2018 IL App (1st) 160495-U

FIFTH DIVISION
Order filed: November 2, 2018

No. 1-16-0495

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. 10 CR 18298
	)	
CHRISTOPHER KOVANDA,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing the defendant's *pro se* postconviction petition for relief at the first-stage of postconviction proceedings.

¶ 2 The defendant, Christopher Kovanda, appeals from the first-stage summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), contending that he was deprived of his constitutional right to the effective assistance of counsel. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 Following a jury trial in January 2012, the defendant was convicted of attempted first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 45 years' imprisonment. On direct appeal, this court affirmed his conviction. See *People v. Kovanda*, 2015 IL App (1st) 123492-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised in this appeal.

¶ 4 The evidence adduced at trial established that between late-night on June 16, 2010, and early-morning on June 17, 2010, the defendant entered the victim's home, beat him, and shot him in the head, causing him physical and mental disabilities. In its case-in-chief, the State called an officer and a detective from the Chicago Police Department, both of whom testified that the defendant fled from them twice during the course of their investigation.

¶ 5 After the State rested, the circuit court admonished the defendant as follows about his constitutional right to testify at his trial:

> "THE COURT: Mr. Kovanda, do you understand, sir, that you have a right to testify in this case if you want? You do understand that, correct?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: And I know that you were listening, of course, carefully to the opening remarks when we selected the jury. You also understand that it's your right, you don't have to put on any evidence at all, and that means you certainly don't have to take the stand in this case. You do understand that also, correct?
>
> THE DEFENDANT: Correct.
>
> THE COURT: And after talking to your attorney about the issue of testifying, do you want to testify or not?
>
> THE DEFENDANT: No. Thank you.

THE COURT: No, you do not want to testify, correct?

THE DEFENDANT: No, I do not want to testify, your Honor."

¶ 6 During the defense's case-in-chief, the defendant did not testify. At the conclusion of the trial, the jury returned a verdict finding the defendant guilty of attempted first-degree murder and the circuit court sentenced him to 45 years' imprisonment.

¶ 7 On direct appeal, the defendant argued that (1) trial counsel rendered ineffective assistance; (2) prejudicial errors occurred during opening and closing arguments; and (3) the State shifted the burden of proof to him during its questioning of its fingerprint expert. See *Kovanda*, 2015 IL App (1st) 123492-U. On January 16, 2015, this court affirmed the judgment of the circuit court. *Id.*

¶ 8 On November 3, 2015, the defendant filed a *pro se* postconviction petition for relief under the Act alleging, *inter alia*, that trial counsel was ineffective for failing to allow him to testify on his own behalf. In support of his petition, the defendant included a sworn affidavit wherein he averred:

> "After the trial judge admonished me that it was my right and my choice and noone [*sic*] else's I brought it to my attorney's attention he was dismissive and I was just too exhausted to press the matter. I briefly considered snitching to my judge but she had already yelled at me for speaking and I was scared of her so I just held my piece [*sic*]. I wish to God that I had pressed the issue but thinking back now and after reading a lot of legal stuff I realize that my lawyer never once prepared me to give testimony or to endure the state's cross-examination."

¶ 9 Additionally, the defendant made the following averments in his affidavit. He wanted to testify that he never knew the victim and to explain why he ran from the police. In anticipation of

questions regarding his prior conviction, he wanted to offer testimony to rehabilitate his character. Accordingly, he would have testified that he earned college credits while incarcerated, continued taking college courses upon his release, married a classmate, and attended a Bible group with his wife. At trial, he intended to admit his college transcripts into evidence and call the Bible group leader to testify. However, trial counsel lost his transcripts and the Bible group leader could not be called because he "threatened to sabotage the entire proceding [*sic*]." Without the college transcripts or testimony from his Bible group leader, the defendant averred that "[t]here was no buffer available to me to minimize the prejudice of my prior criminal conviction. As a result, I could not testify at my own trial." Lastly, the defendant averred that trial counsel knew that he wanted to testify, but "flat out refused to allow" it.

