2017 IL App (3d) 140474-U

Order filed March 31, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0474 Circuit No. 05-CF-2232
KAREEM COBBINS,	)	
Defendant-Appellant.	)	Honorable Daniel J. Rozak, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: Defendant's postconviction petition was frivolous and patently without merit. We affirm the trial court's summary dismissal.

¶ 2 The circuit court of Will County convicted defendant, Kareem Cobbins, of first degree murder in March 2010 (720 ILCS 5/9-1(a)(1) (West 2004)) and sentenced him to 40 years' imprisonment. Defendant appealed, arguing, *inter alia*, that the trial court's finding that he was sane at the time of the offense was against the manifest weight of the evidence; this court

affirmed his conviction and sentence. *People v. Cobbins*, 2012 IL App (3d) 100855-UB. Defendant filed a postconviction petition, which the trial court summarily dismissed. Defendant appeals the dismissal of his postconviction petition, arguing he stated the gist of a claim in his petition by alleging that his appellate counsel was ineffective for failing to argue that his trial counsel was ineffective. We affirm the trial court's summary dismissal of defendant's postconviction petition.

¶ 3 BACKGROUND

¶ 4 We provide a summary of the procedural history of defendant's case and the evidence presented at his trial here. For a more detailed account, reference our previous decision. *Id.* ¶¶ 5-27.

¶ 5 The evidence at defendant's bench trial established that he killed his wife, Tonya Cobbins, in October 2005. Defendant stabbed her in the chest while she lay sleeping in bed. Defendant's five-year-old son and the couples' infant child were both in the room at the time. The victim's sister, Yolanda Glover, was in the house as well.

¶ 6 After defendant stabbed his wife in front of his children, he woke Glover. He apologized for what he had done, told her he needed someone to take care of the children, handed her a telephone, and told her to call 911. When police arrived, defendant confessed to killing his wife and told them she was upstairs in their bedroom with a knife in her chest. After confirming this, police arrested the defendant.

¶ 7 In a videotaped interview, defendant provided a detailed account of his actions leading up to, during, and immediately after the murder. He told police that a week earlier he confessed to his wife that he had an affair with a woman, Gail Stubbs, earlier in their marriage. Defendant said he and his wife had been arguing about it. He said he woke up that morning, grabbed a

knife from the kitchen downstairs, went back into the couple's room, and stabbed his wife repeatedly in the chest. Later at the jail, defendant told a social worker he killed his wife because someone performed voodoo on him.

¶ 8 The trial court ordered a clinical psychologist, Dr. Randi Zoot, to examine defendant and determine whether he was sane at the time of the offense and whether he was fit for trial. Zoot found defendant was fit to stand trial. Zoot's opinion regarding defendant's sanity at the time of the offense, however, was inconclusive. She suspected defendant might suffer from some type of brain dysfunction or pathology and recommended a complete neuropsychological evaluation to help her reach a conclusive opinion.

¶ 9 The trial court ordered a clinical neuropsychologist, Dr. Robert Hanlon, to evaluate defendant. He was asked to assess defendant's then-present mental state, not whether defendant was sane at the time of the offense. In May 2007, Hanlon reviewed Zoot's report, court records, police reports, and the results of defendant's positron emission tomography scan. Hanlon found that defendant suffered from a neuropsychological impairment and a significant functional disability, consistent with the effects of a chronic, untreated seizure disorder. He diagnosed defendant with cognitive, depressive, and seizure disorders. Zoot submitted a supplemental report in October 2007 after reviewing Hanlon's findings. Again, her opinion as to defendant's sanity at the time of the offense was inconclusive. Zoot found that it was unclear whether defendant's neuropsychological impairment had any impact on his mental state at the time of the offense. Defendant filed Zoot's psychological evaluation reports with the trial court in May 2006, July 2006, and November 2007, respectively.

¶ 10 In May 2008, the State charged defendant with two counts of first degree murder by way of superseding indictment. 720 ILCS 5/9(a)(1), (a)(2) (West 2004). The State hired a clinical

psychologist, Dr. Lisa Sworowski, to evaluate defendant's psychological and neuropsychological state. She issued her report in February 2009, finding that while defendant demonstrated some signs of cognitive impairment and potentially experienced mild psychopathology, his impairments did not substantially diminish his capacity to appreciate the criminality of his conduct at the time of the offense.

