2018 IL App (1st) 152699-U

No. 1-15-2699

August 14, 2018

Second 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. 04 CR 7899
	)	
JOSE PEREZ,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's supplemental postconviction petition without an evidentiary hearing when he failed to make a substantial showing that he was denied the effective assistance of posttrial counsel based upon a failure to present evidence and witnesses to support a claim that his access to counsel was delayed. The circuit court did not abuse its discretion when it denied defendant's request for postconviction discovery.

¶ 2 Jose Perez, the defendant, appeals from the dismissal, upon the State's motion, of his supplemental petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1

et seq. (West 2012)). On appeal, defendant contends that the circuit court erred in dismissing the supplemental petition because it made a substantial showing that he was denied the effective assistance of posttrial counsel when posttrial counsel failed to present witnesses and documents to support the contention that defendant's access to counsel was delayed at a police station, which resulted in an inculpatory videotaped statement. In the alternative, defendant contends the circuit court erred when it denied his motion for postconviction discovery when the sought after records were necessary to support this claim. We affirm.

¶ 3 Following a jury trial, defendant was found guilty of first degree murder and dismembering a human body, and sentenced to a total of 50 years in prison. Defendant's convictions arose from the February 2004 kidnapping, murder, and dismemberment of the victim, Jesus Colon.

¶ 4 Prior to trial, defendant filed a motion to suppress statements alleging that his statements were obtained as a result of an interrogation that continued after he "elected to remain silent and/or elected to consult with an attorney" and were therefore involuntary. The trial court denied the motion and the matter proceeded to a jury trial.

¶ 5 At trial, the evidence established that defendant was involved with a group of men that kidnapped the victim for ransom, which resulted in the victim's suffocation and dismemberment. The State presented, *inter alia*, defendant's videotaped statement made on March 9, 2004, in which he stated that he held one of the victim's legs down as the victim was suffocated. Defendant also stated that he was offered $10,000 to help "get rid of the body," and he held the bags into which the victim's body parts were placed. The State also presented the testimony of a forensic scientist who opined that DNA taken from a cigarette butt found in the garage where the

victim's body was dismembered matched defendant's DNA. Defendant testified in his own defense that he was not present when the victim was strangled and did not hold the victim's leg down. Defendant further testified that he only described the events surrounding the victim's death in his videotaped statement because he was instructed to do so by an assistant State's Attorney. Defendant admitted that he held the bags as the victim was dismembered and explained that he did so because he was afraid. The jury found defendant guilty of first degree murder and dismembering a human body.

¶ 6 Trial counsel filed a motion for a new trial. Defendant then obtained new counsel and posttrial counsel filed a supplemental motion for a new trial. The supplemental motion for a new trial alleged that defendant was denied the effective assistance of trial counsel when, although counsel filed a motion to suppress statements, trial counsel did not present the testimony of attorney Sandra Ramos at the hearing on the motion. Attached to the motion in support was Ramos's affidavit.

¶ 7 In her affidavit, Ramos averred that on March 9, 2004, she was contacted by defendant's family and told that he was in police custody. Ramos further averred that after she arrived at the police station between 7:30 and 9 p.m., told an officer that she was there to see defendant, and that she waited "well over an hour" to see defendant. Ramos averred that she saw defendant, "to the best of [her] recollection after 10[ ] p.m." Ramos finally averred that she told trial counsel "everything" contained in her affidavit, but that trial counsel never contacted her to testify at the hearing on the motion to suppress.

¶ 8 At a February 13, 2008 hearing on the motion and supplemental motion for a new trial, Ramos testified that she was contacted by defendant's family on March 9, 2004, and hired to

represent defendant, who was in custody at a police station. She arrived at the police station between 7 and 9 p.m. and told the officer behind the desk to "let them know" that she was there to see defendant. Ramos was told to sit and wait. "Well over an hour" later, a detective came to see her and she saw defendant "sometime" after 10 p.m. When she saw defendant, he had already given a statement.

