2017 IL App (1st) 161998-U

No. 1-16-1998

Order filed December 15, 2017

Fifth 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. 12 CR 9321
	)	
TARRENCE THOMPSON,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: The trial court's first-stage dismissal of defendant's postconviction petition is affirmed over his contention that he raised an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Tarrence Thompson appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). He contends that the trial court erred in dismissing his petition because he presented an arguable

claim of ineffective assistance of trial counsel based on counsel's failure to identify and investigate occurrence witnesses. For the reasons set forth herein, we affirm.

¶ 3 Following a 2013 jury trial, defendant was convicted of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) and was sentenced to respective concurrent terms of 25 and 20 years' imprisonment. On direct appeal, this court affirmed defendant's convictions and sentences. *People v. Thompson*, 2015 IL App (1st) 131366-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised on appeal. See *Thompson*, 2015 IL App (1st) 131366-U, ¶¶ 4-14.

¶ 4 Officer Diblich testified that, on May 1, 2012, he was conducting a narcotics surveillance in the 3700 block of West Grenshaw Street when he observed defendant exit a black Nissan Pathfinder and enter a building. About 30 seconds later, Diblich observed several individuals scatter away from the building and saw defendant return to the Pathfinder with a chrome handgun in his hand. Diblich radioed a description of the vehicle, defendant, and the gun to other officers in the area.

¶ 5 Officer Rojas received the radioed information and stopped the Pathfinder as it drove westbound on Grenshaw. Rojas approached the Pathfinder with his gun drawn and ordered the occupants to show their hands. When defendant did not comply, Rojas approached the vehicle and saw a chrome-handled handgun in defendant's lap. Defendant placed the gun in the crevice between the passenger seat and the door of the vehicle. Rojas and his partner removed defendant from the vehicle, and Rojas recovered the weapon.

¶ 6 Diblich arrived at the scene of the arrest and identified defendant as the suspect he had seen with the gun. Shortly thereafter, Willie Hughes arrived at the scene and accused defendant of robbing him at gunpoint. Later that evening, Hughes gave a written statement which stated that he was a drug dealer and that defendant had robbed him at gunpoint. Hughes signed all four pages of the written statement. The State then rested its case-in-chief.

¶ 7 Hughes testified that, on May 1, 2012, he was selling heroin out of a building located at 3721 West Grenshaw Street, and that three men, named Tall, Lord, and Boise, were providing security. Hughes contacted defendant, and they agreed that defendant would come to that location and take the money from Hughes's drug sales so that they could split the proceeds, and Hughes could tell his employer that the money had been stolen. Hughes testified that defendant did not have a gun when he arrived at the building, and that he willingly gave defendant a brown paper bag containing the money. He also testified that the police later forced him to implicate defendant in the robbery by threatening to "pin something on" him if he did not "participate." Hughes further testified that the assistant State's Attorney forced him to sign the statement implicating defendant.

¶ 8 Defendant testified that, on the day of the robbery, Hughes contacted him about stealing drug proceeds, and that he and Hughes had successfully executed a similar scheme about five years earlier. When defendant arrived at the building, Hughes handed him a bag of money. When Hughes later implicated defendant in the robbery, defendant told the officers that the incident was a "fake robbery." Defendant testified that he did not possess a handgun on the day of the robbery, and that he "did not need one."

¶ 9 After argument, the jury found defendant guilty of armed robbery and of being an armed habitual criminal. After a hearing, the trial court sentenced defendant to concurrent terms of 25 and 20 years' imprisonment, respectively.

¶ 10 On direct appeal, defendant's appellate counsel argued that: he was denied a fair trial because the trial court failed to properly redact the inadmissible portions of a witness's statement; the trial court erroneously instructed the jury with the testimony of an accomplice instruction; the State engaged in prosecutorial misconduct by shifting the burden of proof and misstating the law during rebuttal closing argument; and his concurrent sentences were excessive. This court affirmed defendant's convictions. See *Thompson*, 2015 IL App (1st) 131366-U.

¶ 11 On April 12, 2016, defendant filed a *pro se* postconviction petition under the Act alleging that: (1) his trial counsel was ineffective for failing to identify and interview the men known as Tall, Lord, and Boise; (2) his trial counsel was ineffective for failing to request a fingerprint analysis of the firearm; (3) his appellate counsel was ineffective for not arguing that trial counsel was ineffective for failing to request a fingerprint analysis of the gun; and (4) he was actually innocent.

¶ 12 In support of his petition, defendant attached, *inter alia*, three affidavits. The first affidavit was signed and sworn by defendant, who averred that he "consistently urged" trial counsel to "find out who" Tall, Lord, and Boise were and claiming that these men could verify that he did not have a gun or commit armed robbery. The second affidavit was signed and sworn by Thomas Woods, who averred that: he is the man known as Lord; "there was no gun displayed or aggressive demeanor displayed" when Hughes freely handed defendant a "large paper bag;"

Hughes did not "mention anything being wrong" after defendant left the building; and "the only item [defendant] was carrying" when he exited the building was the brown paper bag that Hughes had given him. The final affidavit, which was attached in support of defendant's actual innocence claim, was signed by Anthony Williams, the driver of the Pathfinder, who averred that defendant was carrying only a brown paper bag when he exited the building on Grenshaw. Williams also averred that he did not see defendant with a gun or see police recover a gun from his vehicle. Williams's affidavit was not notarized.

