retrieved the black jacket from the police station. The jacket appeared to have blood on its front and back. Bowers took the jacket to the crime scene unit, where he confirmed that blood was on the jacket. He would later take the jacket to the Illinois State Police crime lab.

¶ 16 Bowers also examined the white station wagon after it was transported to the crime scene unit. The vehicle contained a number of apparent blood stains, including some on the front and rear passenger doors. There was also blood on the front driver's side quarter panel. Inside the vehicle, blood was found on the armrest of the front passenger door. Bowers took blood swabs from the stains on the front driver's side quarter panel and the passenger-side armrest. He eventually took those swabs to the Illinois State Police crime lab as well. Bowers also found three latent fingerprints on the vehicle: one on the rear passenger door, one on the front passenger door, and one on the driver's door. Bowers found that the fingerprint on the front passenger door matched that of defendant.

¶ 17 Debra Minton testified that she was employed by the Illinois State Police crime lab as a forensic scientist. She tested swabs of the blood found on the front of the black jacket, as well as the blood found on the passenger's armrest of the white station wagon. The DNA on both swabs matched that of Gregory.

¶ 18 After the parties stipulated that defendant had been previously convicted of a felony, the State rested.

¶ 19 The defense called Detective Matthew Ray as its only witness. Ray testified that he spoke to Gregory at the hospital twice on December 10, 2010. On the first of those occasions, Gregory did not mention Nesbit, only telling Ray that he was walking in the alley when defendant called for him. When Ray spoke to Gregory later that day, however, Gregory stated that he had been in a car with Nesbit. Each time Ray spoke with Gregory, Gregory identified defendant as his shooter.

¶ 20 Ray spoke to Gregory again on December 16, 2010, this time at the police station. That interview was video recorded, and a portion of the video was played in open court. In that interview, Gregory told Ray that he did not know why Nesbit drove to Russell Street because he (Gregory) was distracted by his iPad. Aside from that detail, Gregory's recounting of the events was nearly identical to his trial testimony.

¶ 21 In closing arguments, the prosecutor asserted that Nesbit had been complicit in Gregory's shooting, pointing out that after driving Gregory to that location, Nesbit disappeared. The prosecutor called this a "common sense inference[]." In her closing argument, defense counsel argued that there was no evidence to indicate that Nesbit had set Gregory up to be shot. The jury found defendant guilty on all counts.

¶ 22 At sentencing, the State again argued that Nesbit had been complicit in the shooting. The trial court sentenced defendant to a term of 30 years' imprisonment for aggravated battery with a firearm, with the other guilty findings merging. In imposing the sentence, the court stated: "[I]n that alleyway that night, this was an execution. This was an execution. And you just missed the target. From close range. If I could give you more, I would give you more."

¶ 23 Defendant subsequently filed a motion to reconsider the sentence. The trial court denied the motion, reiterating that “[t]his sentence was almost exclusively because of the act[,]” which the court referred to as “a planned execution.”

¶ 24 On direct appeal, defendant challenged only the imposition of a \$200 DNA analysis fee. *People v. Seiber*, No. 3-11-0668 (2013) (unpublished order under Supreme Court Rule 23). In a summary order, this court granted the requested relief. *Id.*

¶ 25 On June 16, 2014, defendant filed a *pro se* postconviction petition. In the petition, defendant claimed, *inter alia*, that trial counsel had been ineffective for failing to call Nesbit as a witness. Defendant alleged that calling Nesbit as a witness “likely would have affected the outcome of the case.” Defendant attached to the petition an affidavit from Nesbit. In the affidavit, Nesbit averred: “that on the day in question bing [*sic*] the ninth or tenth of December, 2010, I was not around or with Taurean Gregory when he was shot, I have no knowledge of what took place, nor did I see anything or had anything to do with the incident.”

¶ 26 The trial court summarily dismissed defendant’s petition at the first stage of postconviction proceedings, finding it frivolous and patently without merit. In its written order, the court found that, even taking Nesbit’s allegations as true, those allegations did not contradict any trial testimony. Nesbit only swore that he was not present during the shooting, which aligned with Gregory’s testimony. The court concluded that any finding of prejudice would be affirmatively rebutted by the record.

