2017 IL App (3d) 150362-U

Order filed June 7, 2017.
Modified Upon Denial of Rehearing August 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0362
v.	)	Circuit No. 08-CF-101
	)	
PHILLIP LYNN CASON,	)	Honorable David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition at the second stage of postconviction proceedings because the petition failed to make a substantial showing of a claim of ineffective assistance of counsel.

¶ 2 Defendant appeals the dismissal of his postconviction petition following the second stage of postconviction proceedings. Specifically, defendant contends that he made a substantial showing that he received ineffective assistance of trial counsel based on trial counsel's failure to file a motion to suppress his statements to the police. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)) in that he knowingly committed an act of sexual conduct with T.T. for the sexual arousal or gratification of defendant or the victim. The indictment alleged that at the time of the incident, T.T. was at least 13 years old but less than 17 years old and defendant was at least 5 years older than T.T.

¶ 5 A jury trial was held. T.T. testified that, on the date of the incident, she was 15 years old and a student at Woodruff High School. T.T. left school around noon because she felt ill. She was wearing blue jeans, a Woodruff T-shirt, a Woodruff step team jacket, and a coat over her jacket. As T.T. was walking home, defendant approached her several times in a vehicle. Defendant asked T.T. to show him where InPlay was located and told her he would drive her home afterward. T.T. got into the vehicle.

¶ 6 Defendant told T.T. that he was a manager for the rapper Lil' Wayne. Defendant said Lil' Wayne was going to have a concert in Peoria and asked T.T. if she wanted to be a backup dancer. T.T. said she thought she would need her grandmother's permission. Defendant eventually parked the vehicle at a house. Defendant asked T.T. how old she was, and T.T. replied that she was 15 years old. Defendant said that backup dancers had to be 13 years old or older. Defendant then got out of the vehicle. He grabbed T.T.'s arm and led her into the house.

¶ 7 Defendant took T.T. upstairs to a bedroom. Defendant took off T.T.'s outer coat. Defendant told T.T. to step onto a scale. He then measured various parts of T.T.'s body. Defendant removed T.T.'s high school step team jacket. He put his hand under T.T.'s shirt and grabbed her breast. Defendant put his hand down T.T.'s pants and began "fingering" her. T.T.'s cell phone vibrated because she had set an alarm for that time. T.T. pretended that she was

talking to her grandmother on her cell phone. T.T. then told defendant that she had to be home in five minutes or her grandmother would call the police. T.T. gathered her things and tried to leave. Defendant told her he needed for her to dance naked in front of his camera. T.T. shook her head. Defendant led T.T. back out to his car, opened the door, and shoved her in. Defendant drove T.T. home.

¶ 8 When they arrived at T.T.'s house, defendant followed T.T. onto her porch. T.T. went inside her house and locked the door. She went to her grandmother's bedroom and told her grandmother to get out of bed. T.T.'s grandmother walked into the living room and sat down. T.T. then unlocked the front door, and defendant walked in. Defendant wrote down his name and phone number, and he then left. Neither defendant nor T.T. asked T.T.'s grandmother if T.T. could dance at the concert. T.T. wrote down defendant's license plate number and called the police.

¶ 9 Detective Shannon Walden testified that he interviewed defendant at the police department three days after the incident. Walden read defendant his *Miranda* rights. Defendant indicated that he understood his rights. Defendant initially denied having any contact with T.T. He eventually admitted that he saw her as he was driving around. He pulled his vehicle over next to her and asked for directions to InPlay. While T.T. was in defendant's car, defendant commented on a jacket T.T. was wearing. T.T. told defendant she danced at school. Defendant told T.T. he was promoting a concert that might take place in Peoria. Defendant asked T.T. if she was interested in dancing for the concert.

¶ 10 Defendant and T.T. drove to InPlay. Defendant asked T.T. if she wanted to show him some dance moves, and they went to defendant's residence. When they were in the residence, they started kissing. T.T. removed her shirt and pants. They "hugged and kissed further."

Defendant said he "groped [T.T.] on the behind area and fondled on her breast area." Defendant then agreed to drive T.T. to her grandmother's house so T.T. could get permission to dance at the concert. T.T. got dressed, and they left. When they arrived at T.T.'s residence, defendant asked T.T.'s grandmother if T.T. could dance at the concert. T.T.'s grandmother said no. Walden asked defendant if he knew T.T.'s age. Defendant said he did not know. Walden determined that defendant was 46 years old.

