

THIRD DIVISION
February 8, 2017

No. 1-14-3569

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 19567
)	
KEVIN WILLIAMS,)	Honorable
)	Michael McHale,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant, who was convicted of being an armed habitual criminal, did not present in his postconviction petition an arguable claim that he was prejudiced by trial counsel's failing to present additional testimony from a witness, given the testimony of two State witnesses who saw defendant in possession of a weapon.

¶ 2 Defendant Kevin Williams appeals the summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends his petition presented an arguable claim of the ineffective assistance of his trial counsel for failing to present additional testimony from a defense witness about the removal of weapons from the apartment where he was arrested. He asserts that testimony would have contradicted a police officer's account that a gun was recovered from a stairwell where defendant had dropped it while being pursued.

¶ 3 Defendant was convicted, among other offenses, of being an armed habitual criminal pursuant to section 24-1.7(a) of the Criminal Code of 1961 (720 ILCS 5/24-1.7(a) (West 2010)) for possessing a firearm having been previously convicted of two qualifying offenses. Defendant and co-defendant Sterling Alexander were tried in separate bench trials, and Alexander was acquitted of all charges.

¶ 4 Before those trials, defendant and Alexander filed separate motions to quash their arrests and suppress evidence, and those motions were heard together and denied by the trial court. The evidence from the suppression hearing was adopted at defendant's trial and included the testimony of Sergeant Demond Parker of the Cook County Sheriff's Department and Chicago police officer Paul Zogg. Parker testified that on October 4, 2010, he and another off-duty police officer, Officer Amador, were in a vehicle working for a security company called Illinois Homeland Security for Marquette Park. Parker saw defendant, who wore a red and black checked hooded shirt, standing with several other individuals at the corner of 71st Street and Artesian Avenue in Chicago. Two or three individuals were shouting gang slogans and flashing gang signs.

¶ 5 The officers stopped their vehicle on the street near the group, and several people in the group started to walk away. Officer Amador got out of the car and addressed defendant, who stopped and appeared to hold something in his pocket. Defendant kept his right hand in his pocket, and Officer Amador yelled “gun.”

¶ 6 Defendant fled and was pursued by Officer Amador on foot and Sergeant Parker in the vehicle. Defendant held his side as he was being chased. Sergeant Parker saw the handle of a gun protruding from defendant’s pocket. Defendant removed the weapon from his pocket before jumping over a fence.

¶ 7 Sergeant Parker lost sight of defendant; however, defendant’s hooded shirt was recovered. After Sergeant Parker sent out a radio message to Chicago police with a description of the offender, he again saw defendant wearing a white shirt and running with a gun in his hand. Chicago police joined the foot chase, and Sergeant Parker lost sight of defendant when defendant ran into a building. He next saw defendant after he had been taken into custody.

¶ 8 Officer Zogg testified that at about 8:30 p.m., he received a radio message that a man with a gun who met the description in Sergeant Parker’s radio report was being chased on foot. Officer Zogg saw defendant from about 50 yards away holding a “standard semiautomatic” handgun in his right hand.

¶ 9 Defendant entered the exterior door of a building at 7115 South Campbell Avenue, and Officer Zogg lost sight of defendant briefly. Officer Zogg then saw defendant run up the building’s interior stairs to the second floor. Officer Zogg testified that defendant “dropped the gun in the front stairwell as he fled up the stairs into the second floor apartment.” When asked

about his statement in a police report that defendant dropped the gun on the “porch stairs,” Officer Zogg testified that he was referring to the building’s interior stairs.

¶ 10 Defendant entered a second-floor apartment and was detained by Officer Zogg and another officer in a rear porch of the apartment. Alexander lived in the apartment. A 9 millimeter semiautomatic weapon was recovered from the stairwell by Chicago police officer Jose Rojas. A .22-caliber weapon was recovered from under a mattress in a bedroom about 10 feet away from the rear porch. Police also recovered from the interior hallway of the building a magazine loaded with 12 rounds of .45-caliber ammunition. Defendant was arrested and placed in a squad car parked in the front of the building.

¶ 11 Officer Zogg testified that during these events, Alexander approached the building and spoke to officers outside and entered the building in disregard of their orders. In the second-floor unit, Alexander asked why officers were in his residence and was arrested when he tried to force his way past police. The State introduced certified copies of defendant’s prior convictions for burglary and delivery of a controlled substance as predicate offenses for the charge of being an armed habitual criminal.

¶ 12 The defense called Krystal Wilson and Alexander as witnesses. Wilson testified she was defendant’s cousin and a friend of Alexander. At 8 p.m. on the night in question, she, defendant, Alexander and a fourth person were standing outside Alexander’s apartment building.