¶ 11 Defendant pled not guilty, raising the affirmative defense of insanity, and proceeded to a bench trial. Stubbs testified to having an affair with defendant in 1992. She said she ended the affair, but maintained communication with defendant afterward, last talking to him by telephone two weeks before the murder. Stubbs noticed nothing strange about his behavior at that time. Defendant's mother also testified that she visited the defendant and victim weekly, last seeing them the day before the incident. She said defendant was acting normal at that time; she was unaware of him ever suffering from seizures.

¶ 12 The parties stipulated that Hanlon would testify consistent with his evaluation of defendant. Zoot testified to her contacts with defendant and her review of the relevant records, as well as defendant's videotaped interview with police and his jail medical records. Defendant told Zoot in interviews that nothing unusual happened in the days immediately preceding the murder, but he did vaguely report "not feeling right." Defendant was unable to be more descriptive. He said the murder happened "real quick" and that he was not thinking anything when he did it. Defendant could not offer an explanation for his thoughts or feelings. He said he was unaware of what he was doing while stabbing his wife until he heard his son yell for him.

¶ 13 Zoot said that in one interview defendant told her his statement about voodoo at the jail was the only possible explanation for the murder. In a follow-up interview, however, defendant said he did not know why he had said that. Zoot also testified that defendant was aware of the

criminality of his actions shortly after the offense when he told Glover to call the police, but said this did not speak to his mental state at the time of the offense. Zoot reiterated that after reviewing Hanlon's findings, she was still unable to reach a conclusion as to defendant's sanity at the time of the murder.

¶ 14 Sworowski testified that in preparing her report, she interviewed defendant three times. She also performed psychological and neuropsychological testing, and interviewed Glover and defendant's mother. In the collateral interviews, Sworowski learned there was nothing unusual about defendant's behavior prior to the murder. She said defendant denied ever having neurological symptoms or seizures. Defendant did tell Sworowski that evil spirits were controlling him when he killed his wife. He would not state definitively whether he believed he was actually the victim of voodoo, and denied having any hallucinations at the time of the offense. Sworowski said that defendant's behavior was not consistent with someone who has delusions stemming from a psychotic disorder. In her professional opinion, such delusions last more than a day and affect multiple aspects of a patient's life. Sworowski said defendant's ability to provide a detailed account of the murder to police approximately one hour later indicated that he was lucid at the time of the offense.

¶ 15 Sworowski said defendant displayed no psychotic behavior and reported no psychotic symptoms around the time of the murder. She disagreed with Hanlon's diagnosis that defendant had cognitive, depressive, and seizure disorders. Sworowski opined that his deficits and symptoms were insufficient to substantially diminish his capacity to appreciate the criminality of his conduct at the time of the offense.

¶ 16 The trial court found defendant guilty of both counts of first degree murder. The trial court further found that defendant did not prove by clear and convincing evidence that he did not

appreciate the criminality of his conduct while murdering the victim. Defendant filed a motion for a new trial, arguing the evidence at trial established that he was insane at the time of the offense. The trial court denied defendant's motion and sentenced him to 40 years' imprisonment. Defendant filed a motion to reconsider sentence, which the trial court also denied.

¶ 17 On appeal, defendant argued (1) the trial court's finding that he was sane at the time of the offense was against the manifest weight of the evidence, and (2) his sentence was excessive. This court affirmed defendant's conviction and sentence. *People v. Cobbins*, 2012 IL App (3d) 100855-UB, ¶ 46.

¶ 18 In March 2014, defendant filed *pro se* a petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 to 122-8 (West 2014). He argued that his conviction should be vacated for a variety of reasons. The trial court summarily dismissed defendant's petition as frivolous and patently without merit under section 122-2.1(a)(2) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)(2) (West 2014)).

¶ 19 Defendant appeals.

¶ 20 ANALYSIS

¶ 21 Defendant appeals the trial court's dismissal of his postconviction petition, arguing he stated the gist of an ineffective assistance of counsel claim. Specifically, defendant argues his appellate counsel should have argued on direct appeal that his trial counsel was ineffective for failing to obtain a definitive ruling on his sanity at the time of the offense. He claims a conclusive opinion would have helped him make a meaningful decision about whether he should plead guilty or proceed to trial.

¶ 22 We review the summary dismissal of a first-stage postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998); *People v. Allen*, 2015 IL 113135, ¶ 25.

¶ 23 A postconviction petition may be summarily dismissed at the first stage only if it is "frivolous" or "patently without merit[,]" meaning it has "no arguable basis either in law or in fact." (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶ 9. "The defendant has the burden of supporting the factual allegations in the petition by affidavits, the record, or other evidence containing specific facts." *People v. Stein*, 255 Ill. App. 3d 847, 848-49 (1993).