¶ 9 During cross-examination, Ramos acknowledged that she did not have any notes "at this time;" rather, she was "still searching for that file" and relying on her memory. Ramos recalled that she represented defendant at a bond hearing the following morning. Although she spoke with trial counsel when he was retained, she did not tell him that she was present at the police station prior to, or at the time, that the videotaped statement was taken.

¶ 10 During redirect, Ramos testified that she told trial counsel that she was at the police station and that when she spoke to trial counsel she did not know what time the videotaped statement was taken. In fact, this was "the first [she] heard of it." She had "a couple conversations" with trial counsel, the details of which she did not remember, and had made herself available if she was "to be needed."

¶ 11 The parties stipulated that defendant's bond hearing was held on March 11, 2004.

¶ 12 The State next presented the testimony of defendant's trial counsel Peter Vilkelis. He testified that he filed a motion to suppress statements and that prior to the filing of that motion, he spoke with Ramos. Ramos stated that she saw defendant at a police station after he made a statement. She did not mention that the statement was made after she arrived at the police station. Ramos was listed as a potential witness prior to trial. If Vilkelis had learned that Ramos was at the police station before defendant gave the statement, he would have included that fact in the

motion to suppress. During cross-examination, Vilkelis testified that Ramos stated that she was at the police station on March 9, 2004, that she saw defendant after he had given a statement, and that she "waited some time" before seeing defendant.

¶ 13 In denying defendant a new trial, the trial court stated that Ramos's "memory is not clear" and that she did not have any notes or records. The court further noted it was "not clear" as to when she arrived at the police station and that the court "can't say for sure" Ramos was at the police station prior to the videotaped statement. The court next stated that defendant was cross-examined on the videotaped statement and that cross-examination on the statement would have been proper even if the statement "went out" because defendant testified to something different than what was contained in the statement.

¶ 14 The matter then proceeded to sentencing. Defendant was sentenced to 40 years in prison for first degree murder and to a consecutive 10-year sentence for dismembering a human body.

¶ 15 Defendant raised the following issues on direct appeal: (1) whether the State proved him guilty of first degree murder beyond a reasonable doubt; (2) whether the State committed prosecutorial misconduct by improperly describing the graphic nature of the victim's death; (3) whether the trial court abused its discretion when it denied defendant's request for a compulsion jury instruction; and (4) whether the 50-year prison term was excessive. Defendant's convictions and sentences were affirmed on appeal. See *People v. Perez*, No. 1-08-0859 (2011) (unpublished order under Illinois Supreme Court Rule 23).

¶ 16 In November 2012, defendant filed a *pro se* postconviction petition. The petition was docketed, and postconviction counsel was appointed.

¶ 17 In July 2013, postconviction counsel filed a motion for postconviction discovery of police reports and seeking leave to subpoena "attorney visitation notification forms, district and area lockup keeper's logs, interview/visitors' logs, visitor/attorney sign-in/out sheets, and the area commander's/front desk logs for" March 8 through 11, 2004, to determine whether defendant was denied his right to counsel at a police station when his attorney's access to him was "delayed." On October 29, 2013, the State tendered approximately 870 pages of documents to postconviction counsel. In January 2014, postconviction counsel filed a "renewal" of the discovery request. Although certain police reports were received, the documents that defendant sought regarding visitors had not been.

¶ 18 At a subsequent court date, postconviction counsel stated that she had received a "very large box" of police reports from the State, but visitor logs were not included. Postconviction counsel then stated that she thought police stations had visitor logs and that such logs could determine when exactly Ramos came to see defendant. The State then asked what the basis of postconviction counsel's belief that there was "some document out there that even exists" detailing visitors considering that the State had never seen visitor logs like postconviction counsel described and did not know whether the police department monitored every visitor to a station. The State also noted even if such a visitor log existed, the existence of that document did not mean that Ramos signed it. The State concluded that defendant was on a "true fishing expedition." Postconviction counsel disagreed, as the police department would just have to look and then report that either nothing was found or that the documents were beyond the department's retention policy.