¶ 27 ANALYSIS

¶ 28 On appeal, defendant argues that his petition was neither frivolous nor patently without merit and should, therefore, be advanced to the second stage of postconviction proceedings. Specifically, defendant argues that Nesbit’s affidavit indicates that counsel was ineffective for

failing to call Nesbit as a witness because his testimony would have refuted the State's theory that Nesbit was involved in the plot to shoot Gregory. Relatedly, defendant argues that the trial court relied on that theory at sentencing, and that he would have received a lesser sentence if Nesbit's testimony had been presented.

¶ 29 The Post-Conviction Hearing Act (Act) provides a three-stage framework under which imprisoned defendants may raise claims of substantial denial of their constitutional rights. See 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 10. "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if [(1)] it is arguable that counsel's performance fell below an objective standard of reasonableness and [(2)] it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 30 In the present case, defendant's contention that counsel was ineffective for failing to call Nesbit as a witness was frivolous and patently without merit in that any claim of prejudice had no arguable basis in law or fact. The evidence that defendant shot Gregory is simply overwhelming. In particular, Gregory gave a vivid first-hand account of the events leading up to and during the shooting. The account Gregory provided at trial tracked nearly perfectly with that given to Ray just six days after the shooting. Though Gregory did not mention Nesbit in his initial interview with Ray, he told the detective on each occasion that they spoke that it was defendant who shot him.

¶ 31 Gregory's testimony was corroborated by physical evidence in the case. Gregory testified that after being shot, he briefly wrestled with defendant. Indeed, defendant was taken into custody later that night wearing a jacket that had Gregory's blood on it. Barnett testified

that he saw a man wearing that jacket flee from the passenger side of a white station wagon. DNA found on the passenger armrest of that vehicle matched Gregory's.

¶ 32 Most importantly, the affidavit from Nesbit does almost nothing to contradict the overwhelming evidence against defendant. As the trial court aptly pointed out, Nesbit's assertion that he "was not around or with Taurean Gregory when he was shot" actually comports with Gregory's testimony that Nesbit left the car and was never seen again. Even if we were to construe Nesbit's affidavit to mean that he had no contact *at all* with Gregory on the night of December 9 or the morning of December 10, 2010, such testimony would hardly impact the State's case. While defendant is correct that such testimony would run counter to the State's theory that Nesbit played a role in setting up the shooting, he overstates the importance of that theory. In order to sustain a conviction for aggravated battery with a firearm, the State needed only to prove that defendant intentionally caused Gregory injury with a firearm. 720 ILCS 5/12-4.2(a)(1) (West 2010). Whether or not Nesbit was complicit in defendant's actions simply had no bearing on that conviction. Moreover, given that defendant was arrested while covered in Gregory's blood, any impact on Gregory's credibility would be negligible.

¶ 33 It should be noted that on appeal, defendant argues that the failure to call Nesbit as a witness at trial also impacted the sentence he received. In support, he contends that the trial court imposed a maximum sentence in "reliance on the State's theory that Nesbit set up Gregory." The argument that the impact of trial counsel's ineffectiveness extended to sentencing does not appear in defendant's petition, and is therefore waived for this appeal. *People v. Davis*, 156 Ill. 2d 149, 158 (1993) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). Even were it not waived, this argument, too, has no arguable basis in law or fact. The trial court made absolutely no reference to Nesbit or his

possible involvement in the offense, either at sentencing or upon the denial of defendant's motion to reconsider. Nor does the court's assertion that defendant attempted to carry out a "planned execution" in any way implicate Nesbit.

¶ 34 In summary, the State presented overwhelming evidence that defendant shot Taurean Gregory. In contrast, Nesbit's purported testimony, even when liberally construed, would have very little impact on the State's case. Accordingly, there is no arguable basis in law or fact for the assertion that defendant was prejudiced by counsel's failure to call Nesbit as a witness.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 37 Affirmed.