¶ 11 The State rested.

¶ 12 Defendant called Trina Bovan as his first witness. Bovan testified that defendant was her fiancé. Around the time of the incident, Bovan wanted to rent a room at InPlay for her birthday party. Bovan told defendant to "check it out" for her. Bovan gave defendant directions to InPlay. Bovan said that defendant was a disc jockey. He also hosted parties and got backup dancers for entertainers. Around the time of the incident, defendant needed backup dancers for a Lil' Wayne concert.

¶ 13 Defendant testified that on the date of the incident, he was looking for InPlay. He had never been there before, and his fiancée had given him incorrect directions. Defendant saw T.T. walking down the street. She flagged him down and asked for a ride. T.T. got into his vehicle. Defendant asked T.T. if she would show him where InPlay was located. Defendant told T.T. he would drive her home afterward. T.T. directed defendant to InPlay. As defendant was driving T.T. home, defendant told T.T. he was "planning to get Lil' Wayne" to come to town to perform a concert. T.T. expressed interest in being a backup dancer for the concert and said she wanted to get "plugged in or registered for the concert." Defendant told her the only place he knew where that could be done was at his house. Defendant told T.T. she had to be at least 18 years old to be a dancer, and T.T. said she was 18 years old.

¶ 14 Defendant drove T.T. to his house. Defendant took T.T. upstairs to interview her in his bedroom. Defendant told T.T. to "take off her stuff and she took off everything that she had on." T.T. was fully unclothed. Defendant told T.T. to step on the scale. Defendant recorded T.T.'s weight. Defendant then measured T.T.'s legs, arms, buttocks, breasts, and neck "[t]o see if she was the right shape for the uniforms that they [were] going to be using in the concert." T.T. then got dressed. She said "she was ready to go because she [had] to get permission from her grandmother to dance." Defendant told T.T. he wanted to see her dance, but she said she needed to get permission from her grandmother first. Defendant then drove T.T. to her grandmother's house. When they arrived, T.T.'s grandmother said that T.T. could not dance at the concert. Defendant then wrote down his telephone number and left.

¶ 15 T.T. did not appear to be ill that day. T.T. never told defendant she was in high school, but "[s]he said she had on a Woodruff jacket ***." Defendant thought T.T. was 18 or 19 years old. Defendant denied ever kissing or groping T.T. Defendant also denied ever telling Walden that he kissed or groped T.T. Defendant told Walden that T.T. was 18 years old.

¶ 16 The jury found defendant guilty of aggravated criminal sexual abuse. On August 22, 2008, the trial court sentenced defendant to six years' imprisonment followed by two years' mandatory supervised release. Defendant appealed, arguing that his sentence was excessive. We affirmed defendant's sentence. *People v. Cason*, No. 3-08-0715 (2010) (unpublished order under Supreme Court Rule 23).

¶ 17 Defendant filed a *pro se* postconviction petition on July 1, 2010. In his petition, defendant argued *inter alia* that his trial counsel was ineffective for failing to move to suppress defendant's statement to the police. Specifically, the petition alleged:

"Counsel further failed to have defendant's statement to police surpressed [*sic*] under a fifth amendment violation when police continued interrogation after defendant envoked [*sic*] his right to counsel.

Defendant requested counsel which was not only denied but continued to question defendant and used in variation and not based on truth by the State to obtain a conviction.

A conviction based any part on violation of 5th amendment is tainted and not able to stand where reversal is required."

¶ 18 On October 4, 2010, the trial court entered an order finding that defendant's postconviction petition set forth the gist of a constitutional claim, appointing the public defender, and docketing the petition for further proceedings.

¶ 19 On January 20, 2011, assistant public defender Thomas Sheets appeared on behalf of defendant at a status hearing. On February 6, 2011, defendant filed a motion asking the court to appoint new postconviction counsel. Sheets continued to appear on behalf of defendant at status hearings for approximately two years. At each hearing, the matter was continued to allow Sheets additional time to review the record.

¶ 20 At a hearing on February 1, 2013, defendant advised the court that Sheets had never responded to his letters or returned his telephone calls. Defendant stated that he filed a motion to dismiss Sheets as his attorney that had never been addressed. The court took defendant's motion under advisement. On March 15, 2013, defendant again appeared along with Sheets and asked the court to appoint a new attorney. On March 25, 2013, the trial court entered a written order granting defendant's motion to appoint new counsel and ordered the public defender's office to reassign defendant's case to another attorney.