¶ 19 The court then stated that in order for the police department to "affirmatively say that we have nothing" the department would have to "search through a lot of stuff" and such a search, considering the "many, many pages of documents that were tendered already" would be "a lot of work." The State suggested that postconviction counsel determine if such a document, that is, one that a lawyer signed when visiting someone in lockup, existed and what it would be called. The State indicated that if, with research, postconviction counsel learned that such documents existed and what they were called, then the State had no objection to "a specific subpoena targeting that specific thing."

¶ 20 At a subsequent hearing, the State noted that it had filed an objection to discovery based upon a lack of specificity, that is, where was the indication that Ramos "signed in somewhere," what was the factual basis, and what specific entity "can be subpoenaed." Postconviction counsel then tendered to the court a handwritten document from 2004, "entitled moving of arrestee out of and into arrest detention facility" and noted this document was something that was apparently retained. Postconviction counsel acknowledged that this document was from another case. She further stated that she had "not been able to contradict that there [were] not sign-in procedures at this station and Area." However, postconviction counsel ventured "to say" that there was perhaps a "visitor sign-in log generally." Postconviction counsel finally stated that there was no indication "in either direction" in the record as to whether Ramos signed in when she arrived at the police station. After hearing further argument at a subsequent court date, the circuit court denied defendant's request for discovery.

¶ 21 In September 2014, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and a supplemental petition for postconviction relief. The

supplemental petition alleged that defendant was denied his right to counsel during a custodial interrogation, and that this denial of counsel violated his right against self-incrimination and deprived him of due process. Specifically, the supplemental petition alleged that defendant's videotaped statement began at 10:14 p.m. on March 9, 2004, and ended around 11:05 p.m., and that when defendant later saw Ramos, she stated she was waiting to see him. The supplemental petition further alleged that trial, posttrial and appellate counsel were ineffective when they failed "to ascertain the relevant sequence of events," and to raise this claim.

¶ 22 Attached to the petition in support were, *inter alia*, defendant's August 2014 affidavit, the supplemental motion for a new trial, Ramos's posttrial affidavit, the transcript from defendant's March 11, 2004 bond hearing, the transcript from the hearing on the motion and supplemental motion for a new trial, and a Chicago Police Department "Arrest Processing Report."[1]

¶ 23 In defendant's August 2014 affidavit, he averred that when he spoke to attorney Sandra Ramos "shortly after the videotaping [of his statement] was over," she told him that she arrived "earlier" and "had been waiting." Defendant further averred that at the time he "was making the videotaped statement" he did not know that anyone was at the police station to see him and that when he saw Ramos it was the first time that he knew that anyone had been contacted regarding his case. Defendant also averred that he saw Ramos "the same night of the videotaped statement" and that Ramos appeared on his behalf one-and-a-half days after she saw him at the police station, "not the next day." Defendant finally averred that he told trial counsel that Ramos saw him at the station the same night that he made the videotaped statement. The "Arrest Processing Report" included a "Movement Log" detailing defendant's movements on March 10 and 11,

[1] The Chicago Police Department "Arrest Processing Report" is also included in the common law record of defendant's direct appeal.

2004. It also included an "Interview Log" and a "Visitor's Log," which stated that no interviews or visitors were logged. The State filed a motion to dismiss, which the circuit court granted.

¶ 24 On appeal, defendant contends the circuit court erred when it granted the State's motion to dismiss because the supplemental petition made a substantial showing that he was denied the effective assistance of posttrial counsel. Defendant contends that posttrial counsel failed to adequately investigate and present his claim that his access to Ramos was delayed on March 9, 2004, which resulted in the inculpatory videotaped statement. In essence, defendant argues that there were witnesses and documents which would have verified when Ramos arrived at the police station and that posttrial counsel failed to discover and present this evidence to the trial court.

¶ 25 To the extent that the State argues that this claim is waived because defendant did not raise it on direct appeal, we disagree. Here, defendant's postconviction claim rests upon the assertion that posttrial counsel failed to present certain evidence and witnesses to the trial court at the hearing on the motion for a new trial, that is, evidence that was *de hors* the record on direct appeal. See *People v. Hall*, 157 Ill. 2d 324, 336-37 (1993) (a defendant's claim that trial counsel was ineffective for failing to investigate and present meaningful mitigating evidence at his death sentence hearing was not waived for failure to raise the issue on direct appeal, because the claim relied on affidavits of the alleged mitigating witnesses, which were not part of the original record on direct appeal). Accordingly, because the witnesses and documents allegedly supporting defendant's claim were outside the record on direct appeal, that is, they were never presented to the trial court, defendant's claim is not waived in this postconviction proceeding.

