2019 IL App (1st) 161671-U

No. 1-16-1671

Order filed September 11, 2019

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. 13 CR 6933
	)	
TIM GRIFFIN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Reversed and remanded. Postconviction petition raised arguable claim of ineffective assistance of counsel.

¶ 2 Defendant Tim Griffin appeals from the circuit court's summary dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) (the Act). Defendant claims he stated an arguably meritorious claim of ineffective assistance of trial counsel. Given the liberal standards at this preliminary stage, we agree.

¶ 3 BACKGROUND

¶ 4 Following a joint bench trial, defendant and codefendant Mitchell Finger were convicted of residential burglary and possession of burglary tools. Defendant received concurrent sentences of 12 and 3 years' imprisonment, respectively. On direct appeal, this court affirmed over defendant's contention that the police officers who testified at trial were not credible. *People v. Griffin*, 2015 IL App (1st) 133579-U. To give color to defendant's argument here, we must restate some of the trial evidence.

¶ 5 Chicago Police Officer Brandon Dougherty testified that, at approximately 1:20 a.m. on March 25, 2013, he responded to a burglary in progress in the 5800 block of West Midway Park, along with two other units on the scene. Dougherty found the rear door to the building forced open. He and his partner, Officer Mendez, entered the building. They noticed that the door to a first-floor apartment was open and appeared to have pry marks on the wood frame.

¶ 6 While in the apartment, they heard a noise in the bedroom. Officer Dougherty announced his office and entered the room to find codefendant holding a flat-screen television. Officer Dougherty announced his office again. Codefendant dropped the television and jumped through the upper portion of a nearby window, smashing through the glass. Officer Dougherty went to the window and shined his flashlight down on codefendant, in the neighboring yard, until Officer Mendez detained him.

¶ 7 With codefendant in tow, Officer Dougherty continued checking the bedroom and found defendant hiding in a closet, trying to conceal himself with clothing. He ordered defendant out of the closet and detained him. As a precaution, Officer Dougherty conducted a brief pat-down for weapons. Although he felt "hard" objects, he did not believe they were weapons, so he did not

remove them from defendant's pockets. He brought defendant outside, where other officers drove the two suspects to the police station. On cross-examination, Officer Dougherty stated he only "secured" and "detained" defendant; another officer actually placed defendant into "custody."

¶ 8 Officer Mendez (no first name given) testified to substantially the same sequence of events as his partner, Dougherty, though Officer Mendez believed they responded to the burglary call at 1:30 a.m., as opposed to 1:20 a.m. Officer Mendez testified that after seeing codefendant jump through the window, he ran out of the apartment building and detained codefendant in the neighboring yard. Officer Mendez was not with Officer Dougherty when defendant was discovered. Officer Mendez never saw defendant in the apartment building.

¶ 9 An Officer Vittori (no first name given) testified that he was at the front of the apartment building when he heard a large crash—"like glass breaking." This caused him to run around to the back, where he saw Officer Mendez handcuffing codefendant. Officer Vittori never entered the building and never saw defendant inside the building. After defendant was brought to the alley, Vittori conducted a pat-down. Later, once defendant was at the station, Vittori performed a full custodial search. During the full search, he recovered "a white metal ring with clear stones. It was in [defendant's] front pants pocket." He also found a flashlight and screwdriver in defendant's possession.

¶ 10 Shakita Moore testified that the jewelry recovered from defendants was taken from a jewelry box she kept on the dresser in her apartment. Moore did not know either defendant, and she had not given them permission to enter her home, much less take the jewelry from the jewelry box.

¶ 11 Defendant moved for a directed finding, which the court denied. Defendant rested without presenting evidence. In closing, defendant argued that the evidence was unbelievable and "just begs the credibility of the officers." The trial court found defendant guilty, finding that "One jumps in a closet and tries to hide; that's Mr. Griffin. He was found, caught inside. *** The case is not even close. There is not a question in my mind."

¶ 12 On direct appeal, defendant argued that in light on the police officers' supposedly unbelievable testimony, his convictions could not stand. The court disagreed and affirmed. *People v. Griffin*, 2015 IL App (1st) 133579-U.

¶ 13 Defendant then filed this *pro se* postconviction petition. The petition includes three claimed constitutional violations. On appeal, defendant only challenges the court's ruling as to the third one. But claim three relates to claim one, so we briefly discuss both.

