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FIRST DIVISION
June 29, 2017

2017 IL App (1st) 150287-U
Nos. 1-15-0287 and 1-15-1596 (cons.)

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. 01 CR 21316
)	
JAMES JOHNSON,)	Honorable
)	William H. Hooks,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court erroneously disposed of postconviction petition as successive, and petition was not frivolous or patently without merit so that it must be remanded for further postconviction proceedings.

¶ 2 Following a jury trial, defendant James Johnson was convicted of first degree murder by personal discharge of a firearm and sentenced to 75 years' imprisonment. We affirmed on direct appeal. *People v. Johnson*, No. 1-09-1324 (2012)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the circuit court's denial of leave to file a successive

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postconviction petition.¹ The parties agree that the petition at issue is effectively defendant's first postconviction petition so that leave of court was not required, and defendant contends that his petition includes an arguably meritorious claim. For the reasons stated below, we vacate the judgment and remand for further postconviction proceedings.

¶ 3 Defendant was charged with first degree murder for allegedly personally discharging a firearm on or about June 28, 2001, proximately causing the death of Jerome Hines.

¶ 4 Before trial, the State filed a motion to introduce other-crime evidence that defendant fatally shot Rufus Smith on May 17, 2001. The motion alleged that defendant killed Smith while trying to shoot Hines, and that Hines identified defendant as the shooter in the Smith killing, so that Smith's killing was relevant to showing defendant's motive, intent, and identity for the Hines killing. The trial court granted the State's motion, finding the Smith and Hines murders "so innately related" that this was a "classic case" for admitting other-crime evidence. The court noted that the jury would be instructed that the evidence was admitted for limited purposes.

¶ 5 Defendant later filed a pretrial motion *in limine* to limit the use of the other-crime evidence to showing motive. Defendant sought to bar his post-arrest statement, arguing that the prejudice from evidence that he admitted to killing Smith would outweigh any probative value because the jury could consider him a killer on the admission alone. Defendant argued that the State could make its case without admitting his statement, by having a detective testify that defendant was charged with killing Smith as he tried to shoot Hines. The court allowed the

¹ In this consolidated appeal, defendant appeals from the 2014 order denying leave to file a successive petition (1-15-0287) and the 2015 order denying reconsideration (1-15-1596). The former appeal is before us pursuant to a supervisory order directing us to accept defendant's late notice of appeal from the May 2014 order as a properly perfected appeal. *People v. Johnson*, No. 121300 (2016).

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statement into evidence, reasoning that excluding the statement would “completely defeat[] the purpose of the evidence” to show identity, motive, and intent.

¶ 6 At the 2005 trial, Hines’s girlfriend Marcia Sloan testified that she and Hines were driving together in two cars on the early morning of June 28, 2001, when they stopped at a red light. A van pulled up to the driver’s side of Hines’s car. Sloan saw defendant, who she knew as “Crunchy,” pointing a gun at Hines through the van’s open side door. Sloan pulled away, heard several gunshots, and in her rearview mirror saw defendant repeatedly shoot Hines. Sloan told police that night that “Crunchy” shot Hines but did not admit to witnessing the shooting because she feared defendant. When she learned of defendant’s arrest in August 2001, she told police, and later a grand jury, that she witnessed the shooting and identified defendant as the shooter.

¶ 7 The forensic evidence was that the nine shell casings found at the Hines scene were fired from one gun. The parties stipulated to Hines’s autopsy showing that he died of multiple gunshot wounds.

¶ 8 Michael Ramsey testified that he was leaving a store on the night of May 17, 2001, when he saw Hines. As they stood talking near Hines’s parked car, a bystander – Smith – was near Hines. Ramsey saw a hooded gunman and took cover. He heard one gunshot, a gun jamming, and the shooter attempting to un-jam the gun. Ramsey saw Hines and the shooter run from the scene in opposite directions, and saw Smith’s body on the ground.

¶ 9 Two detectives testified that Hines came to the police station a few hours after the Smith shooting seeking his car. (A single shell casing was found at the Smith scene, and Hines’s car was removed from the scene.) Based on the detectives’ conversations with Hines, including Hines viewing a photographic array that included defendant, the police were seeking defendant,

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whose nickname was known to be “Crunchy.” Another detective testified that defendant was arrested in August 2001 after fleeing and hiding from police.

¶ 10 A fourth detective testified that, in an August post-arrest interview, defendant willingly discussed the Smith killing. Defendant admitted to shooting Smith while trying to kill Hines due to an earlier dispute between defendant and Hines. The detective did not discuss the Hines killing with defendant, and defendant refused to give a statement to an assistant State’s Attorney.