¶ 13 In a written order, dated June 10, 2016, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. The court determined that defendant waived his claim that counsel was ineffective for failing to identify and investigate the men known as Tall, Lord, and Boise because he could have raised the claim on direct appeal. In the order, the court noted that, even if the claim had not been waived:

> "[the claim] is meritless. Petitioner was unable to name any of the alleged alibi witnesses. Rather, he asserts that he believed he could identify them based on their photographs. Petitioner's claim is predicated on a causality dilemma – he could not identify the witnesses without photographs, while counsel could not obtain their photographs without first knowing their identities. Counsel's performance is not deficient on this basis. Furthermore, even if this court found that counsel's performance was deficient, petitioner does not demonstrate that the failure to obtain the witness testimony would have changed the outcome of his case in light of the credible and consistent testimony of Officers Diblich and Rojas. The officers observed petitioner with a gun at the scene and in the vehicle he departed the scene in, respectively. Furthermore, Officer

Rojas recovered the gun from in between the seat and door that was adjacent to petitioner, after petitioner's vehicle was stopped."

¶ 14 The trial court found that defendant's claims relating to fingerprint analysis of the gun were meritless, as he did not present any evidence suggesting that his fingerprints were not on the gun. It also rejected defendant's actual innocence claim, as the affidavits supporting the claim were either inconclusive or not newly discovered.

¶ 15 In this court, defendant has abandoned his actual innocence claim and his claims regarding fingerprint analysis of the handgun. He solely argues that the trial court erred in dismissing his petition at the first stage because he presented an arguable claim that trial counsel was ineffective for failing to identify and interview Tall, Lord, and Boise, who would have testified in his defense.

¶ 16 The Act provides a method by which a defendant can assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 9. At the first stage of postconviction proceedings, the trial court may dismiss a petition only if it is " 'frivolous or is patently without merit.' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2010)). A petition is frivolous or patently without merit if it " 'has no arguable basis * * * in law or in fact.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17

(2009)). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 17 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). At the first stage of postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. 2d at 17. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, 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." *Strickland*, 466 U.S. at 691. If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 38.

¶ 18 Initially, we note that defendant did not attach affidavits from the men known as Tall and Boise. "A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380 (2000). In the absence of such an affidavit, this court cannot determine whether these witnesses could have provided testimony favorable to the defendant. Accordingly, further review of defendant's ineffectiveness

claim as it relates to trial counsel's failure to investigate Tall and Boise is unnecessary. See *People v. Brown*, 2015 IL App (1st) 122940, ¶ 52.

¶ 19 Regarding defendant's claim that counsel was ineffective for failing to investigate and call Woods as a witness, we find that the trial court did not err in summarily dismissing this claim where defendant did not show that he was arguably prejudiced by counsel's failure. Stated differently, defendant did not show how Woods's proposed testimony would have arguably altered the outcome of his case in light of the evidence presented against him. In his affidavit, Woods averred that he was "positive" that defendant was not holding a gun when he walked out of the building, that he "clearly saw" that Hughes freely handed defendant the brown bag, and that no gun was displayed during the transaction. Woods's testimony, if presented at trial, would have been cumulative to that of Hughes and defendant, who each testified that defendant did not possess a gun and did not rob Hughes. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) ("Evidence is considered cumulative when it adds nothing to what was already before the jury"); *People v. Jarnagan*, 154 Ill. App. 3d 187, 194 (1987) ("Failure to call or investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel").

¶ 20 This version of events was rejected by the jury, who heard the testimony of two Chicago police officers, each of whom saw defendant with a gun. Officer Diblich also saw several individuals scatter away from the building shortly after defendant entered. In addition, the State introduced Hughes's written statement in which he stated that defendant had robbed him at gunpoint. Under these circumstances, it is not arguable that the result of defendant's trial would have been different and that he was prejudiced by counsel's alleged deficient performance. Accordingly, the trial court did not err in summarily dismissing defendant's petition.

¶ 21 In reaching this conclusion, we are not persuaded by defendant's argument that, in dismissing his petition at the first stage, the trial court made improper credibility determinations. See *People v. Sanders*, 2016 IL 118123, ¶ 42 ("Credibility determinations may be made only at a third-stage evidentiary hearing"). In its written order, the court determined that defendant was not prejudiced by trial counsel's failure to investigate Tall, Lord, and Boise. In doing so, the court noted:

> "[defendant] does not demonstrate that the failure to obtain the witness testimony would have changed the outcome of his case in light of the credible and consistent testimony of Officers Diblich and Rojas. The officers observed [defendant] with a gun at the scene and in the vehicle he departed the scene in, respectively. Furthermore, Officer Rojas recovered the gun from in between the seat and the door that was adjacent to [defendant] after [defendant's] vehicle was stopped."

¶ 22 Contrary to defendant's argument, the court's description of the officers' testimony was not a credibility determination, but rather a recitation of the evidence presented against defendant. The record shows that the court made these comments in the context of defendant's claim of ineffective assistance of counsel, and in determining whether he was able to show prejudice as a result of counsel's performance. In light of the evidence presented at trial, the court concluded that Woods's affidavit was not sufficient to raise an arguable claim that defendant was prejudiced by trial counsel's alleged failure to identify and investigate the men known as Tall, Lord, and Boise. We agree, and find that the trial court did not err in summarily dismissing defendant's petition as frivolous and patently without merit.

¶ 23 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.