2018 IL App (3d) 170663-U

Order filed July 25, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0663 Circuit No. 07-CF-656
HUGO SANCHEZ,	)	Honorable Amy M. Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's *pro se* postconviction petition stated the gist of a constitutional claim.

¶ 2 Defendant, Hugo Sanchez, appeals the first-stage dismissal of his postconviction petition, arguing that his petition stated the gist of a constitutional claim. We reverse and remand for second-stage postconviction proceedings.

¶ 3 FACTS

¶ 4 Defendant was convicted of the first degree murder of Regina Los Santos, who was found strangled to death in the basement apartment she shared with her husband (Jesus Regules) and Pablo Alejandro. 720 ILCS 5/9-1(a)(1) (West 2006); *People v. Sanchez*, 2012 IL App (3d) 100890-U, ¶¶ 2, 4. Jorge Garcia lived upstairs with his wife, children, and a male cousin. *Sanchez*, 2012 IL App (3d) 100890-U, ¶ 5. The evidence established that on September 9, 2006, Jesus left for work at 3:30 p.m. *Id.* When he returned home at 2 a.m. on September 10, 2006, he noticed that the back door had been broken and there was blood on the inside of the door. *Id.* When he entered the house, he found his wife strangled to death in the bedroom and her purse was missing. *Id.* Regina "was nude except for a piece of clothing around her neck." *Id.* ¶ 6. There was blood around her head and a bloody knife was found near her body. *Id.* A paramedic that arrived shortly after 2 a.m. detected signs of rigor mortis, which, he said, did not begin for at least three hours after death. *Id.* ¶ 7. However, the time of death was not able to be determined. *Id.* ¶ 22. Blood was found on the bed, the curtains, the floor, the toilet seat, clothing, and on a doorknob. *Id.* ¶¶ 9-10, 24.

¶ 5 Defendant lived across the street from Regina and Jesus with his girlfriend (Elizabeth Sanchez). *Id.* ¶ 17. Elizabeth's parents lived nearby. Elizabeth testified at trial that defendant came home from work on the day of the incident at approximately 2 to 3:30 p.m. and worked on his vehicle until 4 p.m. *Id.* Defendant left the house at 6 p.m. and she did not know where he went until he returned home around 10 p.m. *Id.* ¶¶ 17-18. When defendant arrived home, his hair was wet, his clothes were partially wet, and defendant had a scratch on his face and on the inside of his wrist. *Id.* ¶ 18. Defendant told Elizabeth that he had broken a window at her parents' house on the evening in question. *Id.* ¶ 19.

¶ 6 Defendant told the police that he did not know Regina well and that he would only go to Regina's and Jesus's house for parties or if a fight was televised. *Id.* ¶ 21. Regina socialized with defendant's sister at his house almost every day, but defendant would only greet her. *Id.* ¶¶ 13, 21.

¶ 7 The detectives obtained buccal swabs from defendant, Jesus, Pablo, Gabriel Sanchez, and Jorge. *Id.* ¶ 23. They also took oral, vaginal, and anal swabs from Regina. *Id.* The vaginal and anal swabs tested positive for semen. *Id.* Male DNA from someone other than Jesus was found in the swabs. Defendant and the other two men were not the source of the DNA. *Id.* Blood found on the curtains contained Regina and Pablo's DNA. *Id.* ¶ 24. DNA from the doorknob did not match defendant or any of the other men. *Id.* Fingernail specimens and scrapings were taken from Regina's hands. *Id.* ¶ 25. A DNA profile found on Regina's right hand fingernail clipping matched defendant's DNA. *Id.* The forensic biologist that worked for the Illinois State Police Crime laboratory testified "that the amount of DNA she found in Regina's fingernail clippings could, 'in theory,' come from someone using the same hand towel, bathroom or kitchen, [but] 'in practice that's not what [she] routinely see[s]' in the samples she tests." *Id.* Palm prints were found on the mattress cover on which Regina's body was found. *Id.* ¶ 26. The prints did not match any of the men. *Id.*

¶ 8 The parties stipulated "that the distance between the defendant's house *** and Elizabeth's parents' house *** was 1.9 miles, that this distance could be walked in approximately 35 minutes and driven in approximately 5 minutes" and that defendant had broken the window at Elizabeth's parents' house. *Id.* ¶ 27.