¶ 11 The jury was instructed that the parties’ arguments are not evidence and that the jury should consider the other-crime evidence only for the limited purposes of defendant’s identification, intent, and motive. Following deliberations, the jury found defendant guilty of first degree murder and that he personally discharged a firearm in committing the murder. The court sentenced defendant to 75 years’ imprisonment, including a 25-year firearm enhancement.

¶ 12 Defendant did not file a timely direct appeal. In 2008, he filed a motion for leave to file a late notice of appeal, which we denied for lack of jurisdiction. *People v. Johnson*, No. 1-08-0577 (2008). He also filed a postconviction petition in 2008 claiming that trial counsel rendered ineffective assistance by not filing a notice of appeal to commence a direct appeal. With the State conceding that the petition was meritorious, the circuit court granted defendant leave to file a late notice of appeal. *Johnson*, No. 1-09-1324. Defendant contended on appeal that the (1) trial court abused its discretion when it admitted the other-crime evidence, and (2) State committed reversible error during closing arguments. Regarding the former, we found that the court did not abuse its discretion in admitting the other-crime evidence because it was admitted to show defendant’s motive to kill Hines in June because both (1) he had tried to murder Hines himself in May, and (2) Hines witnessed the Smith murder in May and had discussed it with the police. *Id.*,

¶ 33. We found that the number of witnesses used to present the other-crimes evidence was not

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excessive, and the court's limiting instruction defeated defendant's claim that the evidence was more prejudicial than probative. *Id.*, ¶¶ 34-39. As to the challenge to certain of the State's remarks in closing argument, we found them not improper because they were fair comments on the evidence and responded to defense arguments. *Id.*, ¶¶ 44-61. We also found that defendant was not prejudiced because we found no basis for concluding that the jury's verdict resulted from the remarks, and the jury was duly instructed that arguments are not evidence. *Id.*, ¶ 62.

¶ 13 Defendant filed the instant *pro se* petition in February 2014; it was not styled a successive petition nor accompanied by a motion for leave to file a successive petition. In it, defendant claimed that (1) trial counsel was ineffective for not presenting a defense, calling witnesses, or investigating, (2) appellate counsel was ineffective for not raising trial counsel's ineffectiveness on direct appeal, (3) he was deprived of a fair trial by the other-crime evidence, (4) the trial evidence was insufficient to convict him beyond a reasonable doubt, (5) the venire was not properly examined pursuant to Supreme Court Rule 431(b) (eff. July 1, 2012), (6) the trial court erred in admitting hearsay evidence regarding Hines's conversations with police, and (7) the State made improper opening and closing arguments. Defendant alleged that Xavier Anderson told him that he knew that defendant "didn't do it" because Anderson knew who the killer was and had spoken with him. Attached to the petition was Anderson's 2013 affidavit that he told defendant when they were both in jail "some time in 2002" that (1) Anderson witnessed Hines's shooting and saw that a friend he identified as Rudy was the shooter, and (2) Rudy effectively admitted the shooting to Anderson the day after the shooting. Defendant averred that Anderson expressed willingness to tell his account, and that defendant gave trial counsel Anderson's account and contact information the same day that he heard it "some time in 2002."

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¶ 14 Defendant filed a *pro se* supplemental petition in March 2014. He alleged that trial counsel was ineffective for eliciting certain testimony on cross-examination that defendant claimed was damaging to the defense. He also reiterated his claim that the other-crime evidence was erroneously admitted.

¶ 15 In May 2014, the circuit court issued an order denying defendant leave to file a successive petition. Regarding his claim of ineffectiveness by trial counsel, the court found that defendant did not show cause for not raising the issue earlier, nor did he allege which witnesses were not investigated or called. Regarding his claim of ineffectiveness by appellate counsel, the court found no prejudice; that is, defendant failed to show that the claims not raised by appellate counsel would have succeeded on direct appeal. The court found that the claims regarding other-crime evidence and closing arguments were barred by *res judicata* and forfeiture. The court found the insufficient evidence claim inappropriate for a postconviction petition because it could have been raised on direct appeal. Regarding *voir dire* under Rule 431(b), the court found that the trial court duly admonished the venire and that defendant failed to show that the jury was biased against him. The court noted that defendant did not expressly raise a claim of actual innocence but Anderson's affidavit presented the issue; however, Anderson's account was known to defendant before trial and thus was not newly-discovered evidence of actual innocence.

