2018 IL App (3d) 160704-U

Order filed August 22, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0704
v.	)	Circuit No. 13-CF-591
	)	
TRACY EUGENE JOHNSON,	)	Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it summarily dismissed defendant's *pro se* postconviction petition.

¶ 2 Defendant, Tracy Eugene Johnson, appeals from the first-stage dismissal of his *pro se* postconviction petition. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2012)). The circuit court appointed counsel to represent defendant, and the cause proceeded to a jury trial.

¶ 5 At trial, William Clay testified that he lived on the second floor of a building located at 1103 29th Avenue, Rock Island. The Land of Beauty salon, which Clay owned, occupied the first floor of the same building. On April 6, 2013, Clay terminated hair stylist Shetara Johnson's chair lease because Shetara had failed to pay rent. Defendant is Shetara's father-in-law.

¶ 6 On April 21, 2013, at approximately 1 a.m., Clay heard a noise coming from the first floor. Clay accessed his security camera video feed and saw two men whom he was unable to identify in the hallway near the rear door to the salon. One of the men beat on the door that led into the salon. Clay called the police and yelled to the men "[h]ey. What the hell are you doing. Hey. The police are on their way." The man stopped beating on the door and moved to the front of the building where he broke the glass out of a door and a storefront window. The man took the cash register from the salon and fled on foot.

¶ 7 Clay further testified that one of the State's exhibits, a photograph of a door, showed the rear door to the salon that he saw the man beat on. The photograph showed a hole in the door where the doorknob should be. Clay explained that the man had broken the doorknob off. A close-up photograph of the door showed a small red spot near the area where the doorknob once was. A few weeks before the burglary, Clay had repainted the door. Clay had not noticed the red spot, which he believed to be a bloodstain, until after the burglary. Clay also thought that Shetara might have some connection to the burglary given the recent termination of her lease.

¶ 8 Rock Island Police Officer Steve Marty testified that he was dispatched to the 2900 block of 11th Street on April 21, 2013, at approximately 1 or 1:15 a.m. There, Marty observed a

broken window and damage to a door. Clay showed Marty the surveillance video recording of the burglary.

¶ 9 Rock Island Police Officer Jack LaGrange collected the surveillance video and photographed the scene. One photograph of a door to the salon showed a red stain near the doorknob. LaGrange believed the spot was blood and swabbed the stain for DNA evidence.

¶ 10 Rock Island Police criminalist Mary Devine determined that the door swab contained traces of blood and sent the sample to the Illinois State Police crime laboratory. Illinois State Police forensic scientist Jennifer MacRitchie compared DNA collected from the door swab to a buccal swab that an officer had collected from defendant. MacRitchie determined that the DNA profile from the door swab matched defendant's DNA profile.

¶ 11 Shetara testified she worked at the Land of Beauty salon for eight or nine months. Shetara never saw defendant at the salon. Shetara stopped working at the salon around the first week of April because Clay had increased her rent. Afterwards, Clay would not allow Shetara to retrieve her hair styling tools until she paid her overdue rent. Shetara was unable to retrieve her belongings from Clay's salon.

¶ 12 The defense called defendant's son, TJ Johnson, to testify. TJ said that he was married to Shetara and that Shetara had worked at the Land of Beauty salon. TJ said that defendant had not visited the salon while Shetara worked there. After Clay terminated Shetara's lease, Clay did not allow Shetara to retrieve her hair styling tools. On April 19, 2013, TJ left a message for Clay regarding his wife's belongings. Clay did not return TJ's call. TJ told his father, defendant, about Shetara's dispute with Clay. Defendant told TJ that he knew Clay and that he would speak with Clay about Shetara's belongings.

¶ 13 The jury found defendant guilty of burglary. The court sentenced defendant to 30 years' imprisonment. On direct appeal, defendant solely sought a remand with directions for the court to correct the financial assessments imposed. We vacated the financial assessments imposed by the circuit clerk and remanded the cause with directions for the circuit court to correct the monetary component of defendant's sentence and apply the necessary $5-per-day presentence incarceration credit. *People v. Johnson*, 2015 IL App (3d) 140364.

¶ 14 On August 16, 2016, defendant filed a *pro se* postconviction petition. Defendant's petition alleged eight claims. In this appeal, defendant only argues that counts I and VIII of his petition warranted second-stage postconviction proceedings. Accordingly, our facts and analysis are limited to those that are relevant to these claims.

¶ 15 Count I of defendant's petition appears to allege two distinct constitutional violations. First, defendant possessed newly discovered evidence that called his conviction into question. Specifically, after defendant's conviction, he received a police report, dated April 21, 2013, indicating that Clay's girlfriend, Tina Galdan, had called the police. According to defendant, this contradicted Clay's testimony that he personally called the police. This evidence called Clay's credibility into question. Second, defendant argued that trial and appellate counsel were ineffective for failing to contest the State's elicitation of false testimony from Clay regarding who called the police.