¶ 10 In addition to the affidavit, the defendant attached to his petition email correspondence with counsel, in which they discussed whether or not the defendant would testify. In one email, the defendant made the following statement: "since you are teetering toward allowing me to take the stand and my convictions will be brought up anyway, I would like it [*sic*] to remind you that me and [my wife] have an excellent character witness."

¶ 11 On January 14, 2016, the circuit court entered a written order summarily dismissing the defendant's postconviction petition, finding that the issues raised were "frivolous and patently without merit or otherwise waived." Specifically, the circuit court noted that his claim for ineffective assistance of counsel was "meritless because, as petitioner admits in his petition, the court properly admonished petitioner about his right to testify and he waived that right on the record." This appeal followed.

¶ 12 The defendant contends solely that the circuit court erred when it summarily dismissed his postconviction petition where he presented an arguable claim that trial counsel was

ineffective for denying him his constitutional right to testify.

¶ 13 In a noncapital case, the Act creates a three-stage procedure by which criminal defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution and the Illinois Constitution. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005); *People v. Mahaffey*, 194 Ill. 2d 154, 170 (2001). At stage one, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122–2.1 (West 2014). If not summarily dismissed, the petition proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122–4, 122–5 (West 2014). If a petition survives the second stage, it advances to the third stage for an evidentiary hearing. 725 ILCS 5/122–6 (West 2014). Here, the defendant's petition was dismissed at the first stage of postconviction proceedings, which we review *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 14 If the circuit court finds that the petition is "frivolous" or "patently without merit," the Act requires that the court dismiss it. 725 ILCS 5/122–2.1(a)(2) (West 2014); *People v. Harris*, 224 Ill. 2d 115, 126 (2007). A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 60 (quoting *People v. Hodges*, 234 Ill. 2d 1, 12 (2009)). A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Brown*, 236 Ill. 2d 175, 185 (2010) (quoting *Hodges*, 234 Ill. 2d at 16). Meritless legal theories include ones completely contradicted by the record, while fanciful factual allegations may be "fantastic or delusional." *People v. Allen*, 2015 IL 113135, ¶ 25.

¶ 15 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both

that (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Cox*, 2017 IL App (1st) 151536, ¶ 51 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19.

¶ 16 Here, the defendant contends that in his petition he presented an arguable claim that trial counsel was ineffective where counsel knew that he wanted to testify but would not allow him to do so. The defendant further argues that, while preparing for trial, counsel led him to believe that it was counsel's choice as to whether or not he would testify. In support, the defendant relies on his email to counsel in which he states, "since you are teetering toward allowing me to take the stand."

¶ 17 We find that the defendant's theory is meritless as it is completely contradicted by the record. *Allen*, 2015 IL 113135, ¶ 25. Regardless of the defendant's understanding of his right to testify before the trial began, the record reveals that at the moment when he waived his right to testify, he understood it was his decision to make and he chose not to testify. First, the circuit court properly admonished the defendant of his right to testify at trial. Specifically, the trial judge asked if he understood his right to testify, if he had discussed the issue with counsel, and if he wanted to testify. The defendant responded, "No, I do not want to testify, your Honor." The record clearly reflects that the defendant was properly admonished and waived his right.

¶ 18 Moreover, the defendant admitted, in his affidavit attached to his petition, that he understood the circuit court's admonishment. Specifically, the defendant averred, "the trial judge

admonished me that it was my right and my choice and noone [*sic*] else's." It is clear by the defendant's own characterization of the admonishment that, at the time that he waived his right to testify, he understood that it was his decision to make, not counsel's. He cannot now reasonably claim that, when he waived his right to testify, he was still under the impression that it was counsel's decision to make or that counsel prevented him from testifying.

¶ 19 Therefore, the record establishes that the defendant was properly admonished by the circuit court of his right to testify and he admitted that he understood that admonishment. Accordingly, the record completely contradicts his allegation that trial counsel provided ineffective assistance by refusing to allow him to testify. *Allen*, 2015 IL 113135, ¶ 25. We find the circuit court did not err in finding the defendant*'s* petition frivolous and patently without merit and we affirm its judgment summarily dismissing the defendant's postconviction petition at the first-stage of proceedings under the Act.

¶ 20 Affirmed.