¶ 13 Alexander left, and the remaining three walked to a liquor store at the corner of 71st Street and Artesian, where the officers approached them and told them to move. After defendant and the officers argued, defendant fled. Wilson went into the liquor store with her friend.

¶ 14 Three minutes later, Wilson saw defendant on the porch of Alexander's building and sat there with him. The security officers and police arrived and took defendant into custody. Wilson did not see defendant holding a weapon that night when they walked to the liquor store.

¶ 15 Alexander, who had been acquitted of all charges by the time of defendant's trial, testified that he and defendant had been friends for six years. Alexander testified that on the night in question, he arrived at his apartment building to see defendant handcuffed and seated in a security officer's car. A security officer was trying to enter the building. Wilson and her friend were standing across the street. Alexander testified that after officers arrested him, Chicago police officers arrived and kicked in the building's front door.

¶ 16 On cross-examination, Alexander acknowledged a prior conviction for burglary. Alexander was questioned after officers found a firearm in the apartment; however, Alexander denied that he told Officer Zogg at the police station that he had two handguns under his mattress, he wanted to be a security guard and three years ago, he had bought the gun that was recovered from defendant. Alexander said he was not with defendant that night prior to seeing him seated in the officer's car but said he saw defendant in the area wearing a black and red "hoodie."

¶ 17 In rebuttal, Officer Zogg testified that Alexander told him at the police station he had purchased the gun recovered from defendant at a gun shop three years ago. The officer testified that when he pursued defendant inside Alexander's building, defendant was holding a gun in his right hand and no one was sitting on the building's porch. The officer identified the building at 7115 South Campbell in a photograph.

¶ 18 After the State's examination of Officer Zogg, defense counsel indicated that he had no questions. The court then asked the following questions:

“THE COURT: Officer, did you or other police officers kick in that door at Mr. Alexander's house [?]”

OFFICER ZOGG: Yes. We had left the extended magazine. There was a magazine with 12, [,]45 rounds in there. We came back out remembering we had forgotten it out there, realized both weapons were different caliber and we kicked in the door to retrieve that.

THE COURT: So you entered that building twice?

A. That is correct.

THE COURT: The first time you entered it, how did you enter it?

A. Right through the door after the defendant. The door didn't slam shut at that point.”

¶ 19 The court asked defendant's counsel if he had any questions “based on the Court's question.” Defense counsel asked Officer Zogg if the door had locked behind him the first time they went through it, and the officer said it did. Officer Zogg stated he was “about 15 feet” from defendant when he entered the apartment and was “probably somewhere near the bottom of the stairs.”

¶ 20 The court found defendant guilty of being an armed habitual criminal, armed violence and unlawful use of a weapon by a felon. The court found the officers' testimony “clearly establish[ed]” that defendant was seen with a handgun in the area of 71st and Artesian and ran into the apartment building as police pursued him. The court further found it improbable that the

officers would have broken into Alexander's building and apartment unless they were chasing defendant after he dropped the weapon. The court noted that Wilson and Alexander were not present when the weapons were recovered and although their testimony "illuminates fully the incident that went on, [] neither one testified directly as to the time of the recovery of either the gun or the cocaine." The court further stated that the defense's "minor impeachment" of the officers' testimony "about different weapons and extended magazines and all that" did not raise a reasonable doubt as to defendant's guilt. The court sentenced defendant to seven years in prison.

¶ 21 On direct appeal, defendant asserted the trial court erred in allowing the State to impeach Alexander regarding his statements to Officer Zogg that he owned the guns that were recovered. Defendant argued that questioning was irrelevant to whether he had a gun in his possession. This court affirmed defendant's conviction, holding that any question about Alexander's ownership of the weapons that fell outside the bounds of direct examination did not amount to plain error because Sergeant Parker and Officer Zogg both testified to seeing defendant with a weapon, which established the charged offenses. *People v. Williams*, 2014 IL App (1st) 113091-U, ¶¶ 22-24.

¶ 22 On July 31, 2014, defendant filed a *pro se* postconviction petition, asserting, *inter alia*, that Sergeant Parker and Officers Amador, Zogg and Rojas "fabricated their version of events so that they could have probable cause to enter Alexander's apartment" where the weapons were recovered. Defendant asserted that Officer Zogg lied about chasing him into the apartment building, and defendant claimed he "was already in custody by Marquette security before Chicago police even arrived on the scene." Defendant also stated in his petition that because

Alexander claimed ownership of both weapons, Alexander's affidavit represented newly discovered evidence of his actual innocence.