¶ 14 Claim one alleged that the State knowingly used Officer Dougherty's perjured testimony. Defendant alleged that he was not arrested inside the apartment—as Dougherty claimed—but rather in the alley, outside the apartment, by a different officer. Defendant supported this claim with his own affidavit, as well as documents he obtained under the Freedom of Information Act from the Chicago police department, including a 911 event query and portions of his arrest report. Defendant alleged the event query showed that Officer Dougherty did not arrive on scene until approximately three minutes *after* defendant was arrested. Thus, says defendant, Officer Dougherty must have lied when he testified that he found defendant hiding in the bedroom.

¶ 15 Claim three alleged, in relevant part, that trial counsel was ineffective for failing to subpoena the event query to challenge the credibility of Officer Dougherty and the prosecution's case in general.

¶ 16 In his affidavit attached to the petition, defendant swears he told his trial counsel that he was not arrested by Dougherty, he was not inside the apartment, and he did not know the names of the officers that arrested him. Defendants also swears that, based on Officer Dougherty's testimony at an earlier hearing, he "made a specific request to [his attorney] to motion for or to subpoena a copy of the 911 dispatch report but [the attorney] never acted on my request."

¶ 17 The circuit court dismissed defendant's claims as without merit. The court noted that defendant's claim was that counsel "was ineffective because this 911 log" may have indicated that the sequence and timing of events was a little different than testified to by the officers. Inconsistency aside, the court found:

> "The fact that he is caught inside and was burglarizing the premises and caught red handed by the police, the minor discrepancies, if they are even accurate, would not amount to any kind of constitutional issue. I find this *pro se* motion for postconviction relief is without merit and denied."

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 Defendant says his petition should not have been summarily dismissed, because he sufficiently alleged an arguable claim of ineffective assistance of trial counsel. We review the circuit court's summary dismissal *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 21 In his petition, defendant claims that his trial counsel failed to discover several pieces of exculpatory evidence "that may have changed the outcome of defendant's trial." Specifically, he points to a 911 query report and arrest reports to show what he characterizes as fatal factual

inconsistencies between what actually happened and what the various officers testified happened. In short, defendant claims, "**Both stories cannot be true.**" (Emphasis in original.)

¶ 22 The Act provides a method for incarcerated individuals to assert constitutional violations that led to their convictions. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Walker*, 2018 IL App (1st) 160509, ¶ 17. At the first stage of a postconviction proceeding, the circuit court independently reviews the petition and determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2016); *People v. Patterson*, 2018 IL App (1st) 160610, ¶ 15.

¶ 23 A petition is frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in law or fact if it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "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. At the first stage, the court must accept the factual allegations of the petition as true and construe them liberally, drawing all reasonable inference in favor of the petitioner. *Id*.

¶ 24 A claim of ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *People v. Cherry*, 2016 IL 118728, ¶ 24. In the postconviction setting, "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. To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that, but for defense

counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *People v. Steele*, 2014 IL App (1st) 121452, ¶ 38.

¶ 25 We begin by discussing in more detail the centerpiece of defendant's argument, the 911 event query. This event query is " 'a computer printout[] that document[s] communications between a 911 emergency services dispatcher and the Chicago police department.' " *People v. Demus*, 2016 IL App (1st) 140420, ¶ 10 n.1 (quoting *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 22).

¶ 26 The event query appears to chronicle activity regarding a "BURGIP" (presumably a burglary in progress) at 5843 West Midway Park on "25-MAR-2013 01:25:52." The bulk of the document consists of an "Event Chronology" divided into columns: "Date," "Activity," "Wkstn," "Person," and "Text."

¶ 27 Some of these columns are relatively easy to decipher. For example, the "Date" column is populated with specific times, down to the second, on the date of March 25, 2013, such as "25-MAR-2013 01:59:46." Every "event" that occurred is given a specific time, again down to the second, in descending order down the page, starting with the first event at "1:23:33" and ending at "5:34:50."

¶ 28 The "person" column is not as easy. It is populated with codes—a single capitalized letter followed by a series of numbers. Based on another document titled "Arrest Processing Report," also obtained from the Chicago police department and attached to defendant's petition, at least some of the codes listed under the "Person" column appear to correspond to the officers who responded to the burglary in progress. For example, the code "PC0Y710" would appear to

refer to an Officer Dimalanta, whom the trial testimony showed was one of the responding officers.