¶ 9 Four witnesses testified that on the night in question defendant left his residence between 6:40 and 7:30 p.m. to purchase cigarettes and returned between 9 and 9:30 p.m. *Id.* ¶¶ 28-31. We affirmed defendant's conviction on direct appeal. *Id.* ¶ 65.

¶ 10 In 2013, defendant filed a *pro se* postconviction petition, which is the subject of this appeal. Defendant alleged, *inter alia*, that counsel was ineffective. Specifically, defendant alleged that on the night of the murder he went to a grocery store. He exited the store at 7:15 p.m. and encountered Carmen Vazquez outside the store. He and Carmen drove around in her vehicle until Carmen dropped defendant off at home between 9:15 and 9:30 p.m. Defendant said that he did not know Carmen's last name or how to contact her and, therefore, the evidence was newly discovered. He alleged that Carmen's testimony would account for his whereabouts between 7:15 and 9:15 p.m., which had been missing at trial. He argued that his counsel was ineffective for not attempting to obtain a surveillance videotape from the grocery store to locate Carmen by her license plate number. Defendant attached affidavits to the petition. His affidavits stated that he told his attorney about his interaction with Carmen and that he did not know Carmen's last name, but his attorney did not try to obtain the videotape or locate Carmen. Carmen's affidavit was also attached, which stated:

> "I, Carmen Vazquez Declare After First Being Duly Sworn Upon My Oath That The Following Statements Are True And Correct To The Best Of My Own Knowledge And Belief, In That:
>
> 1. I am available and willing to testify to the Statements That i make herein;
>
> 2. On September 9th, 2006 at approximately 7:15p.m., I went to the store 'La Loma' to get something to eat, as they have a little eating place within the

store. The Store is located on Elgin Street in Joliet, Illinois about three-Blocks away from where [defendant] lived with his girlfriend on Krakar Street;

3. I was only at the Store about ten minutes when [defendant] came in and bought cigarettes, and we began talking, and he said he walked to the store because something was wrong with his Blazer Truck, but he was trying to fix it. I aksed [*sic*] him if he needed a ride home? and [defendant] said he wanted to hang out awhile, it seemed like he had been drinking already, So we got in my car and just drove around, found a Liquor Store, and [defendant] bought a 12-Pack of Beer. We continued to drive around, talking and drinking the beer, and we ended up on (Argyle Street), [defendant] asked that I wait on him, I believe it was 16-Argyle Street, [defendant] went around the back of that house, and within 10-minutes he came back and got in the car. [Defendant] commented that his girlfriends parents were going to be mad at him, but he wouldn't say why. We continued to drive around until about 9:15 to 9:30 P.M., that's when I dropped him off at his *** house at 503 Krakar. I watched [defendant] go inside before I pulled away because he was drunk;

4. I don't believe that [defendant] ever knew my last name, He only knew me as 'Carmen'. I would visit friends I knew who resided in Joliet on weekends, so I don't think he knew I moved from Chicago to Milwaukee, So I never knew that he needed to know where I lived, as I only visit Joliet every couple of Months now because of the distance;

5. I never knew anyone needed to know his whereabouts on September 9th, 2006 between 7:15 P.M. and 9:30P.M., which is the only time I can account

> for his whereabouts, other than that, I wouldn't know where he was. It had to be on a Saturday when this occurred to the best of my Memory."

¶ 11 The court summarily dismissed the petition in a written order, stating that some of defendant's claims could have been raised earlier and that defendant did not show prejudice. Defendant filed a motion to reconsider, which was denied. Defendant appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues that his petition should not have been dismissed. Specifically, defendant argues that his ineffective assistance of counsel claim stated the gist of a constitutional claim. Because we find that defendant's petition stated the gist of a constitutional claim for ineffective assistance of counsel as it was arguable that defendant was prejudiced by the lack of Carmen's testimony and counsel fell below an arguable standard of reasonableness for failing to investigate and locate the witness, we agree.