¶ 23 Defendant attached to his petition an affidavit of Alexander which, in part, reiterated his testimony at defendant's trial. In the affidavit, Alexander stated that on October 4, 2010, he approached the security officers at his apartment building at 7115 South Campbell while officers were trying to kick in the front door. Alexander attested that when asked what was happening, he was handcuffed and placed in a police car with defendant. Within several minutes, additional police cars "and at least ten or more officers" arrived at the scene.

¶ 24 Alexander's affidavit continued:

"Once this happened the Chicago police kicked in my downstairs door and went up to my apartment. They were in there maybe five or ten minutes searching then Officer Rojas came outside with two firearms in which he then asked me to step out of the vehicle."

¶ 25 Alexander further attested that he told the officer the firearms were his, and the officer "said he found them both in the back bedroom." Alexander attested that "the firearms they charged [defendant] with were mine and he was never chased in the apartment."

¶ 26 On October 6, 2014, the circuit court dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals.

¶ 27 The Act provides a method by which a defendant may challenge his conviction or sentence based on a substantial denial of his federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 8. "A postconviction action is

not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings.” *Tate*, 2012 IL 112214, ¶ 8.

¶ 28 At the first stage of postconviction proceedings, the circuit court independently reviews the petition and, taking the allegations as true, determines whether the petition is frivolous or is patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); 725 ILCS 122-2.1(a)(2) (West 2012). A petition may be summarily dismissed on that basis only if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an “indisputably meritless legal theory or a fanciful factual allegation.” *Id.* at 16.

¶ 29 To establish a claim of the ineffectiveness of counsel, a defendant must show that his attorney’s representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). When presenting the claim of the ineffective assistance of trial counsel in a postconviction petition, the petition cannot be summarily dismissed if a defendant can demonstrate that it is both: (1) arguable that counsel’s performance fell below an objective standard of reasonableness; and (2) arguable that the defendant was prejudiced as a result of counsel’s deficient performance, *i.e.*, arguable that the result of the proceeding would have been different had counsel not made the claimed error. *Id.* at 17; see also *Tate*, 2012 IL 112214, ¶¶ 19-20. The summary dismissal of a postconviction petition is reviewed *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 30 On appeal, defendant contends that his petition presented an arguable basis for a claim that his counsel was ineffective in failing to present additional testimony from Alexander.

Defendant points to Alexander's statement in his affidavit that he saw Officer Rojas remove two guns from the apartment at 7115 South Campbell at the same time. Defendant also emphasizes the trial court's remark in finding him guilty that Alexander was not present when the weapons were recovered and did not "testif[y] directly as to the time of the recovery" of the weapon. He contends Alexander's now-proffered testimony on that point would have established that the weapons were recovered after the officers' forced entry into the house and would have contradicted Officer Zogg's testimony that defendant dropped a weapon on the stairs while being chased into Alexander's apartment.

¶ 31 The State responds that defendant's contention of counsel's ineffectiveness was not set out in defendant's petition and asserts, citing *People v. Jones*, 213 Ill. 2d 498, 505 (2004), that any claim that was not raised in a postconviction petition cannot be argued for the first time on appeal. As to the merits of defendant's claim, the State contends that defense counsel's decision not to question Alexander about where and when the weapons were recovered was reasonable because, according to Alexander's testimony, he was not present when the officers pursued defendant into the building and did not arrive at the scene until after defendant was arrested.

¶ 32 The State further contends there was no arguable showing of prejudice for counsel's failure to present that testimony from Alexander because the trial court clearly found the officers' accounts more credible than those of the defense witnesses. The State asserts that even had Alexander's testimony been presented, the outcome of defendant's trial would not have changed in light of Sergeant Parker and Officer Zogg's accounts that they saw defendant in possession of a gun. We agree.

¶ 33 Even if defendant’s assertion on appeal had been fully set out in his postconviction petition, it is not arguable that defendant was prejudiced by the absence of that testimony. The accounts of two State witnesses that defendant was seen in possession of a gun established defendant’s guilt of being an armed habitual criminal. See 720 ILCS 5/24-1.7(a) (West 2010) (“[a] person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm after having been convicted” two or more times of any combination of enumerated offenses). Sergeant Parker testified that as he pursued defendant by car, he saw the handle of a gun protruding from defendant’s pocket and then moments later, he saw defendant running with a gun in his hand. Additionally, Officer Zogg testified that he saw defendant at a distance of about 50 yards holding a “standard semiautomatic handgun.”

¶ 34 In conclusion, defendant has not stated an arguable claim of the ineffectiveness of his trial counsel for failing to present the potential testimony set out in Alexander’s affidavit. Accordingly, the summary dismissal of defendant’s postconviction petition is affirmed.

¶ 35 Affirmed.