NOTICE
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2017 IL App (4th) 150221-U

NO. 4-15-0221

FILED
June 22, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JOHNATHAN MACLIN,	)	No. 10CF1164
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith, Jr.,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in summarily dismissing defendant's postconviction petition where the evidence did not warrant a jury instruction on the affirmative defense of compulsion.

¶ 2 In May 2012, a jury found defendant, Johnathan Maclin, guilty of first degree murder. In August 2012, the trial court sentenced him to 35 years in prison. This court affirmed defendant's conviction and sentence on direct appeal but vacated fines improperly imposed by the circuit clerk. In December 2014, defendant filed a *pro se* postconviction petition alleging ineffective assistance of trial and appellate counsel related to the affirmative defense of compulsion. The trial court summarily dismissed defendant's petition in February 2015.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition, asserting he was denied effective assistance of trial and appellate counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2010, the State charged defendant with two counts of armed robbery (720 ILCS 5/18-2(a) (West 2010)) and first degree murder under various theories, including felony murder (720 ILCS 5/9-1(a)(3) (West 2010)). Defendant pleaded not guilty.

¶ 6 In May 2012, defendant's jury trial commenced. We summarize the evidence relevant to this appeal as follows.

¶ 7 Kieshawn McGee testified on July 30, 2010, at approximately 1 a.m., he and Ishmael Adams were sitting in a Mercury Grand Marquis parked in the driveway of Adams' home. Two individuals approached with bandannas covering their faces. They pointed guns at McGee and Adams and demanded money and drugs. McGee and Adams gave the gunmen all their money, approximately $50. During the robbery, one of the men shot Adams in the chest, killing him. McGee identified Michael Guise as the shooter.

¶ 8 Guise testified on July 29, 2010, he, Ryan Walker, Bryain Young, and defendant planned to rob Ishmael Adams "for crack money." Guise, Walker, Young, and defendant drove to Torrance Park, where Guise and defendant got out of the vehicle. Guise and defendant ran through bushes at the back of Adams' house and "up on the car." Guise ran to the driver's door and defendant ran to the passenger door. They wore bandannas to cover their faces and each had a gun.

¶ 9 Ryan Walker testified he lived with two of Young's nephews. On July 29, 2010, Young approached him at approximately 7 p.m. about helping to sell a television. Young was unable to sell the television, and it was damaged when it was loaded into the vehicle Walker was driving. Walker drove Young to Leafland Street, where Guise joined Walker and Young. At approximately 9:45 p.m., Walker called defendant, asking if he wanted to "hit a lick" because

Young "had a lick for him to hit." Defendant indicated agreement, responding "he was down." Walker explained "hitting a lick" meant robbing someone or burglarizing a home. Walker, Young, and Guise drove to Garfield Street to pick up defendant between 10 and 10:30 p.m. Defendant wore a black T-shirt and jeans. He had a blue bandanna tied at his wrist. Walker and Young obtained two guns, and Young gave the guns to Guise and defendant. Walker testified the four men drove to a Circle K gas station and then to Sedgwick Street, where Young had a "lick" for Guise and defendant to "hit." Walker and Young dropped Guise and defendant on Sedgwick Street and pulled around the corner to wait for them. A short time later, defendant called to have Walker and Young pick them up. Walker testified Guise and defendant were not able to "get anything from the lick" because there were too many people in and around the targeted residence.

¶ 10 Young asked Walker if he could drop Guise and defendant at "one more spot." Young described the robbery as being a "sweet lick," which meant the robbery would be "easy." Walker parked the vehicle near Torrance Park, approximately two blocks behind Adams' house. Guise and defendant exited the vehicle with the guns they had been given by Young on Sedgwick Street, and they approached Adams' house from the rear. Guise wore a black T-shirt and carried a red bandanna. Defendant wore a black T-shirt and carried a blue bandanna. In approximately 10-15 minutes, Young received a call from defendant to pick him up behind a nearby convenience store. The four men returned to Walker's house. There, Young poured bleach into a sink and told Guise and defendant to wash their hands to remove gunpowder residue.

¶ 11 Detective David Pruitt of the Decatur police department testified he was the lead detective assigned to investigate the murder of Adams. Pruitt visited the area surrounding the

crime scene. He testified Torrance Park is approximately two blocks behind the driveway where Adams was murdered. Photographs offered into evidence showed the area between the park and driveway densely covered with trees and shrubs. Pruitt testified the area is very dark at night, and "[y]ou couldn't see what was going on back there."

