2017 IL App (1st) 143270-U

No. 1-14-3270

March 14, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 19099
	)	
KENNETH STARR,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of postconviction petition was proper; defendant failed to present the gist of a meritorious claim that trial counsel was ineffective for not requesting a fitness hearing.

¶ 2 Following a bench trial, Kenneth Starr, the defendant, was convicted of first degree murder and sentenced to 45 years' imprisonment. We affirmed on direct appeal. *People v. Starr*, No. 1-11-2266 (2013)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his 2014 postconviction petition, contending that it stated the gist

of a meritorious claim that trial counsel was ineffective for not requesting a fitness hearing. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with first degree murder for allegedly killing Jacint Calderazzo by striking him with a vehicle on or about September 7, 2008, during the commission of aggravated vehicular hijacking. The aggravated vehicular hijacking charge alleged that defendant took a motor vehicle by force or threat of force from the person or presence of Calderazzo, who was at least 60 years old.

¶ 4 At a July 2009 hearing, the State successfully sought a continuance for scientific testing of evidence and to evaluate whether to seek the death penalty. Defendant then asked to represent himself "if I can't be represented fairly" but admitted upon the court's questions that he did not consider himself able to represent himself. The court admonished defendant at length regarding the difficulties of self-representation and the risks of taking legal advice from non-attorney jail inmates, and continued the case to August 2009. The court ended by suggesting that defendant "think *** through" his request to represent himself; defendant replied "I [have] been thinking through all these extensions. Now I have another one to think about."

¶ 5 At the next hearing in August 2009, the State sought a further continuance and the court expressed at length its displeasure with the delay but granted the continuance. Defendant then apologized, without explanation. The court replied "He was frustrated, but so am I." Defense counsel told the court that "they are working on the dosage of his medication." The court asked if defendant had undergone a behavioral clinical examination (BCX); counsel replied that he had not. The court noted the frustration of being in jail and the court's own frustration with the State's continuances. "To the extent that you have apologized, Mr. Starr, it was not necessary but it will be accepted. If you think about the things I said that day, you know, they were designed to

try to, *** I think you should give them a lot of thought because ultimately I think they were in your best interest."

¶ 6 Later in August 2009, trial counsel filed a motion that defendant be transferred to the jail's medical wing due to his "history of psychiatric problems" including psychiatric treatment at various specified hospitals and clinics. The motion alleged that defendant was being treated with various medications; the antidepressants Prozac and Doxepin, Risperdal for bipolar disorder, and a sleeping aid. The motion argued that defendant "needs treatment without which he could possibl[y] become unfit and uncooperative with his attorneys." On the defense motion, the court ordered that jail medical personnel evaluate defendant to see if "programs to assist with [his] mental health would be appropriate." The court noted that if the jail evaluation "accomplishes what you are trying to achieve, that will be the end of it. If it doesn't, you can raise the issue again." The court also granted a defense request to subpoena defendant's mental health records.

¶ 7 The issue of defendant's mental health was not raised again, and the case came to trial in 2011. Twice before trial, in January 2011 and at the commencement of trial in April 2011, the court admonished defendant on his right to a jury trial and ascertained from questioning him that he was voluntarily waiving that right.

¶ 8 The evidence was that defendant fatally struck and ran over Calderazzo with Calderazzo's own car, after taking the car when Calderazzo briefly exited it in a store parking lot. Calderazzo's car, body, and clothing bore marks and injuries showing that his car was the cause of his death. An eyewitness saw the incident and testified that Calderazzo yelled and reached into the car before it dragged him backwards. Another eyewitness heard squealing tires and a loud "bang," saw a car driven by defendant leaving at a high rate of speed, and noticed the

injured Calderazzo in the parking lot. Defendant used Calderazzo's credit cards to make multiple purchases of gasoline that he resold for cash, and Calderazzo's credit and insurance cards were in defendant's possession when he was arrested. Calderazzo kept golf clubs in his car but they were not there when the car was recovered. Defendant's girlfriend testified that, on the day after the incident, defendant expressed an intent to pawn some golf clubs, though he did not own any. She also testified that he told her on the day of the incident that he had "jacked" someone – which she interpreted as punching someone – and that he told her after his arrest that he took an unoccupied car from the store parking lot and heard a "thump" as he drove away.

¶ 9 Following admonishments on his right to testify and not testify, and the denial of his motion for a directed verdict, defendant testified against counsel's advice. He admitted to taking an unoccupied car from the store parking lot, including that he felt a "thud" as he backed up at a high speed before leaving the scene. However, he denied ever seeing Calderazzo and attributed his high speed in reversing to a sensitive accelerator pedal. He admitted to taking the credit cards but not the golf clubs. He also admitted to telling a friend on the day of the incident that he had "jacked" someone. He explained that this referred to punching someone, but conceded it could also refer to carjacking or theft.