¶ 24 It is well settled that "the affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations. [Citation.] Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it 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. As a result, the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." (Internal quotation marks omitted.) *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008).

¶ 25 Defendant's postconviction petition did not have the evidentiary support required to survive first-stage dismissal. Defendant's only claim is that his trial counsel should have located an expert who would have made a conclusive finding about his sanity at the time of the offense. Defendant has not provided the name of such an expert, let alone supplied an affidavit verifying that he or she would have made a conclusive determination regarding his sanity. It is easy for a defendant to claim that discovery of certain evidence would have changed the outcome of his trial. However, to survive summary dismissal, a defendant is required to, at the very least, show

that such evidence exists. Defendant's claim in this case amounts to nothing more than a "broad conclusory allegation of ineffective assistance of counsel," which is insufficient to withstand scrutiny under the Postconviction Hearing Act. *Delton*, 227 Ill. 2d at 258.

¶ 26 Nevertheless, even if we were to assume defendant's postconviction petition was properly plead, his claim is frivolous and patently without merit. To survive first-stage dismissal, a defendant must allege facts sufficient to establish that counsel's performance was objectively unreasonable under prevailing professional norms. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). Here, defendant alleges it was objectively unreasonable for trial counsel not to have procured a conclusive expert opinion regarding his sanity. However, "mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent. [Citations.] In fact, counsel's strategic choices are virtually unchallengeable." (Internal quotation marks omitted.) *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 27 In reality, seeking another expert opinion ran the risk of tipping the balance on the issue of defendant's sanity further in the State's favor. Aside from killing his wife, defendant showed no signs of mental instability. After stabbing his wife in the chest, defendant immediately told his sister-in-law to call the police. This indicates defendant firmly appreciated the criminality of his conduct moments after the offense. Given the strength of the State's case, trial counsel's decision not to obtain another expert—one who may very well have determined defendant was sane at the time of the offense—was an objectively reasonable trial strategy, not deficient performance.

¶ 28 Moreover, we reject defendant's argument that a second finding of sanity would have led him to plead guilty, thereby putting him in a better position to negotiate a plea. Taking away any uncertainty surrounding defendant's sanity at the time of the offense, we are left with the fact

that defendant confessed to stabbing his wife repeatedly in the chest—while his children were present—because she was unhappy he had engaged in an extramarital affair. Nothing about this scenario leads us to believe the State would have been inclined to offer a negotiated sentence lower than that which defendant ultimately received. What possible motive would the State have had for offering a sentence below the mid-range? The prejudice prong of *Strickland* requires a showing that the result of the proceedings would likely have been different, not merely that it could have been different. *People v. Manning*, 241 Ill. 2d 319, 326 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Defendant's argument is based entirely on unsubstantiated speculation and is therefore insufficient as a matter of law. Accordingly, we affirm the trial court's summary dismissal of defendant's postconviction petition.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 31 Affirmed.

¶ 32 JUSTICE MCDADE, dissenting.

¶ 33 The majority has held that appellate counsel rendered effective assistance despite not arguing trial counsel's alleged ineffective assistance on direct review because (1) trial counsel exercised sound trial strategy by eliminating the possibility of a conclusive expert opinion strengthening the State's case and (2) the evidence against Cobbins would not lead the State to negotiate a lower sentence and, thus, would not likely result in a different proceeding. I respectfully dissent and would reverse the trial court's summary dismissal of Kareem Cobbins' postconviction petition at the first stage.

¶ 34 FACTS

¶ 35 Additional facts have been included to put this dissent in proper context. Following a bench trial, Cobbins was convicted of first degree murder for killing his wife and was sentenced to 40 years' imprisonment. Directly after stabbing her, Cobbins told his sister-in-law what he had done, asked her to care for his children, and requested that she call 911. He confessed to the police and opined that someone had performed voodoo on him. In light of the circumstances, his only viable defense was insanity.

¶ 36 Before trial, Dr. Randi Zoot was ordered by the court to examine Cobbins to determine whether he was sane at the time he killed his wife and whether he was fit to stand trial. She was unable to provide a conclusive opinion as to his sanity at the time of the offense. Dr. Zoot opined that Cobbins' sanity was at issue because his behavior was "extremely aberrant" because he did not have a history of violence or antisocial behavior. He did have a history of mental problems; however, his behavior "did not represent any classic mental illness." Overall, Dr. Zoot could not simply rule out the possibility that Cobbins was insane at the time of the offense because his behavior did appear to be delusional. She believed Cobbins might have suffered from organic brain damage but could not come to a conclusion. She recommended Cobbins undergo a neuropsychological evaluation.