¶ 12 Pruitt interviewed defendant on August 1, 2010. Defendant admitted approaching Adams' vehicle with Guise on July 30, 2010, and being present on the passenger side of the vehicle. He had been dropped at Torrance Park by Walker. The State played the videotape of Pruitt's interview of defendant. We note no transcript of the interview is in the record on appeal and the videotape is difficult to understand.

¶ 13 On the video, defendant reported walking to his girlfriend's house when he received a call from Young, using Walker's phone. Defendant believed he was speaking to Walker. The individual told defendant "they" were coming to pick him up. Defendant identified his location. When Walker arrived, Young and Guise were also in the vehicle. They wore black T-shirts and had "bags" on. Defendant did not know what was in the bags. Defendant asked Walker what was happening, but Walker told defendant he could not talk to him and advised defendant to sit quietly. Defendant stated he and Walker did not know what was going on.

¶ 14 On the video, defendant stated Young was sitting in the front passenger seat, holding a bag in his lap "like he had a gun or somthin[g]." Guise sat next to defendant in the back of the vehicle, also with a bag in his lap. Walker reiterated he could not talk to defendant. According to defendant, Young started "talking loud" to Walker before Walker dropped Guise and defendant at the park. Defendant next stated, "And dude was like if anything go wrong we kill him." Guise told defendant to follow him to his cousin's house. Defendant followed Guise through the bushes and as they neared Adams' driveway, he told defendant they were going to

rob the individuals seated in the vehicle. Defendant told Guise "he didn't have time for that" but continued to follow Guise as he ran up to the driver's side of the vehicle. Guise demanded money and pulled out a gun. Defendant moved to the passenger side window, thinking Guise might be trying to rob him, too. When defendant heard the gun cock, he took off running. He heard a gunshot a couple of minutes later. Guise eventually caught up to defendant and threatened him to keep quiet or he would be killed.

¶ 15 Pruitt testified, pursuant to the investigation, he subpoenaed the cell phone records of defendant, Guise, and Walker. Defendant called Walker approximately 13 times from 9:45 p.m. on July 29, 2010, to 7:04 p.m. on July 30, 2010.

¶ 16 Rasheena Graves testified she worked with defendant on a gardening crew and, on the day of the shooting, heard defendant state he needed to "hit a lick" because he "needed money bad" and "the job wasn't cutting it." Graves testified the term "hit a lick" means "going to rob someone," although she admitted the term can have other meanings. Graves also testified defendant was not at work the day after the shooting.

¶ 17 Defendant did not testify. At closing argument, defendant argued the State had not proved he was legally responsible for Guise's conduct. Defense counsel pointed out defendant told the police he did not know Guise planned to rob Adams and ran away as soon as he realized Guise was going to rob Adams and McGee. Defense counsel suggested defendant had been honest with the police officer and the State's witnesses were less credible. Specifically, Walker and Guise had reasons to lie and had frequently changed their stories, and Graves did not come forward to the police until a few days before the trial, approximately two years after she overheard defendant's statements.

¶ 18 During the jury instruction conference, defense counsel tendered a withdrawal instruction. (A defendant withdraws, and thereby ends his accountability for the acts of another, if, " '[b]efore the commission of the offense, he terminates his effort to promote or facilitate such commission, and *** wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.' " *People v. Trotter*, 299 Ill. App. 3d 535, 540, 701 N.E.2d 272, 276 (1998) (quoting 720 ILCS 5/5-2(c)(3) (West 1996)). Following arguments, the trial court ruled the withdrawal instruction would be given over the State's objection.

¶ 19 During jury deliberations, the jury sent the trial court a note asking, "May we please see the video of Jonathon [*sic*] Maclin during police interview?" The court allowed the jury to view the video. The jury also sent a note asking, "Does the [d]efendant's intent being at the crime scene matter when convicting him?" The court asked the jury to explain in more detail what it was asking. The jury replied, "If the defendant's only reason to be at the scene is because he feels threatened?" The court stated, "You have the court's instructions as to the law. Please continue your deliberations."

¶ 20 After the jury found defendant guilty of all charges, the trial court entered judgment on the felony murder count and later sentenced defendant to 35 years in prison. This court affirmed defendant's conviction and sentence. *People v. Maclin*, 2014 IL App (4th) 120722-U.

