

2018 IL App (1st) 152806-U

No. 1-15-2806

June 29, 2018

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 07 CR 5705
)	
JEFFERY STARKS,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition because he failed to present an arguable claim that his trial counsel was ineffective for failing to call a witness.

¶ 2 Following a 2011 jury trial, defendant Jeffery Starks was found guilty of the felony murder of Jesse Herrera, based on the predicate felony of vehicular invasion, and was sentenced to 40 years' imprisonment. On direct appeal, this court affirmed. See *People v. Starks*, 2013 IL App (1st) 112002-U. Defendant filed a *pro se* postconviction petition under the Post-Conviction

Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), which the trial court summarily dismissed. On appeal, defendant argues that the trial court erred in summarily dismissing his petition because the petition presented an arguable claim that his trial counsel provided ineffective assistance by failing to call a witness whose testimony would have undermined the testimony of the State's only witness, who saw defendant beating Herrera. We affirm.

¶ 3 Because on direct appeal we set forth a detailed recitation of the evidence adduced at trial, we recount the facts here only to the extent necessary to resolve the issue raised on appeal. See *Starks*, 2013 IL App (1st) 112002-U, ¶¶ 3-10.

¶ 4 The evidence at trial established that, at approximately 2 a.m. on January 20, 2007, defendant and Herrera sat in a parked car in an alley near East 91st Street in Chicago. Herrera was in the driver's seat and the driver's door was against a structure which prevented it from opening. Defendant, who was in the front passenger's seat, began punching Herrera and then exited the car through the passenger's door. Defendant continued punching Herrera and attempted to drag him out of the car through the passenger's door. Police arrived at the scene and saw defendant near Herrera, who was lying on the ground near a pool of blood. Defendant looked toward the police and fled into an apartment building, where he was eventually taken into custody. Herrera was hospitalized, entered a coma, and died on February 18, 2008.

¶ 5 The sole issue at trial was determining Herrera's cause of death. The State argued that Herrera died of injuries caused by blunt force trauma inflicted by defendant's beating. Defendant argued Herrera died from his preexisting liver disease and not the injuries he inflicted.

¶ 6 The State called Sonya Moore, an eyewitness to the beating. At the time of the incident, Moore was a resident of a shelter on 91st Street and was standing on a porch overlooking the

alley, where she saw a parked car with two men in it. The passenger, defendant, demanded money from the driver, Herrera. When Herrera refused, defendant began punching him. Defendant exited the car, continued punching Herrera, and attempted to drag Herrera out of the car through the passenger's side door. When Herrera cried out in pain, Moore went inside and told the shelter manager, Linda Motley, who called 911. Moore continued to watch the events in the alley on a security monitor located inside the shelter. The monitor displayed live footage from a surveillance camera in the alley. Moore observed that Herrera was almost all the way out of the car, but not quite on the pavement. Defendant was hitting, kicking, and stomping on Herrera. Because the surveillance camera did not show the ground, Moore did not see Herrera when he was lying on the ground.

¶ 7 Prior to her trial testimony, Moore had described what she observed in an interview with police at the scene. She had also provided a statement to an Assistant State's Attorney (ASA) and a detective two days after the incident. Moore had further testified before a grand jury. At trial, after Moore's direct testimony, it was elicited that the only time Moore mentioned that the security monitor showed defendant kicking and stomping on Herrera was during her grand jury testimony, when she was asked to clarify whether defendant only used his fists to beat Herrera. Moore responded that defendant initially only hit Herrera with his fists, but later, when she watched from the surveillance monitor inside the shelter, he also kicked and stomped on Herrera.

¶ 8 Police officers who responded to the scene also testified at trial. Two officers arrived and saw defendant standing next to a car. Herrera was lying on the ground, and there was a pool of blood nearby. Defendant looked toward the officers and fled into an apartment building. He was eventually taken into custody. Defendant told arresting officers that Herrera had tried to rob him.

Later, defendant told a detective that he punched Herrera in the face several times because Herrera was asking for drugs and refused defendant's request to leave.

¶ 9 Dr. Ariel Goldschmidt, an employee of the Cook County Medical Examiner's Office, reviewed Herrera's hospital records and autopsy report, which had been prepared by a doctor who was no longer with the medical examiner's office. Herrera was 50 years old when he died and had a liver transplant several years earlier. Herrera's new liver was cirrhotic and he had esophageal bleeding, which was an indicator of late-stage liver disease. Herrera had several facial lacerations and bone fractures, including to his face, shoulder blades, and two cervical vertebrae. Herrera's facial injuries were consistent with being hit with a fist or being pressed against a hard surface. Fractures to Herrera's shoulder blades and vertebrae were caused by a significant force, which could have been a person stomping on Herrera's neck or chest.

¶ 10 Goldschmidt agreed with the doctor's conclusion in the autopsy report that Herrera's death was caused by injuries from an assault and that it was a homicide. Goldschmidt explained that Herrera's broken bones "started the domino effect leading to his death." Specifically, Herrera's broken bones caused immobilization, which is known to cause further debilitation. In Herrera's case, his condition worsened relatively quickly; he was alert at the scene, arrived at the hospital and required tracheal intubation to breath, and then lost consciousness and became comatose until his death.

¶ 11 The defense called medical experts, who testified that Herrera's death was caused by his liver disease and was not caused by injuries sustained during the beating. Herrera's medical records showed that, after he had a liver transplant, he ceased taking his anti-rejection medications for his new liver and was drinking alcohol. His worsening liver condition was

reflected in medical records from as early as 2006, when an MRI showed cirrhosis of his liver and esophageal bleeding. While records showed Herrera had sustained broken bones and lacerations, the experts opined that those injuries would not have caused his death because he did not lose a large amount of blood from those injuries.

