2017 IL App (1st) 152473
Filed: March 24, 2017

SIXTH DIVISION

No. 1-15-2473

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. 03 CR 6433
	)	
ARMANDO RODRIGUEZ,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's *pro se* postconviction petition affirmed over his claim of ineffective assistance of trial counsel.

¶ 2 Defendant-appellant, Armando Rodriguez, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal defendant argues that the circuit court erred when it dismissed his petition because he presented the gist of a constitutional claim of ineffective assistance of counsel. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder in connection with the death of Ariel Torres (the victim). We set forth the facts of this case in our affirmance of

defendant's conviction on direct appeal in *People v. Rodriguez*, 1-05-2632 (2007) (unpublished order under Supreme Court Rule 23).

¶ 4 On February 15, 2003, at approximately 7 p.m., the victim and his girlfriend, Melissa Gomez, attended a birthday party at the home of the victim's sister. While Ms. Gomez waited in the victim's vehicle, he went inside to the party. When he returned to the vehicle, he mentioned to Ms. Gomez that he had noticed a group of men gathered on the corner. Shortly thereafter, one of the men from the group approached the passenger side of the victim's vehicle where the victim was sitting. The man, who wore a dark jacket, fired several shots at the victim, killing him. At the police station a short time later, Ms. Gomez identified defendant as the shooter from a photographic array.

¶ 5 Jaime Perez testified that he was a member of the same gang as defendant. Mr. Perez acknowledged that he had received a plea bargain in exchange for his testimony. On the date of the shooting, Mr. Perez, defendant, and several other gang members observed the victim, whom they recognized as a member of a rival gang, sitting in his vehicle. After retrieving a gun from defendant's home, Mr. Perez, defendant, and other gang members returned to the victim's vehicle. Defendant volunteered to shoot the victim with Mr. Perez acting as a lookout. Mr. Perez observed defendant walking up to and shooting at the passenger side of the victim's vehicle. After the shooting, Mr. Perez and the other gang members fled the scene. Later that night, police arrested defendant and Mr. Perez at defendant's home.

¶ 6 Defendant was arrested within hours of the shooting, and Ms. Gomez identified him in a line-up soon after. Defendant agreed to speak with police detectives and waived his *Miranda* rights. Defendant confessed to the shooting a number of times and he implicated Mr. Perez and four others in the crime. Defendant was a gang member and recognized the victim as a member

of a rival gang. His statement was memorialized by videotape on February 17, 2003, and the videotape was played at trial.

¶ 7 Defendant informed the police that he had hidden the gun used in the shooting on a rooftop, where it was later recovered. Ballistic testing confirmed that, the gun recovered from the rooftop, matched the cartridge cases and bullets recovered at the scene of the shooting. The police also recovered from defendant's home the dark jacket he wore at the time of the shooting.

¶ 8 At his jury trial, defendant testified that, after his gang recognized the victim as a rival gang member, they drove to defendant's apartment to retrieve a gun. Defendant and several other gang members returned to the area where they had observed the victim. Defendant had his hand on the gun in his pocket when he approached the victim's vehicle. When he was within two feet of the victim's vehicle, he could see the victim inside the vehicle, reaching down. Defendant believed the victim was reaching for a gun, so he fired a number of shots toward the victim.

¶ 9 Ultimately, defendant was found guilty of first degree murder and sentenced to 65 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. See *Rodriguez*, 1-05-2632 (2007) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal on November 29, 2007. See *People v. Rodriguez*, 226 Ill. 2d 603 (2007).

¶ 10 On May 12, 2015, defendant filed a *pro se* postconviction petition that alleged ineffective assistance of counsel and claimed that trial counsel failed to investigate and call as a witness the victim's cousin, Margie Lugo, who would have supported defendant's self-defense theory. Defendant attached to his petition the affidavit of Ms. Lugo. In her affidavit, Ms. Lugo stated that she had attended the family party held on the night the victim was shot and that, when the

victim had arrived at the party, she observed a gun tucked into his waistband. Ms. Lugo's affidavit did not state that, if called, she would testify as to its contents.

¶ 11 On August 6, 2015, the circuit court summarily dismissed defendant's *pro se* postconviction petition. The court concluded that the evidence presented at trial negated a self-defense claim, and that the contents of Ms. Lugo's affidavit did not support defendant's theory of self-defense. Additionally, in light of the substantial evidence against defendant, the court found that Ms. Lugo's potential testimony would not have altered the outcome of the trial. The court, therefore, concluded that defendant's assertion—that his trial counsel was ineffective for failing to investigate Ms. Lugo and call her as a witness—was frivolous and patently without merit. Defendant timely appealed.

¶ 12 On appeal, defendant argues that the circuit court erred by dismissing his petition at the first stage of postconviction proceedings because he made an arguable claim of ineffective assistance of counsel and that the court applied a more stringent standard under *Strickland v. Washington*, 466 U.S. 668 (1984), than is required at the first stage of postconviction proceedings.

