

2017 IL App (1st) 151241-U

No. 1-15-1241

Order filed December 15, 2017

Fifth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 08 CR 21009
)	
EFRAIN ALCARAZ,)	Honorable
)	William G. Lacy,
Petitioner-Appellant.)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's *pro se* postconviction claim of ineffective assistance of appellate counsel for failure to raise on direct appeal trial counsel's failure to challenge the prosecutor's rebuttal remarks about a surveillance video is clearly factually baseless and indisputably meritless. Accordingly, we affirm the circuit court's dismissal of the petition at the first stage of postconviction proceedings as frivolous or patently without merit.

¶ 2 In this proceeding under the Post-Conviction Hearing Act (Act), 720 ILCS 5/122-1 *et seq.* (West 2014), defendant Efrain Alcaraz appeals the circuit court's order that dismissed his

pro se petition at the first stage of postconviction proceedings. Defendant argues that his petition set forth the gist of an ineffective assistance of counsel claim that was not frivolous or patently without merit. Specifically, defendant's petition alleged that appellate counsel was ineffective for failing to challenge on direct appeal trial counsel's failure to object to the State's erroneous closing argument remark about a surveillance video establishing that defendant was the offender who fatally shot the victim.

¶ 3 For the reasons that follow, we affirm the judgment of the trial court.

¶ 4 I. BACKGROUND

¶ 5 Following a jury trial in 2012, defendant was found guilty of the first degree murder of Danny Calderon and aggravated battery with a firearm of Maximino Aguero. Defendant was sentenced to a 35-year prison term for murder, with a 25-year enhancement for personally discharging the firearm that proximately caused Calderon's death, and a consecutive 15-year prison sentence for aggravated battery with a firearm.

¶ 6 At the trial, the State's evidence showed that on the evening of October 10, 2008, defendant, who was a member of a street gang, wounded Aguero, who was a member of a rival street gang, by shooting him in the back. A few minutes later and a short distance away, defendant fatally shot Calderon multiple times in the back.

¶ 7 Specifically, occurrence witness Daisy Baez was sitting on a stoop on Seeley Avenue near 23rd Street on the evening of the offense. A red Jeep with two occupants circled the block several times. The Jeep stopped at the corner of 23rd Street and Seeley Avenue and a man who wore a Yankees baseball cap and a dark hooded sweatshirt exited the passenger side of the Jeep. Baez later identified this man as defendant. Maximino Aguero and Pedro Montalvo were across

the street from Baez, on the west side of Seeley Avenue. Defendant was also on the west side of Seeley Avenue, crouched behind some cars at the corner of Seeley Avenue and 23rd Street. Then defendant stood up and pulled out a gun. He fired twice at Aguero and Montalvo, neither of whom saw the shooter. Aguero sustained a gunshot wound to his back.

¶ 8 Baez ran past defendant and then west on 23rd Street. Meanwhile, defendant quickly walked east on 23rd Street. When Baez looked around to see if defendant was gone, Danny Calderon had exited a basement apartment on 23rd Street. Baez saw defendant fire about five gunshots at Calderon and then enter the Jeep, which drove away.

¶ 9 Calderon had been inside the apartment with several friends watching movies. A few seconds after Calderon left the apartment, his friends heard several gunshots. They all went outside and found Calderon, wounded and lying on the pavement. One friend observed someone jump into a nearby double-parked red Jeep, which drove away. Calderon died from multiple gunshot wounds: two to his back, one to the rear side of his right forearm, and one to the back of his right thigh.

¶ 10 Responding police officers heard a flash message describing the Jeep, and they observed the vehicle. An officer saw the front seat passenger remove a dark garment from his body and put it in the back of the vehicle. When the police stopped the Jeep, defendant was in the front passenger seat. The police recovered from the Jeep a blue Yankees cap and a black hooded sweatshirt. The police presented defendant and the driver in show-up identification procedures, and Baez identified defendant as the shooter. The police recovered metal fragments, a fired bullet, and six fired cartridge cases at the scene.