¶ 26 The Act (725 ILCS 5/122-1 *et seq*. (West 2012)), provides a three-stage process for defendants who allege they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the second stage of proceedings under the Act, the circuit court must determine whether the petition and its supporting documentation make a substantial showing of a constitutional violation. *Id.* ¶ 28. A substantial showing is a measure of the legal sufficiency of the petition's allegations which, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. A defendant, however, is not entitled to an evidentiary hearing as a matter of right; rather, the allegations of the petition must be supported by the record or by accompanying affidavits, and nonspecific and nonfactual assertions that merely amount to conclusions are not sufficient to warrant a hearing under the Act. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). A defendant has the burden to demonstrate a substantial showing *(Domagala*, 2013 IL 113688, ¶ 35), and if he fails to meet that burden, the court will dismiss the petition *(Cotto*, 2016 IL 119006, ¶ 28). If, however, the court determines that the petition made a substantial showing of a constitutional violation, the petition will advance to the third stage, where an evidentiary hearing is held. *Id*.

¶ 27 Here, we are reviewing the second stage dismissal of defendant's claim that he received ineffective assistance of posttrial counsel. To prevail on such a claim, defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). With respect to the first element, objectively deficient performance, a defendant must overcome the presumption that the complained-of action or inaction was the product of sound trial strategy.

People v. King, 316 Ill. App. 3d 901, 913 (2000). Generally, counsel's decision whether to present a witness at trial is considered to be a strategic decision. *Id.* Attorneys have, however, been found to be ineffective where they have failed to present exculpatory evidence of which they are aware. *Id.*

¶ 28 In the case at bar, although defendant contends that posttrial counsel failed to use available "evidence and witnesses" to corroborate that Ramos was in fact at the police station prior to defendant's videotaped statement, the record contains neither witness affidavits nor evidence in support of this claim. At the second stage of proceedings under the Act, a defendant has the burden to make a substantial showing of a constitutional violation (*Domagala*, 2013 IL 113688, ¶ 35); an evidentiary hearing will only be held when the allegations in the petition make a substantial showing of a constitutional violation, and the petition is supported by affidavits, records, or other evidence (*People v. Johnson*, 154 Ill. 2d 227, 239 (1993)). The affidavits must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the defendant's allegations. *Id*. at 240. "A post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record." *Id.*

¶ 29 Here, the record reveals that Ramos testified at the hearing on the motion and supplemental motion for a new trial that she arrived at the police station where defendant as being held between 7 and 9 p.m. on March 9, 2004, that she waited over an hour to see defendant, and that by the time she saw defendant he had already made a videotaped statement. During cross-examination, Ramos testified that she was relying on her memory rather than notes

and that she represented defendant at his bond hearing the next morning. The parties then stipulated that defendant's bond hearing was held on March 11, 2004. In denying defendant a new trial, the court stated, in pertinent part, that Ramos's memory was not "clear" and that she did not have any notes to corroborate when she arrived at the police station, and thus, the court could not "say for sure" if Ramos was at the police station prior to the time that the videotaped statement was made.

¶ 30 Defendant's argument on appeal is that posttrial counsel should have used available "evidence and witnesses" to corroborate that Ramos was in fact at the police station on March 9, 2004 prior to defendant's videotaped statement, and, presumably to contradict her testimony that she saw defendant on March 10, 2004, that is, the day before the March 11, 2004 bond hearing. However, other than his affidavit in support, defendant identifies no witnesses and points to no documents that that support this claim. To the extent that defendant argues that a Chicago Police Department "Arrest Processing Report" "strongly suggests" that Ramos was at the police station on the night that he gave his videotaped statement, we note that a copy of that document is also contained in the record on appeal in defendant's direct appeal. Moreover, that document indicates that no visitors were logged on March 10 and 11, 2004.