¶ 10 Following closing arguments, the court convicted defendant of first degree murder and aggravated vehicular hijacking. The pre-sentencing investigation report stated in relevant part that defendant was diagnosed "as being bi-polar" in 1991 and was receiving Prozac, Risperdal, and the anti-psychotic Thorazine in jail. At the sentencing hearing, defense counsel argued in relevant part that defendant "has some psychiatric issues" being treated with medication. Counsel added that "I'm not saying he's not fit for trial or anything like that." The court sentenced defendant to concurrent prison terms of 45 and 30 years.

¶ 11 Defendant filed a *pro se* petition for relief from judgment in April 2012, while his direct appeal was pending, including a claim that the court erred in "not taking into account [his] bipolar manic depression and chemical makeup during the commission of the crime." The court dismissed the petition *sua sponte* in June 2012, finding that defendant did not present any claim entitling him to relief and that all the claims were based on the record. Defendant appealed, but the appeal was dismissed upon defendant's motion. *People v. Starr*, No. 1-12-2187 (2013).

¶ 12 On direct appeal, defendant contended that there was insufficient evidence to convict him, the court relied upon facts not in evidence (its interpretation of defendant's word "jacked") to convict him, his sentence was excessive, and the aggravated vehicular hijacking conviction was redundant. *Starr*, No. 1-11-2266, ¶¶ 2, 28. Noting that aggravated vehicular hijacking was the predicate felony for first degree murder, we corrected the mittimus to vacate the aggravated vehicular hijacking conviction and to properly reflect his presentencing detention credit. *Id.*, ¶ 40. We affirmed the conviction and sentence for first degree murder. *Id.*, ¶¶ 22-30, 36-38.

¶ 13 Defendant filed his *pro se* postconviction petition in June 2014, claiming in relevant part that trial counsel had been ineffective for not requesting a fitness hearing and that the court erred in not ordering a fitness hearing *sua sponte*. Defendant noted counsel's request for a mental health evaluation of defendant in prison, and his argument of mental health as a mitigating factor in sentencing, as evidence of a *bona fide* doubt of his fitness. Defendant alleged "upon information and belief" that he had been prescribed certain psychotropic medications while in jail, and alleged that he tried unsuccessfully to obtain his jail medical records. Attached to the petition was a copy of a freedom-of-information request to the Cook County Jail for defendant's "medical and mental health records on file from October 2008 thr[ough] July 2011" including medication records and any evaluations or testing performed in August 2009. In his affidavit,

defendant averred that in jail he was prescribed Klonopin, Doxepin, Prozac, and Risperdal, and that he "does not recall most of what happened during my trial proceedings due to the prescribed medication." He averred that he would not have waived a jury trial or chosen to testify except that "my mind was foggy due to the prescribed medication I was taking." He also averred that, because counsel had advised him not to testify, counsel had not prepared him to testify.

¶ 14 The trial court – with the same judge presiding as at trial – summarily dismissed the petition on September 5, 2014. The court found that defendant's claims were "bald conclusory allegations" based on the record and thus forfeited for not being raised on direct appeal. As to the instant claim, the court found that defendant failed to present evidence that he was taking psychotropic medication. The court also found that he "was fit to stand trial and was present in court on many dates for observation by this Court," his "fitness was not a concern to any of the parties, including [his] own counsel who acknowledged on several occasions his fitness," and he failed to show "that a bona fide doubt ever existed at trial that he was unfit." The court noted that, assuming *arguendo* defendant was taking psychotropic medication, it would not create a presumption of unfitness.

¶ 15 On appeal, defendant contends that his postconviction petition should not have been summarily dismissed because it stated the gist of a meritorious claim that trial counsel was ineffective for not requesting a fitness hearing.

¶ 16 A postconviction petition may be summarily dismissed within 90 days of filing if the court finds it frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition should not be summarily dismissed unless it has no arguable basis in law or fact because it relies upon an indisputably meritless legal theory contradicted by the record, or upon a fanciful factual allegation. *People v. Allen*, 2015 IL 113135, ¶ 25. Well-pled factual allegations in a

petition and supporting evidence must be taken as true unless positively rebutted by the record. *People v. Sanders,* 2016 IL 118123, ¶ 48. Whether to dismiss a postconviction petition is a legal question, and we make our own independent assessment of the allegations of the petition and its supporting documents. *Id.*, ¶ 31. Our review of a summary dismissal order is *de novo*. *Id.*; *Allen*, ¶ 19.