¶ 13 The Act provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005) and 725 ILCS 5/122-1 *et seq*. (West 2014)). At the first stage of postconviction proceedings, the circuit court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009); 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be summarily dismissed as "frivolous or patently without merit only if the petition has no arguable basis either

in law or in fact." *Hodges*, 234 Ill. 2d at 11-12; 735 ILCS 5/22-105(b) (West 2006). A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as one that is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16.

¶ 14 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. "The 'gist' standard is 'a low threshold.' " *People v. Edwards*, 197 Ill. 2d 239, 243 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). "To set forth the 'gist' of a constitutional claim, the post-conviction petition 'need only present a limited amount of detail' [citation] and hence need not set forth the claim in its entirety. *Id*. (quoting *Gaultney*, 174 Ill. 2d at 418). We review the summary dismissal of a petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 15 Under *Strickland*, to state a claim of ineffective assistance of counsel, defendant must allege that: (1) counsel's performance " 'fell below an objective standard of reasonableness;' " (*Hodges*, 234 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 687-88)) and (2) counsel's "deficient performance prejudiced the defense." *Id*. To establish prejudice, defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *People v. Hale*, 2013 IL 113140, ¶ 18. The failure to satisfy either prong will defeat an ineffective assistance claim. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 16 Defendant asserts he made an arguable constitutional claim of ineffective assistance of counsel based on counsel's failure to investigate and call Ms. Lugo as a witness to corroborate

his theory of self-defense. The State responds that the court properly dismissed defendant's petition because he failed to make an arguable claim of ineffective assistance where Ms. Lugo's statement did not support a self-defense theory and would not have altered the outcome of the trial.

¶ 17 As our supreme court stated, counsel must conduct " 'reasonable investigations or *** make a reasonable decision that makes particular investigations unnecessary,' " (*People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691)), which includes a duty to independently investigate any possible defenses. *Id*. " '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' " *People v. Guest*, 166 Ill. 2d 381, 400 (1995) (quoting *Strickland*, 466 U.S. at 691). "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 18 Here, defendant cannot demonstrate that he was arguably prejudiced by counsel's failure to investigate and call Ms. Lugo. Taking the pleadings as true, as we must, and assuming counsel failed to investigate Ms. Lugo, her affidavit does not corroborate defendant's self-defense theory; it merely establishes that the victim was in possession of a gun on the night of the shooting. Although in her affidavit Ms. Lugo stated that she observed the victim with a gun at a family party, she does not claim to have witnessed the shooting and, therefore, could not testify to the circumstances leading up to the shooting, including whether defendant acted in self-defense from a perceived threat. Therefore, Ms. Lugo's potential testimony had little or no value to defendant's self-defense claim. See *id.*

¶ 19 Even assuming that, at a relevant time, the victim actually possessed the gun that Ms. Lugo observed prior to the shooting, defendant's own testimony precluded a self-defense claim. To prove self-defense, the defendant must establish some evidence of each of the following elements: "(1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) [defendant] actually and subjectively believed a danger existed which required the use of the force ***; and (6) [defendant's] beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). If the State negates any one of the self-defense elements, the defendant's claim of self-defense must fail. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 64 (citing *People v. Young*, 347 Ill. App. 3d 909, 920 (2004)).

¶ 20 Defendant testified that he and his fellow gang members observed the victim, a rival gang member, sitting in his vehicle. Defendant drove to his apartment to retrieve a gun and returned to the victim's location. Defendant approached the victim's vehicle with the loaded gun to intimidate the victim. By defendant's own admission, he was the initial aggressor, which negates self-defense. *Id.* Defendant also fled the scene following the shooting, and made inconsistent statements before finally admitting to the shooting, further disproving that the shooting was done in self-defense as he lacked the subjective belief that deadly force was necessary. See *People v. Armstrong*, 244 Ill. App. 3d 545, 555 (1993) (defendant had no subjective belief that deadly force was necessary, where he made no attempt to obtain medical help for the victim, attempted to hide from the authorities, and gave varying stories of what occurred). Defendant, therefore, failed to demonstrate that he was arguably prejudiced when counsel failed to investigate and call Ms. Lugo to corroborate his self-defense theory where his own testimony rebutted self-defense.

¶ 21 Further, defendant fails to make an arguable claim of prejudice because the evidence in this case was not close. See *Harmon*, 2013 IL App (2d) 120439, ¶ 26. The evidence at trial established that defendant informed the police of the location of the murder weapon, confessed to the shooting, and was identified by two eyewitnesses: Ms. Gomez and Mr. Perez. As defendant's testimony rebutted his self-defense claim, and the evidence against him was so overwhelming, there is not arguably a reasonable probability that, but for counsel's failure to investigate and call Ms. Lugo, the trial's outcome would have been different. *Id*. ¶¶ 34-35 (no arguable prejudice was shown by the failure to call a witness at trial, given all the other evidence of defendant's guilt). Accordingly, we affirm the circuit court's order dismissing defendant's petition at the first stage of proceedings.

¶ 22 As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 23 Affirmed.