¶ 21 On May 17, 2013, defendant appeared personally along with assistant public defender Samuel Snyder. The court granted Synder's request for a continuance.

¶ 22 On July 12, 2013, defendant appeared alone and stated that he wanted to represent himself. The court allowed defendant to proceed *pro se*. Defendant moved for a one year continuance to prepare his amended petition. The court continued the matter until November 8, 2013. On November 8, defendant moved for a five-month continuance, and the court granted his motion. On April 4, 2014, defendant requested a continuance until October 10, 2014. The court granted defendant 60 days to make any additional amendments to his petition. The court noted that the petition had been pending for three years. On June 6, 2014, defendant advised the court that he had not filed an amended petition. The court gave defendant an additional 30 days to file an amended petition.

¶ 23 On July 3, 2014, defendant filed a petition for leave to file a supplemental postconviction petition adding the following allegation: "Detective Walden's testimony was perjured; he built an entirely new narrative that has nothing to do with the truth."

¶ 24 On August 29, the State filed a motion to dismiss. Regarding defendant's claim that his trial counsel was ineffective for failing to move to suppress his statements to the police, the State argued: "Defendant fails to establish by citation to the record or by supporting affidavit a basis for such a suppression." A hearing was held that same day. Defendant advised the court that he had retained an attorney and asked for a continuance. The State objected. The court denied defendant's request for a continuance. The court advised defendant that it had set deadlines so the pleadings would be fixed. The court told defendant that even if he hired an attorney, the court would not allow the attorney to amend the petition at that point. After hearing arguments, the court took the State's motion to dismiss under advisement.

¶ 25 On October 24, 2014, defendant filed an unnotarized affidavit describing his interrogation with Walden. Defendant denied telling Walden that he kissed, hugged, or groped T.T. Defendant stated that he told Walden that T.T. was 18 years old. The affidavit also stated:

> "After I told Detective Walden that I had nothing to say until I have an attorney present, he did not Scrupulously honor my rights.
>
> They went outside the room for a while, when they returned the detective said to me 'If I did not have anything to hide I would write down my statement.' [H]e then placed a yellow legal pad in front of me along with a pen. I did not write anything down.
>
> Then the detective say's [*sic*] to me 'If I did not have anything to hide I would talk to him.' I said to detective Walden 'are those cameras on.' 'He said yes one of the cameras was on.' I said 'if one of the cameras is on I will talk to you.' "

¶ 26 On February 13, 2015, defendant filed another affidavit that was prepared and signed by defendant. The affidavit listed the reasons why defendant's trial counsel was not prepared for trial. One of the enumerated reasons stated: "[Trial counsel] told me before I was sent to prison, 'that the judge rushed this case, there were several cases ahead of ours and he did not have time to prepare.' " The affidavit also stated: "[Trial counsel] called me into his office 13 hours before my trial for the first time to discuss my case."

¶ 27 On April 22, 2015, the trial court entered an order granting the State's motion to dismiss. In so ruling, the trial court found that defendant's affidavit was untimely. However, the court stated that it would have still granted the State's motion to dismiss even if the affidavit had been timely filed. The trial court found that defendant failed to make a substantial showing that his

trial counsel's performance was deficient because defendant failed to allege that (1) he requested counsel after receiving *Miranda* warnings or (2) he advised his trial counsel that the detectives continued to interrogate him after he invoked his right to counsel. Additionally, the court found that trial counsel's decision not to file a motion to suppress could have been a matter of trial strategy. The trial court also found that defendant had not established prejudice because even if defendant's statements had been suppressed, the State could have used the statements to impeach defendant in the event that he testified.

¶ 28 ANALYSIS

¶ 29 I. Standing

¶ 30 Initially, we reject the State's argument that defendant lacks standing to assert his postconviction claim because defendant completed his sentence of incarceration and term of mandatory supervised release during the pendency of the postconviction proceedings. Because defendant was incarcerated at the time he filed his initial petition, we find defendant has standing under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). Our supreme court has held that defendants who file their postconviction petitions while incarcerated may sustain claims under the Act even if they are released from prison during the pendency of the postconviction proceedings. *People v. Davis*, 39 Ill. 2d 325, 327 (1968); *People v. Carrera*, 239 Ill. 2d 241, 246 (2010) (" '[I]mprisoned in the penitentiary' [under the Act] has been held to include defendants who have been released from incarceration after timely fling their petition."). Having found that defendant has standing, we consider the merits of defendant's argument on appeal.