¶ 31 A postconviction claim that trial counsel failed to investigate and call a witness to testify must be supported by an affidavit of the proposed witness. *People v. Guest*, 166 Ill. 2d 381, 402 (1995). Without affidavits from the proposed witnesses, this court cannot determine whether those witnesses could have provided testimony favorable to the defendant, and thus, further review of the claim is not necessary. *People v. Enis*, 194 Ill. 2d 361, 380 (2000).

¶ 32 Here, not only did defendant not provide affidavits from witnesses who could support his claim that Ramos was at the police station on March 9, 2004, he did not even identify possible witnesses. Absent some indication of the specific witnesses that posttrial counsel should have investigated and presented at the hearing and the content of their testimony, this court cannot determine whether these unidentified witnesses exist, and if so, whether they could have provided testimony favorable to defendant. *Id.*

¶ 33 Similarly, the record does not contain, and defendant does not identify, the documents defendant believes that posttrial counsel should have obtained and presented to support the claim that Ramos was present at the police station on March 9, 2004 prior to the creation of the videotaped statement. The record reveals that postconviction counsel sought police documents relating to visitors and "front desk logs" for March 8 through 11, 2004 to determine when Ramos visited defendant, but that such documents were not included in the documents produced by the State. In fact, it is unclear from the record whether such documents actually exist. Thus, defendant's assertion that there were "available" documents that posttrial counsel should have discovered and presented in order to corroborate when Ramos arrived at the police station is unsupported and conclusory, that is, not sufficient to warrant an evidentiary hearing under the Act. See *Coleman*, 186 Ill. 2d at 381.

¶ 34 Accordingly, we find the circuit court properly dismissed the instant supplemental postconviction petition at the second stage of proceedings under the Act because defendant failed to make a substantial showing that posttrial counsel's performance was deficient when defendant failed to identify the witnesses and documents that posttrial counsel should have presented at the

hearing on the motion and supplemental motion for a new trial. See *Domagala,* 2013 IL 113688, ¶ 35.

¶ 35 In the alternative, defendant contends the circuit court erred when it denied his motion for postconviction discovery when the records that he sought from the police, that is, sign in sheets and logs, and the area commander's front desk log, would have determined when exactly Ramos arrived at the police station.

¶ 36 In the context of a postconviction proceeding, discovery should only be granted upon a showing of " 'good cause.' " *People v. Johnson*, 205 Ill. 2d 381, 408 (2002). Good cause is shown by "considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources." *Id*. We review the circuit court's denial of a postconviction discovery request for an abuse of discretion. *People v. Lucas,* 203 Ill. 2d 410, 429 (2002). No abuse of discretion occurs where the request "ranges beyond the limited scope of a post-conviction proceeding and amounts to a 'fishing expedition.' " *Johnson*, 205 Ill. 2d at 408 (quoting *Enis*, 194 Ill. 2d at 415).

¶ 37 Here, the record reveals that postconviction counsel sought documents that would establish exactly when Ramos arrived at the police station. Although postconviction counsel thought that the police department kept visitor logs and such logs could determine the exact time that Ramos visited defendant, she acknowledged that the record did not indicate "either way" whether Ramos actually signed a visitor log. When postconviction counsel argued the police department could simply look to determine whether such logs existed, the court noted that in order to "affirmatively" answer that such documents did not exist, "a lot of stuff" would have to

be searched and "a lot of work" would have to be completed. Although postconviction counsel relied upon a handwritten document from a contemporaneous case that detailed an arrestee's movements to argue that such a document may have been created in defendant's case, counsel did not point to a factual basis for the conclusion that such a document was routinely created or existed in defendant's case. Ultimately, this court cannot say the circuit court abused its discretion when it denied defendant's motion for postconviction discovery when the record is silent as to whether or not sign in sheets actually existed at the police station where defendant was held in 2004, and whether or not Ramos actually signed such a sheet. See *Lucas*, 203 Ill. 2d at 429.

¶ 38 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.