¶ 37 Dr. Robert Hanlon was ordered by the court to conduct that evaluation. Specifically, he was asked to evaluate Cobbins' *current* mental state; not his state at the time he killed his wife. Dr. Hanlon concluded that Cobbins had a "significant functional disability" that could be due to a "chronic, untreated seizure disorder." Dr. Hanlon did not provide an opinion as to Cobbins' sanity at the time of the offense because he had not been asked to do so.

¶ 38 Dr. Zoot updated her evaluation after reviewing Dr. Hanlon's report. She filed an addendum in which she stated that she was unclear as to whether Dr. Hanlon's conclusion "had

any impact on [Cobbins'] mental state at the time of the offense and I am still unable to offer an opinion."

¶ 39 Dr. Sworowski was hired by the State to conduct an evaluation of Cobbins and concluded that Cobbins was sane at the time of the offense.

¶ 40 At the bench trial, Dr. Zoot testified that she could not offer an opinion as to Cobbins' sanity at the time of the offense, Dr. Sworowski testified that Cobbins was sane at the time of the offense, and the parties stipulated to Dr. Hanlon's evaluation. The court found Cobbins sane at the time of the offense and guilty of first degree murder.

¶ 41 Cobbins appealed his conviction, arguing that: (1) the trial court's determination that Cobbins was sane at the time of the offense was against the manifest weight of the evidence; and (2) Cobbins' 40-year sentence was excessive. *People v. Cobbins*, 2012 IL App (3d) 100855-UB, ¶ 2. With regard to the first argument, this court found that the trial court's determination was not against the manifest weight of the evidence. *Id.* ¶ 38. This court reasoned that, along with persuasive expert witness testimony, the State provided evidence that Cobbins was sane by presenting both Cobbins' statements and lay witness testimony regarding Cobbins' actions after the offense was committed. *Id.* ¶ 36. As a result, this court affirmed Cobbins' conviction. *Id.* ¶ 38.

¶ 42 Cobbins has now filed a *pro se* postconviction petition claiming his trial counsel was ineffective for failing to provide a conclusive expert opinion on Cobbins' sole defense—that he was insane at the time of the offense. Cobbins also argued that his appellate counsel was ineffective for not arguing on direct review that trial counsel rendered ineffective assistance.

¶ 43 The trial court dismissed Cobbins' postconviction petition at the first stage and denied his subsequent motion to reconsider. Cobbins appealed.

¶ 44 ANALYSIS

¶ 45 Postconviction Petition

¶ 46 I disagree with the majority's holding that Cobbins' *pro se* petition lacked the evidentiary support to survive the first stage of postconviction proceedings. While the majority has set out the relevant law regarding postconviction proceedings, I reiterate, for the purpose of emphasis, the following: An extremely low burden is imposed on the *pro se* petitioner at the first-stage proceeding: "defendant need only present a modest amount of detail and need not make legal arguments or cite to legal authority" to survive first-stage dismissal. *Jones*, 213 Ill. 2d at 504 (citing *Gaultney*, 174 Ill. 2d at 418). "[W]hile a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it 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).

¶ 47 Cobbins did attach an affidavit to his postconviction petition and it explained the absence of such evidence. The affidavit explains his lack of success in obtaining additional information to support his claim of ineffective assistance of counsel as follows:

> "[D]ue to my limited resources I was not able to secure or obtain my affidavit from expert neuropsychologist Dr. Robert Hanlon stating that he would come to court as a witness to testify about his own diagnosis, the reasons he concluded to them and to answer any questions about them which should resolve instead of conflict issues in which left the court with doubt about my sanity at the time of the offense.

> I was also unable to secure or obtain my affidavit from Dr. Randi Zoot, Will County's psychologist, stating that she would release the report of our interview about the dream in which I jumped up from right before the occurrence. This evidence was not in place at my trial nor mentioned. This would've given the State's Attorney's and their doctor and the court more insight on my sanity at the time of the offense.
>
> I also testify that had my 1993 medical reports been at my trial, even during my evaluations it would've proven that I had a history of psychological problems. This evidence would've changed the State's case immensely. I have attached this evidence.
>
> If I am able to further develop this claim with the assistance of an adequate counsel I'm sure we can contact the above parties; to receive the report, and to have expert Dr. Robert Hanlon to testify to his own diagnosis etc. These are circumstances that would've made a difference in my outcome and changed the State's case considerably."

