2018 IL App (1st) 162558U

No. 1-16-2558

Order filed November 14, 2018

Third 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. 12 CR 3937
	)	
KENDERICK ADAMS,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's first-stage dismissal of defendant's *pro se* postconviction petition over his contention that his trial counsel was ineffective for failing to file a motion to suppress his confession.

¶ 2 Defendant, Kenderick Adams, appeals the trial court's first-stage dismissal of his *pro se* petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). He contends that the trial court erred in summarily dismissing his petition because he

presented an arguable claim of ineffective assistance of trial counsel based on counsel's failure to move to suppress his confession. We affirm.

¶ 3 Following a 2014 jury trial, defendant was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). He was sentenced to consecutive, respective terms of 14 and 4 years' imprisonment. On direct appeal, this court affirmed defendant's convictions and sentence. *People v. Adams*, 2016 IL App (1st) 141748-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised on appeal. See *Adams*, 2016 IL App (1st) 141748-U, ¶¶ 4-7.

¶ 4 At trial, the parties stipulated that A.M. was born on July 17, 1997 and that defendant was born on February 15, 1989.

¶ 5 A.M. testified that defendant is his cousin and, in 2007, when A.M. was 10 years old, lived in the apartment below that of A.M. and his mother. One day that year, A.M. entered defendant's room and witnessed him watching a pornographic film. Defendant told A.M. to close the door and leave, which he did. On a subsequent occasion, A.M. again entered defendant's room and witnessed him watching a pornographic film. A.M. stayed and both he and defendant masturbated. One day, while the two watched pornography together, defendant asked if he could touch A.M.'s penis. A.M. said yes and defendant manually masturbated A.M. This occurred multiple times.

¶ 6 On another occasion, defendant asked if he could put his mouth on A.M.'s penis. A.M. agreed and defendant performed oral sex on A.M. The oral sex happened more than one but less than five times. A.M. testified that the sexual interactions with defendant began when he was 10

years old but also stated he did not remember when they began. Defendant last put A.M.'s penis in his mouth when A.M. was approximately 12 or 13 years old.

¶ 7 Detective Robert Midlawski testified that he questioned defendant on January 31, 2012, at the police station. After Midlawski gave defendant his *Miranda* warnings, defendant informed him that he performed oral sex on A.M. between 10 and 20 times. Midlawski called for an Assistant State's Attorney (ASA) and ASA Jane Dillman arrived shortly thereafter.

¶ 8 Dillman testified that, on January 31, 2012, defendant provided a signed statement to her during his interview at the police station. The statement was published to the jury. In the statement, defendant declared that he masturbated with A.M., "jag[ged] him off" multiple times, and performed oral sex on him between six and eight times. Defendant stated all of the incidents took place over the course of a year when A.M. was between 9 and 10 years old and defendant was between 16 and 18 years old, "between July 17, 2007 and July 16, 2008." Defendant's signed statement contains the following passage: "Kenderick states that no threats or promises have been made to him to get him to make this statement and that he is giving this statement freely and voluntarily." Dillman testified that, when she asked defendant whether the police threatened him or made promises to him, he responded: "no threats or promises had been made before [she] arrived."

¶ 9 After being instructed by the court, the jury found defendant guilty on both counts. Defendant was sentenced to 14 years' imprisonment for predatory criminal sexual assault of a child and 4 years' imprisonment for aggravated criminal sexual abuse, to be served consecutively.

¶ 10 On direct appeal, defendant argued that the trial court erred when it imposed the sentence for predatory criminal sexual assault of a child based on the mistaken belief that the statutory sentencing guidelines allowed for a range of 6 to 60 years' imprisonment rather than 6 to 30 years. This court affirmed defendant's convictions and sentence. See *Adams*, 2016 IL App (1st) 141748-U.

¶ 11 On June 6, 2016, defendant filed the *pro se* postconviction petition at bar, alleging several instances of ineffective assistance of trial counsel and multiple errors by the trial court. In addition to these allegations, the petition's "Statement of Facts" includes the allegation that, after he was arrested, "police officer's [sic] made promises that [his] case would be a juvenile case if [he] made a statement." Defendant makes a similar allegation in his affidavit, stating that "[t]he police made promises that it would be a juvenile case if I admitted things happened."

¶ 12 On August 2, 2016, the circuit court summarily dismissed defendant's petition in a written order, finding it frivolous and patently without merit. The court's order addressed only those allegations found in defendant's "Argument" section and did not address defendant's allegation in the facts section of his petition regarding the officers' promise made prior to his confession.

¶ 13 Defendant appeals, arguing that the circuit court erred in summarily dismissing his petition at the first-stage of postconviction proceedings because his petition presented an arguable claim that his trial counsel was ineffective for failing to file a motion to suppress his confession because it was not voluntarily made.

¶ 14 Where, as here, a postconviction petition does not implicate the death penalty, a circuit court adjudicates the petition in three distinct stages. *People v. Hodges,* 234 Ill. 2d 1, 10 (2009).

At the first stage of postconviction proceedings, the trial court may dismiss a petition only if it is " 'frivolous or is patently without merit.' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). A petition is frivolous and or patently without merit if it " 'has no arguable basis * * * in law or in fact.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17 (2009)). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 15 During first-stage postconviction proceedings, "a petition alleging ineffective assistance [of counsel] 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." *Hodges*, 234 Ill. 2d at 17. 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." *People v. Petrenko*, 237 Ill. 2d 490, 496–97 (2010); *Strickland*, 466 U.S. at 690, 694. Because a defendant must prove both elements, we may review the prejudice prong first. *People v. Gray*, 2012 IL App (4th) 110455, ¶ 25.

¶ 16 In this court, defendant contends that his trial counsel was ineffective for failing to file a motion to suppress his confession because it was not voluntarily made. Specifically, defendant

claims that detectives induced him to confess by promising that he would be prosecuted as a juvenile.

¶ 17 After reviewing the record, we find that the court did not err in summarily dismissing defendant's postconviction petition because defendant failed to present an arguable claim that his trial counsel's performance was objectively unreasonable. Although in his brief defendant argues that his trial counsel was ineffective for failing to move to suppress his confession, neither his petition nor his affidavit alleges that his counsel had any knowledge of the officers' promise to prosecute defendant in a juvenile proceeding. In his petition, defendant did not allege that he told counsel about the officers' promise to him such that counsel could file the motion on this basis. Simply put, defendant's petition does not make any allegation against his trial counsel with regard to this issue. While we must accept factual allegations at the first-stage of postconviction proceedings as true unless positively rebutted by the record, defendant must still allege facts that present an arguable claim that his conviction was a result of a substantial denial of his constitutional rights. See *Hodges*, 234 Ill. at 10 (explaining that "our recognition of a low threshold at this stage does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation."). Here, defendant has failed to provide any factual details that his counsel was aware of the involuntary nature of his confession.

¶ 18 Rather, the record rebuts defendant's allegation that his confession was involuntary. We note that defendant's signed statement contains the following passage: "Kenderick states that no threats or promises have been made to him to get him to make this statement and that he is giving this statement freely and voluntarily." Dillman likewise testified that, when she asked

defendant whether the police threatened him or made promises to him, he responded: "no threats or promises had been made before [she] arrived." Given this record and defendant's failure to allege that his counsel had any knowledge of the officers' promise, we conclude that the court did not err in summarily dismissing his petition as frivolous and patently without merit.

¶ 19 For these reasons, we affirm the decision of the circuit court of Cook County.

¶ 20 Affirmed.