¶ 11 The right cuff of the black hooded sweatshirt was later determined to contain gunshot residue. The State's firearms expert testified that all of the six recovered cartridge cases were fired from the same firearm. The State's DNA analysis expert testified that she conducted an analysis of defendant's DNA and the DNA recovered from the sweatshirt. She identified a mixture of at least three people from the sweatshirt swabbing. She compared that mixture to defendant's profile and opined that he could not be excluded as having contributed to that mixture. Concerning the chance a random person would be included in that mixture, she testified that "approximately one in three [African-American], one in three [Caucasian], or one in two Hispanic unrelated individuals cannot be excluded from having contributed to that mixture at four locations."

¶ 12 The jury viewed a video recording from a camera mounted outside a private residence across the street from the scene of Calderon's shooting. A porch light caused some distortion to the recording. Chicago police officer Majei Shalabi obtained the recording from the resident and viewed it. According to Officer Shalabi, the video showed a male approach another male, who was standing on the sidewalk, an apparent muzzle flash, a vehicle pull up, and then the male that was behind the muzzle flash was gone. The vehicle in the video looked like the Jeep that the police stopped after the shooting and found defendant in the passenger seat. Also, Chicago police detective Jose Gomez viewed surveillance video from another building near the scene of the shooting, which did not show the shooter but did show what Baez did at the time of the shooting. However, the building owner did not successfully download and record that video footage.

¶ 13 During closing argument, defense counsel argued that defendant was not the shooter but the driver, who was now in Mexico, was the shooter. In rebuttal closing argument, the prosecutor

argued that the timeline and the video clearly established that defendant, and not the driver, was the shooter. The video was replayed during rebuttal, and the prosecutor stated:

“They want to try to blame [the driver] from here to Christmas, it’s not him. [The driver], the guy who has so much to hide. Look—here—you heard before there is [Calderon] walking out[,] you could see him in the white shirt, you are able to see the [figure] of this defendant coming from this direction, one car passed kind of obscured it, but he’s going to appear from here—there he is, murdering [Calderon], getting in the jeep, people coming out chasing after him—you could see the figures there.”

¶ 14 The jury found defendant guilty of first degree murder and aggravated battery with a firearm. The jury also found that defendant personally discharged the firearm proximately causing death to another person.

¶ 15 On appeal, defendant argued that his aggregate 75-year sentence was excessive in light of his youth, work history, minimal criminal background, and potential for rehabilitation. We affirmed the judgment of the trial court. *People v. Alcaraz*, 2014 IL App (1st) 122104-U.

¶ 16 On December 17, 2014, defendant filed the *pro se* postconviction petition at issue in this appeal. Defendant alleged that appellate counsel failed to raise on direct appeal the meritorious claims that (1) the trial court abused its discretion by allowing the presentation of gang-related evidence; (2) the unavailability of a surveillance videotape violated defendant’s right to be confronted with the witnesses against him; (3) the testimony of police officers about the contents of surveillance videotapes violated the silent witness theory; (4) the trial court admitted improper lay opinion testimony regarding the videotapes; (5) the jury received erroneous instructions

regarding the firearm sentencing enhancement; (6) the trial court allowed a biased venire member to serve on the jury; (7) the State's closing argument improperly shifted the burden of proof and mischaracterized the evidence; (8) defendant received ineffective assistance from trial counsel, who presented evidence about defendant's gang membership, failed to request the removal of a biased venire member from the jury, failed to interview the owner of the private surveillance videotape and object to witness narrations about the unavailable videotape, failed to object to improper jury instructions, and failed to object to the prosecutor's prejudicial remarks during closing argument; (9) the State failed to prove defendant's guilt beyond a reasonable doubt; and (10) the cumulative effect of these errors necessitated a new trial.

¶ 17 On January 7, 2015, defendant supplemented his petition to add claims that appellate counsel failed to challenge on direct appeal (11) trial counsel's failure to inform defendant about his rights as a Mexican national under the Vienna Convention; and (12) trial counsel's failure to object to the prosecutor's closing argument remarks that defined reasonable doubt for the jury.

¶ 18 On March 10, 2015, the circuit court issued a written order that dismissed defendant's petition as frivolous and patently without merit. Defendant timely appealed.