¶ 31 II. Second-Stage Dismissal

¶ 32 Defendant argues that the trial court erred in dismissing his postconviction petition at the second stage of proceedings. Specifically, defendant contends that his petition made a substantial showing that his trial counsel was ineffective for failing to file a motion to suppress his statements to the police on the basis that the police continued interrogating defendant after he invoked his right to counsel.

¶ 33 At the second stage of postconviction proceedings, "the petitioner bears the burden of making a substantial showing of a constitutional violation." *People v. Domagala*, 2013 IL 113688, ¶ 35. To make the requisite substantial showing, "the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Id.*

> "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Domagala*, 2013 IL 113688, ¶ 35.

¶ 34 We review the trial court's second-stage dismissal of defendant's postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388.

¶ 35 "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the

defendant." *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish deficient performance, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms." *Id*.

¶ 36 We find that defendant failed to make a substantial showing that his trial counsel was constitutionally deficient based on counsel's failure to file a motion to suppress. The petition failed to allege any facts showing that defendant's counsel was aware or should have been aware of the alleged fifth amendment violation.[1] That is, defendant did not allege that he told his trial counsel that he invoked his right to counsel during the interrogation or that trial counsel failed to discuss the interrogation with him. We note that the interrogation was not video recorded. In the absence of any allegation that trial counsel knew or should of have known that defendant invoked his right to counsel during his interrogation, defendant cannot make a substantial showing that counsel was deficient for failing to file a motion to suppress on that basis.

¶ 37 We reject defendant's argument on appeal that "[t]he only fair and logical interpretation of [his] petition is that he told [trial counsel] police continued to question him, or resumed questioning him, despite his invocation of counsel." Defendant reasons that "any layperson would have to realize that" trial counsel "could not be ineffective for failing to file a motion to suppress if he did not know there was a basis for filing such a motion." Essentially, defendant asks that we assume that his counsel was aware of the alleged fifth amendment violation. Such an assumption would be inappropriate at the second stage, where "the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial constitutional deprivation which requires an evidentiary

[1]Defendant also filed an affidavit dated October 24, 2014, which the court found to be untimely. We agree with the court's assessment. However, even if we were to consider the affidavit, it would not change our analysis. The affidavit merely describes the interrogation and does not allege that trial counsel was aware or should have been aware of the alleged fifth amendment violation.

hearing." *People v. Makiel*, 358 Ill. App. 3d 102, 106 (2005). Here, defendant was required to set forth factual allegations showing that his counsel was aware (or should have been aware) of the basis for the motion to suppress defendant claims counsel should have filed.

¶ 38 Defendant filed a *pro se* petition for rehearing, defendant arguing that we failed to consider the affidavit he filed February 13, 2015, which stated: "[Trial counsel] told me before I was sent to prison 'that the judge rushed this case, there were several cases ahead of ours and he did not have time to prepare.' " Defendant argued in his petition for rehearing: "It was not, that I did not inform [trial counsel] of the 5th Amendment violation by police. The fact is that it was ignored, like the plethora of ineffective issues, supporting his statement in this Affidavit."

¶ 39 First, we did not initially address the affidavit filed February 13, 2015, because defendant did not reference the affidavit in his appellate brief. "Arguments not raised until the petition for rehearing are forfeited." *Department of Healthcare & Family Services. v. Arevalo*, 2016 IL App (2d) 150504, ¶ 37. Additionally, this affidavit—like the affidavit dated October 24, 2014—was untimely. Even if we were to consider the affidavit, it would not change the disposition of the case. The affidavit merely stated that trial counsel told defendant he did not have time to prepare. The affidavit did not show that defendant informed his trial counsel of the alleged fifth amendment violation or set forth facts showing that counsel should have known about the violation. Thus, we reassert our holding that defendant's postconviction petition failed to make a substantial showing of a claim of ineffective assistance of counsel.

¶ 40 We need not reach defendant's arguments that the trial court's other reasons for dismissing this claim failed to justify dismissal, as the trial court's judgment may be affirmed on the above basis alone. Additionally, "[t]he reviewing court is not bound to accept the reasons

given by the trial court for its judgment ***." *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983).

¶ 41 CONCLUSION

¶ 42 The judgment of the trial court is affirmed.

¶ 43 Affirmed.