¶ 16 Defendant filed a motion for reconsideration, arguing that (1) the court did not properly review Anderson's affidavit, (2) his 2014 petition should not be deemed successive because his 2008 petition was filed merely to obtain a direct appeal, and (3) the court's May 2014 order did not refer to his supplemental petition. The court denied reconsideration in April 2015, finding that (1) Anderson's affidavit was not newly-discovered evidence of actual innocence because his testimony was available at trial, and (2) the court had reviewed the claims in the supplemental

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petition. In denying reconsideration, the court referred repeatedly to the 2014 petition as successive. These appeals followed and were consolidated here.

¶ 17 On appeal, defendant contends, and the State agrees, that defendant's 2014 petition is effectively his first postconviction petition and thus the court could not deny him leave to file it as a successive petition. The State also agrees that the petition should be remanded for a second stage hearing because the trial court improperly treated it as successive.

¶ 18 Section 122-1(f) of the Post-Conviction Hearing Act (Act)(725 ILCS 5/122-1(f) (West 2014)) generally provides that a defendant may file only one postconviction petition without leave of court. However, we have held that “where a defendant files an initial postconviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness, a subsequent petition is not a successive petition for purposes of section 122-1(f).” *People v. Little*, 2012 IL App (5th) 100547, ¶ 19. Thus, defendant here did not require leave of court to file the instant petition. In *People v. Wilson*, 2014 IL App (1st) 113570, the circuit court had found such a petition was successive but referred in dismissing it to both the cause-and-prejudice test for successive petitions and the frivolous-and-patently-without-merit test for initial petitions. We agreed with the analysis in *Little* but noted that a defendant's right in such cases is to be “ ‘restored to the procedural posture he would have enjoyed if he had been represented by effective counsel who had timely filed a notice of appeal.’ ” *Wilson*, ¶ 40, quoting *Little*, ¶ 21. Noting that the defendant was contending on appeal that one of his claims was arguably meritorious, the court had disposed of the petition within 90 days, and we can affirm on any basis on the record, we examined the petition as an initial petition and focused on that claim. *Wilson*, ¶¶ 29, 35, 41, 45-49. We found it to be frivolous and patently without merit, and affirmed the dismissal. *Id.*, ¶¶ 41, 49. We agree with the *Wilson* court that remanding a *Little*

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second-but-not-successive petition for further proceedings when it (1) was disposed of within 90 days and (2) is frivolous and patently without merit would leave a defendant in a better procedural posture than he or she is entitled to.

¶ 19 Under section 122-2.1 of the Act (725 ILCS 5/122-2.1(a) (West 2014)), a petition may be summarily dismissed within 90 days of filing if “the court determines the petition is frivolous or is patently without merit.” A petition may be summarily dismissed at this first stage of proceedings if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation, or it is substantially incomplete because it does not include objective or independent corroboration of its allegations. *People v. Allen*, 2015 IL 113135, ¶¶ 24-26. At this stage, documented factual allegations are accepted as true and construed liberally. *Allen*, ¶ 25-26. We review *de novo* both the summary dismissal of an initial petition and the denial of leave to file a successive petition. *Allen*, ¶ 19; *Wilson*, ¶ 31.

¶ 20 A first-stage petition claiming ineffective assistance of counsel must establish that it is arguable that (1) counsel’s performance was objectively unreasonable, and (2) the defendant was prejudiced by counsel’s performance. *Wilson*, ¶ 46. While the general rule is that a defendant must overcome a strong presumption that counsel’s allegedly unreasonable decision was the product of sound trial strategy, we do not consider arguments related to strategy in reviewing first-stage petitions. *Id.*, citing *People v. Tate*, 2012 IL 112214, ¶ 22.

¶ 21 Here, as in *Wilson*, the circuit court disposed of defendant’s petition within 90 days of its filing. While the parties both seem to agree that the petition was not dismissed within 90 days, the clerk stamped the petition as “received” on February 4 and “filed” on February 10, and the court disposed of the petition on May 2. As in *Wilson*, we shall examine the claim that defendant expressly contends has arguable merit: ineffective assistance of trial counsel for not investigating

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or calling Anderson as a witness. Based on the affidavits of Anderson and defendant, we must accept as true at this stage that Anderson gave defendant an exculpatory account – Anderson saw Rudy shoot Hines – and defendant relayed that account to trial counsel in 2002, well before the 2005 trial. We cannot presume at this stage that trial counsel then decided not to call Anderson as a witness as a result of sound trial strategy. Lastly, despite substantial evidence regarding defendant’s motive to kill Hines, the only evidence that he killed Hines came from Hines’s girlfriend Sloan. We find it arguable – that is, not fanciful – that a jury hearing Sloan and Anderson as witnesses could reach a different verdict. We conclude that defendant’s petition was not appropriate for summary dismissal and must proceed to the second stage of postconviction proceedings.

¶ 22 Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further proceedings.

¶ 23 Vacated and remanded.