¶ 12 During closing arguments, defense counsel argued that the injuries defendant inflicted on Herrera were not so severe as to have been the cause of Herrera's death and that Herrera died of liver disease. The jury found defendant guilty of felony murder, based on the predicate felony of vehicular invasion, and the trial court sentenced him to 40 years' imprisonment.

¶ 13 On direct appeal, defendant argued that the State failed to prove him guilty beyond a reasonable doubt of vehicular invasion and that his conviction for felony murder, based on vehicular invasion, violated the once-act, one-crime doctrine. He also argued that the trial court erred in admonishing the jury regarding the reasonable doubt standard and the court improperly considered a factor inherent in the offense as an aggravating factor at sentencing. See *Starks*, 2013 IL App (1st) 112002-U, ¶ 2. This court affirmed defendant's conviction and sentence. *Id.*

¶ 14 On December 12, 2014, defendant filed the instant *pro se* postconviction petition. In it, defendant alleged, in pertinent part, that trial counsel provided ineffective assistance by failing to call Motley as a witness. Defendant argued that Motley's testimony would have contradicted Moore's testimony regarding what was visible on the surveillance monitor, which would have decreased the weight the jury assigned to Moore's testimony. Defendant's petition included a notarized affidavit signed by Motley. In the affidavit, Motley attested that the alleyway surveillance camera did not provide an extended view down the alley and that, during the

incident, she saw “movement” but not anything to “lawfully confirm” aggressive or violent activity.

¶ 15 In a written order, the trial court summarily dismissed defendant’s postconviction petition, finding his claims frivolous and patently without merit. Defendant appeals.

¶ 16 Defendant’s only contention on appeal is that the court erred in summarily dismissing his petition because it presented an arguable claim that he was denied his right to the effective assistance of trial counsel. Specifically, he argues that his counsel was ineffective for failing to call Motley, whose testimony would have contradicted and impeached Moore’s testimony that hitting and kicking were visible on the surveillance footage.

¶ 17 The Act provides a process for a convicted defendant to assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). A proceeding under the Act does not constitute a continuation of the criminal case or substitute for direct appeal. Rather, it serves as a collateral proceeding that is limited to claims that were not, but could have been, litigated earlier. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). “Consequently, any issues that were decided on direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are forfeited.” *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006). A defendant bears the burden of showing that he qualifies for relief under the Act by demonstrating a violation of a constitutional right. 725 ILCS 5/122-1(a)(1) (West 2014).

¶ 18 Proceedings under the Act are divided into three stages. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). At the first stage of the proceedings, the trial court examines the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v.*

Hodges, 234 Ill. 2d 1, 10 (2009). A petition is considered “frivolous” or “patently without merit” when it has “no arguable basis either in law or in fact.” *Id.* at 16. A petition will have “no arguable basis either in law or in fact” when it “is based on an indisputably meritless legal theory or a fanciful factual allegation.” *Id.* Where the record contradicts a defendant’s legal theory, the theory is meritless. *Id.* “Fanciful factual allegations include those which are fantastic or delusional.” *Id.* at 17. We review *de novo* the summary dismissal of a postconviction petition. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 19 Here, defendant’s *pro se* petition alleged that his trial counsel was ineffective for failing to call Motley as a witness. Claims of ineffective assistance of appellate counsel are governed by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Griffin*, 178 Ill. 2d 65, 74 (1997). To show ineffective assistance under *Strickland*, a defendant must show that (1) counsel’s performance was deficient and (2) the deficient representation was prejudicial. *Strickland*, 466 U.S. at 688; *Petrenko*, 237 Ill. 2d at 496. In *Hodges*, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors. 234 Ill. 2d at 17. Rather, “a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel’s performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced.” *Id.* Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice is found where there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Petrenko*, 237 Ill. 2d at 496-97. If we can dispose of defendant’s ineffective assistance claim because he suffered no prejudice, we need not address

whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 20 After reviewing the record, we find that the court did not err in summarily dismissing this claim, because defendant cannot show that he was arguably prejudiced by counsel's alleged deficient performance. Stated differently, defendant cannot show that if counsel presented Motley's proposed testimony there is a "reasonable probability" that the result of the proceeding would have been different. *Petrenko*, 237 Ill. 2d at 496–97. Motley's proposed testimony merely disputes the manner in which defendant beat Herrera, *i.e.*, that the kicking and stomping was not visible on the security monitor. However, the issue at trial was not whether defendant beat Herrera or the manner in which he did so. Rather, the issue was whether the injuries Herrera suffered as a result of the beating caused his death or if the death was caused by Herrera's preexisting liver disease. After hearing expert testimony on the matter, the trier of fact resolved this issue in favor of the State. Motley's proposed testimony has no bearing on Herrera's cause of death where, regardless of how long defendant beat Herrera or whether he beat him with just his fists, it is undisputed that the beating resulted in the lacerations and fractures suffered by Herrera. The State's medical examiner testified that these lacerations and fractures ultimately caused Herrera's death. In light of this evidence, even if Motley had testified at trial, defendant cannot show a reasonable probability that the result of the proceeding would have been different. *Petrenko*, 237 Ill. 2d at 496-97. Accordingly, the court did not err in summarily dismissing defendant's claim of ineffective assistance of trial counsel.

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

¶ 22 Affirmed.