¶ 19

II. ANALYSIS

¶ 20 On appeal, defendant contends his *pro se* postconviction petition set forth the gist of a constitutional deprivation claim that was sufficient to advance to the second stage of postconviction proceedings. Specifically, the petition alleged that defendant's trial counsel was ineffective for failing to challenge the prosecutor's inaccurate remarks in rebuttal closing argument that the video evidence actually depicted defendant fatally shooting Calderon, and defendant's appellate counsel was ineffective for failing to raise this issue on direct appeal. This

is the only argument defendant raises on appeal from the summary dismissal of his *pro se* petition. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (“Points not argued [in the appellant’s brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.”).

¶ 21 A proceeding under the Act is a collateral attack on the defendant’s prior conviction and allows only constitutional claims to be heard that were not presented during trial and could not have been raised in the appeal from the conviction. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). Therefore, *res judicata* bars any issues previously decided at trial or on direct appeal and issues that could have been presented in the appeal from the conviction but were not. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 22 The Act provides a three-stage process for hearing a petitioner’s constitutional claims. *Harris*, 224 Ill. 2d at 125. When, as here, a petition is dismissed at the first stage of the postconviction process, we review the matter *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005). At this initial stage of the process, “ ‘the court considers the petition’s substantive virtue rather than its procedural compliance.’ ” *People v. Allen*, 2015 IL 113135, ¶ 27 (quoting *People v. Hommerson*, 2014 IL 115638, ¶ 11). At this stage, there is no involvement by the State; the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 9. The circuit court acts strictly in an administrative capacity to screen out petitions that lack any legal substance or obviously lack merit. *People v. Rivera*, 198 Ill. 2d 364, 373 (2001).

¶ 23 A petition may be summarily dismissed as frivolous and patently without merit only if the petition has no arguable basis either in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 13 (2009). A petition lacks an arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16. “An example of an indisputably meritless legal theory is one which is completely contradicted by the record.” *Id.* at 16-17 (citing *People v. Robinson*, 217 Ill. 2d 43 (2005), which rejected a claim that appellate counsel was ineffective for failing to challenge an out-of-court identification of the defendant as inadmissible hearsay because the record showed that the statement at issue fell within the hearsay exception for spontaneous declarations). “Fanciful factual allegations include those which are fantastic or delusional.” *Hodges*, 234 Ill. 2d at 17.

¶ 24 Because most petitions at the first stage are drafted by defendants with little legal knowledge or training, a defendant need only present a limited amount of detail to survive summary dismissal by the circuit court. *Id.* at 9, 11 (using the term “gist” to describe the low factual threshold a defendant must satisfy at the first stage to substantiate an arguably constitutional claim under the Act). The *pro se* petition “must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.” *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008) (explaining the purpose of the requirement under section 122-2 of the Act (725 ILCS 5/122-2 (West 2006)) that affidavits, records, or other supporting evidence must be attached to the petition). If a single claim in the *pro se* petition is deemed sufficient, the entire petition advances to the second stage of the process. *Tate*, 2012 IL 112241, ¶ 10.

¶ 25 A petition that is not frivolous or patently without merit should advance from the first to the second stage of the process, where the trial court may appoint counsel for the defendant, the

petition may be amended, and the State may either answer the petition or move to dismiss it. 725 ILCS 5/122-2.1, 122-4, 122-5 (West 2014); *Harris*, 224 Ill. 2d at 126. The petition may be dismissed at the second stage “when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.” *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At the second stage, the court focuses only on the legal sufficiency of the claims, and all well-pleaded facts in the petition and any accompanying affidavits, which are not positively rebutted by the record, are taken as true. *People v. Domagala*, 2013 IL 113688, ¶ 35. Any fact-finding or witness credibility determinations must await an evidentiary hearing at the third stage of the postconviction proceedings. *Id.* The defendant, however, is not entitled to an evidentiary hearing as a matter of right; the allegations of the petition must be supported by the record or by accompanying affidavits, and nonspecific and nonfactual assertions that merely amount to conclusions are not sufficient to warrant a hearing under the Act. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 26 “ ‘At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance [of counsel] may not be summarily dismissed if (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.’ ” (Emphasis added.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17). This “arguable” *Strickland* test applicable to first-stage postconviction petitions alleging ineffective assistance of counsel is a lower pleading standard than the “substantial showing of a constitutional violation” applicable to petitions alleging ineffective counsel claims at the second stage. *Tate*, 2012 IL 112214, ¶ 20. Appellate counsel is constitutionally ineffective if counsel fails to raise a meritorious issue. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). In the context of first-stage postconviction proceedings, the issue is whether