¶ 16 Count VIII of the petition alleged a violation of defendant's right to the effective assistance of trial and appellate counsel. Defendant alleged that trial counsel was ineffective for failing to adequately prepare for trial by independently investigating the surveillance video or object to the authenticity of the video played during the trial, and did not call witnesses Jennifer Cannady and Emerald Klemmer to testify. Cannady and Klemmer would have testified that

defendant had been at the Land of Beauty salon prior to the burglary. This testimony would have supported the defense's theory that defendant's DNA was left at the salon during a visit that occurred before the burglary. Defendant further alleged that appellate counsel provided ineffective assistance where counsel did not raise this issue in defendant's direct appeal. In support of this claim, defendant filed affidavits from Cannady and Klemmer.

¶ 17 Cannady averred that sometime in the first few weeks of April 2013, she took defendant to the hospital after he had been turned away from donating blood plasma at a center near the Land of Beauty salon. Defendant told Cannady that the blood plasma center refused to accept defendant's donation because his heart rate was elevated. Cannady remembered listening to defendant's heart and noting that it was beating rapidly. While driving defendant to the hospital, defendant told Cannady that he had stopped at the Land of Beauty salon after he was turned away from the blood plasma center. Defendant attempted to speak with the owner of the salon about retrieving Shetara's hair styling tools. Defendant said that this was his third attempt to speak with the owner and he was becoming frustrated.

¶ 18 Klemmer averred that, in the first few weeks of April 2013, defendant contacted her after he had been to the blood plasma center. At the time, it was raining, and defendant needed a ride. Defendant arranged for Klemmer to pick him up at the Land of Beauty salon. Defendant told Klemmer that he went to the salon to try to retrieve his daughter-in-law's hair styling tools after she had been "fired" by the salon owner.

¶ 19 The circuit court summarily dismissed defendant's petition, and defendant appeals.

¶ 20 ANALYSIS

¶ 21 Defendant raises two issues on appeal regarding the first-stage dismissal of his postconviction petition. At the first stage, the circuit court must independently review

defendant's *pro se* petition, take the allegations as true, and then determine whether " 'the petition is frivolous or is patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). The supreme court has referred to this threshold standard as the "gist" of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition that has no arguable basis in fact or law is subject to dismissal. *People v. Tate*, 2012 IL 112214, ¶ 9. A petition lacking an arguable basis in fact or law is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. For example, a claim that is completely contradicted by the record has no meritorious legal basis and is subject to dismissal. *Id.*

¶ 22 I. New Evidence Claim

¶ 23 Defendant argues that the court erred when it summarily dismissed his postconviction petition where he asserted the gist of a claim that newly discovered evidence would have contradicted key evidence from the State. We find that the court did not err as the evidence relied on by defendant was not newly discovered.

¶ 24 For a claim of actual innocence based on newly discovered evidence to survive the first stage of postconviction proceedings, it must present evidence that is arguably "new, material, noncumulative *** [and] so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. Defendant has failed to satisfy this standard as the evidence alleged in count I of his petition was not new. "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.*

¶ 25 The police report that defendant relies on to support his first claim is not newly discovered. The police report is dated April 21, 2013, and therefore, it existed at the time of

defendant's trial. As a result, this evidence was available prior to trial and readily discoverable during the pretrial proceedings. Therefore, this claim did not warrant second-stage proceedings.

¶ 26 II. Ineffective Assistance of Counsel Claim

¶ 27 Defendant argues that his postconviction petition presented the gist of a claim that he received ineffective assistance of trial and appellate counsel. Defendant contends that it is at least arguable that trial counsel was ineffective where they did not call Cannady and Klemmer to testify for the defense. We find that defendant cannot establish that he suffered prejudice as a result of counsel's decision not to call these two witnesses as their testimony does not refute the DNA evidence that placed defendant at the scene at the time of the burglary.

¶ 28 To warrant second-stage proceedings on defendant's claim of ineffective assistance of trial and appellate counsel, defendant's petition must establish both that "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010). We examine only the prejudice prong because a lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998). To satisfy the prejudice prong, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Barrow*, 195 Ill. 2d 506, 520 (2001).

¶ 29 We find that, even presuming that counsel's performance was deficient for failing to call Cannady and Klemmer to testify, defendant cannot satisfy the prejudice prong. According to defendant's petition and supporting affidavits, Cannady and Klemmer's testimony would only establish that defendant had been to the Land of Beauty salon before the burglary. These testimonies would not refute the existence of the bloodstain on the damaged salon door where

Clay saw an individual attempt to make a forceful entry. This evidence also would not dispute the DNA match from the bloodstain to defendant. Moreover, Cannady and Klemmer's proposed testimonies were potentially harmful to defendant's case as they established that defendant harbored some frustration with Clay before the burglary occurred. Therefore, defendant failed to make an arguable allegation of prejudice as Cannady and Klemmer's testimonies did not have the potential to alter the outcome of the trial.

¶ 30 Finally, we find that defendant's petition did not allege the gist of a claim of ineffective assistance of appellate counsel. Appellate counsel was not ineffective for failing to raise the issue of trial counsel's ineffectiveness because this potential issue was meritless. *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 32.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Rock Island County is affirmed.

¶ 33 Affirmed.