¶ 21 In December 2014, defendant filed a *pro se* postconviction petition alleging ineffective assistance of trial and appellate counsel related to the affirmative defense of compulsion. On February 26, 2015, the trial court dismissed defendant's postconviction claim, stating, in relevant part:

> "With respect to the defendant's 'compulsion' argument, the defendant specifically claimed that he was intimidated into committing the armed robbery based on the actions of one of the co-defendants, Bryain Young, who was much older and much larger than this defendant and who also had a gun pointed at one of the co-defendant's [*sic*] in the vehicle on the night in question. In addition, the defendant alleges that the co-defendant, Bryain Young, threatened to kill his entire family on two separate occasions if the defendant told anyone about the night in question. This Court finds the defendant's arguments fail in that there is no assertion that Bryain Young threatened the defendant into committing the armed robbery, and the facts are undisputed that Bryain Young was not present when the defendant committed the armed robbery of the two victims with the co-defendant, Michael Guise, who subsequently shot and killed Ishmael Adams. In addition, there is evidence that the defendant planned the robbery in advance due to his statement to his co-worker that he planned on 'hitting a lick' that evening due to the fact he was not able to earn sufficient funds from his job."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant argues the trial court erred in summarily dismissing his postconviction petition. He argues his trial counsel was ineffective for not tendering a compulsion instruction where there was sufficient evidence to support an instruction, and appellate counsel was ineffective for failing to raise the issue on direct appeal.

¶ 25 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), "provides a mechanism for criminal defendants to challenge their convictions or sentences based

on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 26 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold," requiring the petition to contain only "a limited amount of detail." *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation or is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "In considering a petition pursuant to [section 122-2.1 of the Act], the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate

court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014); see also *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394.

¶ 27 Claims of ineffective assistance of counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006) (appellate counsel contest). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). "More specifically, the defendant must demonstrate 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. Petrenko*, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198, 1203 (2010) (quoting *Strickland*, 466 U.S. at 694).

¶ 28 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Strickland*, 466 U.S. at 687. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Stated differently, the defendant must prove a reasonable

probability exists, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted, when a case is more easily decided on the ground of lack of sufficient prejudice, rather than on the ground counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 29 Defendant contends his counsel was ineffective for not tendering a compulsion instruction to the jury where there was ample evidence to support such an instruction. Additionally, defendant contends this was exacerbated by the fact, even when the jury sent a note to the trial court indicating its consideration of defendant's evidence, defense counsel did not request the instruction. The affirmative defense of compulsion requires a defendant to establish (1) the conduct was performed under the threat or menace of the imminent infliction of death or great bodily harm and (2) the defendant reasonably believed death or great bodily harm would be inflicted on him if the conduct was not performed. 720 ILCS 5/7-11(a) (West 2010); *People v. Collins*, 2016 IL App (1st) 143422, ¶ 34, 55 N.E.3d 764. "Compulsion implies complete deprivation of free will and the absence of choice[.]" *People v. Roberson*, 335 Ill. App. 3d 798, 801, 780 N.E.2d 1144, 1147 (2002). To warrant an instruction on compulsion, the defendant must present "some evidence" sufficient to raise an issue of fact for the jury and create reasonable doubt as to the defendant's guilt. *People v. Redmond*, 59 Ill. 2d 328, 337-38, 320 N.E.2d 321, 326 (1974). However, this defense is not available if defendant had ample opportunity to withdraw from participation in the offense but failed to do so. *People v. Scherzer*, 179 Ill. App. 3d 624, 645-46, 534 N.E.2d 1043, 1058 (1989).

¶ 30 For the compulsion defense to apply, the threat of death or great bodily harm must be imminent. *People v. Jackson*, 100 Ill. App. 3d 1064, 1068, 427 N.E.2d 994, 997 (1981). A

threat of future injury is not sufficient to excuse criminal conduct. Thus, the evidence must show the threat against the defendant would soon have been carried out if he had not followed the orders of the compeller. See *People v. Robinson*, 41 Ill. App. 3d 526, 529, 354 N.E.2d 117, 120 (1976); *Jackson*, 100 Ill. App. 3d at 1068, 427 N.E.2d at 997.