the defendant's ineffective assistance of appellate counsel claim has no arguable basis either in law or fact—*i.e.*, whether it is based on either an indisputably meritless legal theory or a factual allegation that is clearly baseless, fantastic or delusional. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

¶ 27 Defendant argues that, contrary to the prosecutor's remarks, the video did not depict defendant moving toward Calderon, murdering him, and getting in the Jeep because the gunman's face was not visible in the blurry video. Defendant argues that the prosecutor's misstatements were material and arguably prejudiced defendant, who had no opportunity to respond to the State's rebuttal argument. Defendant contends that "the case came down to the uncorroborated and impeached testimony" of Baez, who had a motive to falsely implicate defendant based on Baez's connection to a rival street gang. Defendant asserts that the prosecutor's remarks were "a blatant attempt to vouch for or bolster Baez's credibility" and the prejudice was heightened because no physical evidence definitively connected defendant to the shooting, the gun used in the shooting was not recovered, and defendant made no inculpatory statements.

¶ 28 Prosecutors are afforded wide latitude in making their closing arguments (*People v. Jones*, 2014 IL App (3rd) 121016, ¶ 37), and "may comment on the evidence and any fair, reasonable inferences it yields" (*People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)).

¶ 29 After thoroughly reviewing defendant's petition and the supporting record, we conclude that this claim of ineffective appellate counsel is frivolous and patently without merit because it has no arguable basis in law or fact. Defendant mischaracterizes the prosecutor's remarks about the video and, thus, defendant's ineffective counsel claim is based on an indisputably meritless legal theory and a clearly baseless factual allegation.

¶ 30 The record establishes that the prosecutor did not argue the video recording actually showed defendant shooting Calderon. Rather, the prosecutor's challenged remarks acknowledged that the video showed merely the figures of the victim in the white shirt being approached by the shooter in the dark clothing. Also, the prosecutor acknowledged that traffic at times obscured the action depicted in the video. However, in response to the defense argument that the driver of the Jeep was the actual shooter, the prosecutor argued that the jury knew the victim in the video was Calderon and the shooter was defendant based on the other evidence presented at trial, which included the testimony of Baez and Calderon's friends and the evidence about Calderon's clothing and the black sweatshirt with gun residue that was recovered from the Jeep in which defendant was the front seat passenger.

¶ 31 Moreover, the State replayed the video for the jury while the prosecutor made the challenged remarks, so there was no risk the jurors could have misunderstood the prosecutor's remarks because it was apparent from the blurry video that the figures in question were not identifiable by their faces, hair, or other similar details of their appearance. Furthermore, the record establishes that the prosecutor did not make any statement that either vouched for Baez's credibility as a government witness or used the state's attorney's office to bolster her testimony. Thus, defendant's assertion that the prosecutor's challenged remarks about the video were "a blatant attempt to vouch for or bolster Baez's credibility" is clearly factually baseless and indisputably meritless.

¶ 32 Because the underlying issue of defendant's ineffective trial counsel claim is meritless, defendant cannot show prejudice based on appellate counsel's failure to raise this claim on direct appeal. Similarly, defendant's assertion that appellate counsel was ineffective for failing to argue

in the alternative that the prosecutor's remarks constituted plain error also lacks merit. Defendant cannot utilize the plain-error doctrine to bypass the normal forfeiture principles when no error has occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 33

III. CONCLUSION

¶ 34 Defendant's claim of ineffective assistance of counsel based on the prosecutor's rebuttal remarks about the surveillance video was frivolous and patently without merit. Therefore, we affirm the circuit court of Cook County's summary dismissal of defendant's *pro se* postconviction petition.

¶ 35 Affirmed.