¶ 14 "The [Post-Conviction Hearing] Act (Act) provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); 725 ILCS 5/122-1 *et seq.* (West 2006). A defendant wishing to commence proceedings under the Act begins by filing a postconviction petition. *Id.* Postconviction proceedings contain three stages. Here, defendant's petition was dismissed at the first stage. At the first stage, the court reviews the petition and takes the allegations therein as true. *Id.* at 10. Based on its review, the court determines whether the petition is frivolous or patently without merit. *Id.*

> "A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. [Citation.] This

> first stage in the proceeding allows the circuit court 'to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). Because most petitions are drafted at this stage by defendants with little legal knowledge or training, *** the threshold for survival is low." *People v. Tate*, 2012 IL 112214, ¶ 9.

¶ 15 Defendant first argues that he stated the gist of a constitutional claim that trial counsel provided ineffective assistance when counsel failed to request security tapes from the grocery store in an effort to ascertain Carmen's identity. "At the first stage of postconviction proceedings under the Act, 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." *Hodges*, 234 Ill. 2d at 17. While at the second stage "it is appropriate to require the petitioner to 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense," the standard at the first stage is lower and "lenient." *Tate*, 2012 IL 112214, ¶ 19.

¶ 16 Here, Carmen's affidavit stated that she was with defendant from 7:15 to 9:15 or 9:30 p.m. on the night of the murder. She and defendant drove around and went to Elizabeth's parents' house before Carmen dropped defendant off at his home. Carmen stated that she lived in Milwaukee, did not often travel to Joliet, and that she did not believe defendant knew her last name. Further, Carmen stated that she was able and willing to testify.

¶ 17 At trial, the evidence against defendant consisted primarily of DNA and defendant's opportunity to commit the murder. DNA from fingernail scrapings taken from the victim matched defendant's DNA. The forensic scientist stated at trial that it was possible that this was

from using the same hand towel. Defendant had attended parties or fights at Regina's home, and Regina socialized with defendant's sister at his house almost every day. Moreover, blood and semen recovered and tested from the scene did not match defendant's DNA. While the time of death had not been determined, the only time defendant was not accounted for and had the opportunity to commit the murder was between approximately 7 and 9:30 p.m. Taking the allegations in the petition and affidavit as true, Carmen's testimony would provide an alibi for defendant during this time, thus making it harder for defendant to have committed the murder. It is at least arguable that defendant was prejudiced by not having the testimony of this witness and that defense counsel's performance "fell below an arguable standard of reasonableness" by not attempting to locate the witness. See *id.* at ¶ 24. We, therefore, reverse the order of the circuit court dismissing defendant's *pro se* postconviction petition and remand for second-stage proceedings.

¶ 18 In coming to this conclusion, we reject the State's contention that defendant should have raised this issue on direct appeal.

> "An ineffective assistance claim based on what the record discloses counsel did, in fact, do is subject to the usual procedural default rule. *People v. Erickson*, 161 Ill. 2d 82, 88 (1994). 'But a claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation.' *Id.* Thus, [the supreme court] has 'repeatedly noted that a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense.' *People v. West*, 187 Ill. 2d 418, 427 (1999)." *Tate*, 2012 IL 112214, ¶ 14.

Defendant's allegation of ineffective assistance of counsel consisted of matters outside of the record and could not have been raised on direct appeal.

¶ 19 We further reject the State's claim that defense counsel's decision not to request the tapes and attempt to locate Carmen should be given deference as a product of trial strategy. This argument, as well as many of the cases cited and arguments made by the State, is applicable at the second stage and is inappropriate at this stage of the proceedings. In *Tate*, the State raised a similar argument regarding trial strategy, and the supreme court rejected it, stating,

> "This argument is more appropriate to the second stage of postconviction proceedings, where both parties are represented by counsel, and where the petitioner's burden is to make a substantial showing of a constitutional violation. The State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performances fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced." *Id.* ¶ 22.

We caution the State to be cognizant of the different standards utilized in the first and second stages.

¶ 20 We note that defendant raised other claims in his postconviction petition, including an actual innocence claim. As we find that defendant's ineffective assistance of counsel allegation states the gist of a constitutional claim, we need not consider these claims. See *Rivera*, 198 Ill. 2d at 370-371 (as long as one allegation set forth in defendant's *pro se* petition states the gist of a constitutional claim, the entire petition must advance to the second stage).

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Will County is reversed and remanded.

¶ 23 Reversed and remanded.