¶ 31 We find *People v. Pegram*, 124 Ill. 2d 166, 529 N.E.2d 506 (1988), instructive. In *Pegram*, the defendant was at the victim's place of business to perform work. He was confronted by two masked men, one of whom pointed a gun at the defendant's head and told him he would blow the defendant's brains out if he did not act as requested. *Pegram*, 124 Ill. 2d at 169, 529 N.E.2d at 507. The masked men ordered the defendant to take them to the victim, Mackin, and when they got to his office, they ordered Mackin to lie on the floor and empty his pockets. After Mackin did so, the men ordered the defendant to open the freezer door, and they pushed Mackin into the freezer. *Pegram*, 124 Ill. 2d at 169, 529 N.E.2d at 507. The defendant was then ordered to lie on the floor while one of the men stood over him with a gun, and the other man ransacked the office. They then ordered the defendant to take them to Mackin's vehicle. While walking to the vehicle, they had the gun pointed at the defendant. He was ordered to lie on the floor in the back of Mackin's station wagon and, about 40 minutes later, the men let the defendant out of the vehicle on an expressway. Meanwhile, back at Mackin's place of business, Mackin managed to smash open the freezer. He notified police of the robbery and later identified the defendant in a police photograph. *Pegram*, 124 Ill. 2d at 170, 529 N.E.2d at 508. The court in *Pegram* found the record presented sufficient evidence the defendant had been forced, under threat of imminent harm, to participate in the robbery, supporting the use of the compulsion instruction. *Pegram*, 124 Ill. 2d at 173, 529 N.E.2d at 509.

¶ 32 Here, we find the record devoid of any evidence defendant was forced to perform any conduct under compulsion. Defendant never claimed to have committed armed robbery under compulsion by Young or any other individual. A generous reading of defendant's statement suggests, at most, he was unaware the robbery would take place. Defendant stated Guise "ran up on" Adams' vehicle, demanded money, and shot Adams. Defendant believed Guise might try and rob him also. "The defense of compulsion is a defense only with respect to the conduct demanded by the compeller." *People v. Johns*, 387 Ill. App. 3d 8, 15, 898 N.E.2d 1142, 1148 (2008). No individual could have compelled defendant to engage in conduct (armed robbery) he professed to know nothing about. Defendant's statement he was unaware the robbery would take place forecloses the defense of compulsion. See *Scherzer*, 179 Ill. App. 3d at 644, 534 N.E.2d at 1057 (The defendant was not entitled to a jury instruction on the affirmative defense of compulsion where he testified he was unaware the offenses were going to take place.). Accordingly, trial counsel was not ineffective for failing to tender a compulsion instruction.

¶ 33 Alternatively, there was clear evidence defendant had ample opportunity to withdraw from the criminal activity. Walker and Young dropped Guise and defendant at Torrance Park. The two guns had been given to Guise and defendant at the site of the earlier "lick" on Sedgwick Street. Defendant carried his cell phone and a gun. No other individual accompanied Guise and defendant. Defendant followed Guise for approximately two blocks through dense shrubbery and in the dark of night. Defendant stated, as they approached Adams' vehicle, Guise told defendant they were going to rob the individuals seated in the vehicle, and defendant continued to follow as Guise "ran up on the car." There was no evidence Young ever threatened or coerced defendant. He was not present with Guise and defendant as they approached Adams' vehicle. Defendant failed to detail any act compelling his commission of

armed robbery. The compulsion which will excuse the commission of a criminal act must be imminent. There must be no reasonable opportunity to escape the compulsion without committing the crime. A threat of future injury is not enough. Defendant had ample opportunity to withdraw from the planned armed robbery but failed to do so. More to the point, the jury was instructed on withdrawal and it was rejected.

¶ 34 We note further the jurors' questions during deliberations simply disclose a desire for information. They raise no suggestion, much less "some evidence," defendant performed conduct (armed robbery) under compulsion. The trial court properly responded by first asking for clarification and then assuring jurors they had the court's instructions as to the law.

¶ 35 Defendant fails to assert anything more than a generalized fear based on "the sheer number of threats, as well as the age, appearance, and background of the individual delivering the threats." He does not identify conduct he performed because of a specific threat by an individual and makes no showing of a fear of imminent infliction of death or great bodily harm. This evidence of a generalized fear does not rise to the level of a sense of imminent death or great bodily harm to defendant. Defendant did not satisfy his burden of presenting evidence of a nature and quality sufficient to raise the defense of compulsion and merit an instruction. Therefore, defense counsel was not ineffective for failing to request the trial court instruct the jury on the affirmative defense of compulsion.

¶ 36 Defendant also raised a claim of ineffective assistance of appellate counsel for failing to raise the compulsion-instruction issue on direct appeal. "Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel." *People v. Childress*, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). Unless the underlying issue is meritorious, a postconviction petitioner suffers no

prejudice from counsel's failure to raise the issue on direct appeal. *Childress*, 191 Ill. 2d at 175, 730 N.E.2d at 36. Since we have found defendant's compulsion-instruction claim was not meritorious, defendant cannot establish ineffective assistance of appellate counsel.

¶ 37 Based on the foregoing, we find the trial court did not err in summarily dismissing defendant's postconviction petition.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.