¶ 29 But that's all we can tell from the "Person" column. Many of the "persons" listed during the events are coded with the first letter "D." The one that appears most often is "D559877." We have no way of knowing to whom that code refers—an officer, a dispatcher, etc. But the vast majority of the events chronicled in the event inquiry are credited to that "person," including:

"1:33:01	IN FRONT AND BACK
1:33:19	EVERYTHING OK?
1:33:26	YEP
1:33:37	IN CUSTODYT [*sic*]
1:33:44	JUST ONE SO FAR
1:34:00	STILL LOOKING FOR ONE MORE M/B
1:34:08	5843 W MIDWAY PARK
1:34:27	2ND IN CUSTODY
1:34:29	INSIDE
1:34:53	5843 W MIDWAY PARK
1:36:07	1510R
1:36:15	SWITCH OVER TO CW FOR ETECH
1:37:31	1506E"

¶ 30 Defendant says that "1506E" on the last line above refers to the beat car driven by Officers Daugherty and Mendez that night. He takes that from (1) another document produced by Chicago police, and attached to his petition, that lists Officers Dougherty and Mendez as assigned to "B-1506E" on that date and (2) Dougherty's testimony, at defendant's suppression hearing, that his and Mendez's beat car was unit "1506 Eddie" that day. If we focus specifically on that line of the event chronology, in referring to "1506E" at the time of 01:37:31, the

"activity" that is referenced is the word "ASST," presumably referring to "assist" or "assistance."

¶ 31 A "Unit Summary" beneath the event chronology also lists each beat car and associates various times to each one:

Unit	**Dispatch**	**Enroute**	**Onscene**	**Clear**
1512R	01:26:15	01:59:40		04:19:06
1533R	01:28:43	03:40:49		05:34:50
1510R	01:36:07	02:13:26	02:13:28	
1506E	01:37:31	01:59:33		05:34:50

¶ 32 The reference to beat number 1506E's "dispatch" at 01:37:31 lines up with the first reference to that unit in the event chronology.

¶ 33 According to defendant, these records show that beat car 1506E did not arrive at the scene until 1:37 am. That's a problem, he says, because the event chronology refers to "2nd in Custody" at 1:34:27. That must mean defendant, as the trial testimony confirmed that defendant was apprehended after codefendant, not before—defendant was the "second" taken into custody.

¶ 34 In other words, defendant says that these records show that he was taken into custody at 1:34 in the morning, but Officers Daugherty and Mendez did not even arrive at the scene until three minutes later, at 1:37 am. So Officer Daugherty could not have been telling the truth when he testified that he found defendant hiding inside a bedroom closet; he wasn't even there. His testimony was perjury, and had defendant's trial counsel obtained this 911 event query as defendant requested, he would have exposed Daugherty accordingly.

¶ 35 There is a fair amount to unpack here. As a preliminary matter, we note that neither the trial court nor the State, on appeal, attacked defendant's supporting documentation on

evidentiary grounds such as foundation for the police records or hearsay, and rightly so. The rules of evidence do not strictly govern postconviction proceedings. See Ill. R. Evid. 1101(b)(3) (eff. Apr. 8, 2013); *People v. Shaw*, 2019 IL App (1st) 152994, ¶ 66; *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 119.

¶ 36 We likewise lack, at this early stage, any authoritative translation of these police reports—whether the 1:37:31 entry for Dougherty's patrol car meant that this was the first time his car arrived at the scene, as opposed to any number of other things it might mean. We simply don't know. Neither does defendant—or at least he hasn't pled any facts that would indicate he has such knowledge or experience. There is nothing in this record that provides any authoritative guidance as to how to read these reports. (The experienced trial judge very well may be able to decipher these codes with ease, but if so, no such translation was made on the record.)

¶ 37 Is the lack of a definitive translation of this report fatal to defendant's petition? No, at least not at this preliminary stage. For one thing, it would be unfair to require defendant to produce such evidence at this first stage. Like most first-stage petitioners, defendant is unrepresented by counsel and has no ability to compel someone with knowledge of these reports to provide testimony by way of affidavit. Indeed, it is precisely because these incarcerated, *pro se* petitioners lack legal training or resources that our supreme court has emphasized that the threshold at the first stage is "low," and that a first-stage petitioner " 'need only present a limited amount of detail' " in the petition. *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)).

¶ 38 Instead, we only require some " 'objective or independent corroboration' " of defendant's claim of constitutional error. *Id*. (quoting *People v. Hall*, 217 Ill.2d 324, 333 (2005)). Exhibits

that accompany the petition "must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *Id*.