¶ 17 Ineffective assistance of counsel is generally shown when counsel's performance was objectively unreasonable and prejudicial to the defendant. *People v. Tate*, 2012 IL 112214, ¶ 19. A petition alleging ineffective assistance may not be summarily dismissed if (a) it is arguable that counsel's performance was objectively unreasonable and (b) it is arguable that the defendant was prejudiced. *Id*. A defendant is not prejudiced by counsel's failure to raise a non-meritorious claim. *People v. House*, 2015 IL App (1st) 110580, ¶ 76. Counsel is not incompetent for not "raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Id*., citing *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 18 A defendant is unfit to stand trial if, due to his or her mental condition, he or she is unable to understand the nature and purpose of the proceedings against him or her to assist in the defense. 725 ILCS 5/104-10 (West 2014). A defendant is presumed fit to stand trial and is not presumed unfit merely because he or she is receiving psychotropic medication. 725 ILCS 5/104-10, 104-21(a) (West 2014); *People v. Brown*, 236 Ill. 2d 175, 186 (2010). While the issue of a defendant's fitness for trial may be raised at any time by either party or the trial court, a fitness hearing is required only upon a *bona fide* doubt of a defendant's fitness. 725 ILCS 5/104-11(a) (West 2014); *Brown* at 186. The factors considered in assessing whether a *bona fide* doubt of fitness was raised include any irrational behavior by the defendant, his or her demeanor at trial,

any prior medical opinion on his or her competence, and any representations by defense counsel on his or her competence. *Id.* at 186-87.

¶ 19 Here, the issue raised by defendant's petition was not whether he was mentally ill or receiving medication before or during trial but whether he was fit to stand trial; that is, whether he was able to understand the proceedings against him and assist in his defense. See 725 ILCS 5/104-10 (West 2014). Thus, defendant's claim falls under *Brown*.

¶ 20 Regarding the *Brown* factor of representations by trial counsel regarding a defendant's competence, trial counsel twice addressed the issue of defendant's mental health and neither time expressed a *bona fide* doubt of his fitness. In the motion seeking a mental health evaluation for defendant while in jail, counsel mentioned a concern that defendant *could become* unfit and uncooperative rather than that he was unfit. At sentencing, counsel argued defendant's mental health issues in mitigation while denying any intention to argue his unfitness. Our review of the record reveals that counsel was aware of defendant's past mental health treatment and present medication but did not seek a BCX or a fitness hearing, and therefore counsel did not have a *bona fide* doubt of defendant's fitness meriting a request for a fitness hearing. This is in stark contrast to *Brown*, where "[d]efense counsel's statements at sentencing about petitioner's condition are called into question by petitioner's allegations and supporting affidavits asserting counsel lied to the court when he stated he did not know petitioner was taking psychotropic medication." *Brown* at 189.

¶ 21 Regarding the *Brown* factor of any irrational behavior by the defendant, defendant repeatedly notes "an outburst in the courtroom" in August 2009. However, the incident taken in context of the July and August 2009 hearings does not bear the weight defendant places on it. As the circumstances and the trial court's remarks make clear, defendant expressed understandable

frustration at delays in the case and briefly considered representing himself (despite admitting that he lacked the requisite skills) before reconsidering and apologizing to the court. The record taken as a whole refutes the allegation that the "outburst" arose from possible unfitness.

¶ 22 Regarding the *Brown* factor of the defendant's courtroom demeanor, the record positively refutes defendant's averment that his medication rendered his mind "foggy" at trial. In his trial testimony, he answered questions (including many questions not answerable with a mere "yes" or "no") responsively and coherently. Moreover, his April 2011 trial testimony demonstrated his clear recollection of the events of September 2008. As defendant has averred in his petition that counsel did not prepare him to testify – an allegation not positively refuted by the record insofar as counsel told the court that he advised defendant to not testify – defendant himself has precluded any possibility that his coherent testimony was the result of "coaching" rather than his own clear mind. This case is distinguishable from *Brown*, where the defendant did not testify and his "waivers of his right to a jury trial and his right to testify were essentially brief exchanges with the trial court where petitioner asserted he understood the trial court's admonitions," so that our supreme court did not find a positive rebuttal of the petition. *Brown* at 190-91.

¶ 23 As to the *Brown* factor of any prior medical opinion on the defendant's competence, the record here, from the trial court proceedings through the instant petition, does not include any such opinion. There are references to defendant's psychotropic medications and other psychiatric treatment, and to a diagnosis of bipolar disorder, but no allegation or documentation that any psychologist or psychiatrist ever offered an opinion on defendant's fitness. Again, *Brown* is distinguishable from this case. The *Brown* defendant's evidence did not document mere psychotropic medication or mental illness but suicidal ideations and attempts directly related to his offense. *Brown* at 180-81. The *Brown* "petitioner alleged much more than ingestion of

psychotropic medication. He alleged additional facts on his history of suicide attempts, the 'suicide by police' nature of his offense, and his inability to understand the trial proceedings." *Brown* at 187. Only the latter is alleged here, and as stated, the record belies defendant's allegation of inability.

¶ 24 Lastly, it is not arguable that defendant was prejudiced by counsel's decision not to seek a fitness hearing when, in dismissing the petition, the trial court found that it had no *bona fide* doubt of defendant's fitness during the trial proceedings. The court had ample opportunity to observe defendant, including defendant's trial testimony where he answered questions logically and coherently. There is no probability that the outcome of the original proceedings would have been changed by trial counsel making a motion or request that the court would have denied. Defendant's ineffective assistance claim is thus indisputably meritless as a matter of law.

¶ 25 For the foregoing reasons, the summary dismissal of defendant's petition was proper. Accordingly, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.