Also, Cobbins attached to his petition the letters he sent to Dr. Zoot requesting his own interview report and to Dr. Hanlon requesting an affidavit that he would be willing to testify to his neuropsychological evaluation. I believe the record shows that Cobbins' petition contains an explanation for the absence of evidence sufficient to meet the requirements of section 122-2. See 725 ILCS 5/122-2 (West 2004).

¶ 48 Ineffective Assistance of Counsel

¶ 49 In order to establish whether appellate counsel was ineffective, the court must first determine whether trial counsel was ineffective because "appellate counsel is not obligated to brief every conceivable issue on appeal." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). This is especially true when the claim is meritless. *Id.* ("it is not incompetent of counsel to refrain from raising issues which, in his or her judgment, are without merit"). Therefore, I will first address whether trial counsel rendered ineffective assistance.

¶ 50 To state a claim of ineffective assistance of counsel, defendant must prove (1) counsel's performance was deficient and (2) the deficient performance prejudiced defendant. *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 51 The majority has determined that trial counsel exercised sound trial strategy because an additional expert opinion could have resulted in a finding of sanity in favor of the State's case. However, the record shows that Cobbins had a viable insanity defense because Cobbins told a social worker that he was operating under voodoo when he killed his wife, told Dr. Sworowski that evil spirits were controlling him when he killed his wife, and told Dr. Zoot that the murder happened "real quick" and that he was not aware of what he was doing until he heard his son yelling. Further, Dr. Zoot opined that Cobbins' behavior was "extremely aberrant" for someone with no history of violent behavior. Yet, trial counsel failed to adequately prepare the insanity defense. Specifically, when Dr. Zoot requested an additional evaluation of Cobbins to aid in her determination of Cobbins' sanity, trial counsel failed to request that Dr. Hanlon evaluate Cobbins' mental state at the time of the offense, and as a result, Dr. Hanlon only assessed Cobbins' mental state at the time of the examination. Because of this, Dr. Zoot was unable to reach a conclusion about Cobbins' sanity at the time of the offense. Therefore, I believe Cobbins

established an arguable basis that trial counsel rendered deficient performance and has satisfied the first *Strickland* prong.

¶ 52 With regard to *Strickland*'s prejudice prong, I also disagree with the majority's ruling that, in light of the fact that Cobbins confessed to stabbing his wife, it is not likely that he would receive a negotiated sentence lower than the 40 years actually imposed. To the contrary, if Dr. Zoot had been able to offer a firm conclusion that Cobbins was insane at the time he killed his wife, the competing expert opinions would have provided strong incentive for the State to offer and Cobbins to consider the negotiation of a plea. Even if Dr. Zoot could not conclude Cobbins was *legally* insane, Dr. Hanlon's assessment of Cobbins' mental condition at the time of the killing might have permitted a more reasoned and effective argument of actual mental impairment short of insanity suggesting negotiating a plea might be appropriate. As discussed above, Cobbins' only explanation of his actions was a belief that someone must have performed voodoo on him and his assertion that he was not aware of his actions during the stabbing. There was also evidence that Cobbins had no history of violent conduct, had a history of mental illness, was diagnosed by Dr. Hanlon with mental dysfunction, and a finding by Dr. Zoot that his behavior was "extremely aberrant."

¶ 53 Also, given the documented sequence of events, Cobbins' only possible defense was insanity, and in the absence of a definitive opinion, Cobbins was not able to make a fully-informed decision whether to proceed to trial with the insanity defense or seek to persuade the State to enter into plea negotiations. Had trial counsel requested Dr. Hanlon conduct an evaluation of Cobbins' mental state at the time of the offense, is it likely that Dr. Zoot would have been able to provide a conclusive opinion as to Cobbins' sanity and Cobbins would have proceeded differently on his case. For these reasons, I believe Cobbins established an arguable

basis that he was prejudiced by trial counsel's deficient performance. Accordingly, I would find that Cobbins established the gist of a constitutional claim that trial counsel rendered ineffective assistance.

¶ 54 Lastly, I believe appellate counsel rendered ineffective assistance for failure to bring a meritorious claim on direct review because Cobbins presented an arguable basis of ineffective assistance of trial counsel. Therefore, I would advance Cobbins' petition to second-stage review.