¶ 39 And we must again bear in mind the standard by which we govern first-stage postconviction petitions alleging ineffective assistance. Defendant need only make an *arguable* showing of deficient performance and prejudice. *Tate*, 2012 IL 112214, ¶ 19. He need only show that his legal theories are not "indisputably meritless," his factual assertions not "fantastic or delusional." *Allen*, 2015 IL 113135, ¶ 25. And we must draw all reasonable inferences in defendant's favor. *Id*.

¶ 40 All of that said, defendant has put forth sufficient documentation at this preliminary stage to corroborate his petition. Though we may harbor serious doubts that defendant is reading these police reports correctly, we cannot say his reading of them is delusional or indisputably meritless at this preliminary stage. It is not unreasonable to read these reports as indicating that the police officer who testified that he captured defendant inside the bedroom closet was, in fact, not even on the scene at the time of defendant's capture. And so, drawing all reasonable inferences in defendant's favor, it is an interpretation we must adopt.

¶ 41 With that established, it seems clear that defendant has arguably established deficient performance of defense counsel. "Trial counsel has a professional duty to conduct 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). " 'Lack of investigation is to be judged against a standard of reasonableness given all the circumstances, 'applying a heaving measure of deference to counsel's judgment.' " *Id*. (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 330 (1994)). "Where the record establishes that counsel

had reason to know, from an objective standpoint, that a possible defense *** was available, failure to investigate fully can constitute ineffective assistance of counsel.' " *Id.* (quoting *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002)).

¶ 42 Here, defendant's entire theory at trial—the theme of his opening and summation, the gist of the cross-examinations—was that the officers' testimony was so incredible as to defy belief. A police-generated report that (at least arguably) significantly and materially contradicted the testimony of Officer Daugherty would have been a huge piece of counsel's overall attempt to attack Daugherty's credibility. At this preliminary juncture, under the minimal standards applicable, defendant has arguably demonstrated deficient performance by counsel.

¶ 43 The question of prejudice is closer, because defendant does not dispute that he was taken into custody near the burglarized building (just not inside it), nor does he deny that he was caught in possession of a ring that belonged to the apartment owner who was burglarized. That's fairly damning evidence by itself; it's tempting to hold that any impeachment of Dougherty's testimony would be unlikely to change the result of the trial, and thus defendant suffered no prejudice from counsel's deficient performance.

¶ 44 But if—*if* it's true that Dougherty and Mendez did not arrive on the scene until after defendant was taken into custody, that means they also did not arrive until after *codefendant Fingers* was taken into custody. And both Dougherty and Mendez (and Vittori, for that matter) testified that Mendez captured codefendant in a neighboring yard. If it was a physical impossibility for Dougherty to have caught defendant in the bedroom closet because he hadn't yet arrived, it is likewise impossible for Mendez to have captured codefendant. Said differently, if Daugherty did not tell the truth on the stand, neither did Mendez or Vittori.

¶ 45 However unlikely it may be that all of these cops were not telling the truth, suppose for the moment, as we must, that that is exactly what happened in this case—suppose that each of these three officers was not telling the truth about both Dougherty's and Mendez's involvement in the apprehension of defendant and codefendant. If that were the trial court's belief, would the prosecution's case be saved by Vittori's testimony that defendant was found with contraband—a ring from the apartment—in his possession? Not likely, because Vittori was one of these three officers. If the trial court found that each of these officers had not told the truth about a material part of this case, it's hard to imagine it would credit *that* portion of Vittori's testimony. It's hard to believe that this alleged perjury would not have infected the entire case.

¶ 46 In other words, under the standard we must apply, it is at least *arguable*, if not probable, that the outcome of defendant's trial would have been different if the trial court believed that the testifying officers had lied about significant facts concerning the two defendants' capture.

¶ 47 To repeat: we are not saying defendant's trial lawyer was deficient, only that under the liberal standards applicable at this early juncture, it is arguable he was. And by no means are we concluding that any perjury took place at trial. We are not accusing these officers of anything. We are only saying that defendant should have his day in court, based on the information he has submitted. Drawing all reasonable inferences in favor of defendant, his petition's claim of ineffective assistance is not delusional or fantastic; it is sufficient to warrant advancement to the second stage of postconviction proceedings.

¶ 48 The judgment of the circuit court is reversed. The cause is remanded for second-stage postconviction proceedings.

¶ 49 Reversed and remanded.