

2019 IL App (1st) 161830-U

No. 1-16-1830

Order filed March 29, 2019

Fourth Division

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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. 08 CR 13811
)	
AARON KELLEY,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal of defendant's *pro se* postconviction petition is affirmed where defendant did not state an arguable claim that he was prejudiced by his trial counsel's failure to investigate a potential witness.

¶ 2 Defendant Aaron Kelley appeals the summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)).

On appeal, defendant contends his petition raised an arguable claim that his trial counsel was ineffective for failing to investigate the account of a potential witness, as set out in a police

report, that on the night of the murder, the victim was heard screaming after the time that others observed defendant leave the victim's apartment. We affirm.

¶ 3 Following a jury trial in 2013, defendant was convicted of the first-degree murder of Edna Marie Smith (720 ILCS 5/9-1(a)(1) (West 2006)) and was sentenced to 35 years in the Illinois Department of Corrections (IDOC). On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Kelley*, 2015 IL App (1st) 132782. Although the trial testimony is fully set forth in that opinion, it is recounted in large part here to consider the claim in defendant's postconviction petition.

¶ 4 On the night of July 4, 2007, the victim¹ was found dead in her apartment on South Talman Avenue in Chicago. She had been beaten and stabbed multiple times. Defendant was observed entering Marie's apartment earlier that day. Two witnesses observed defendant leave the apartment through a bedroom window.

¶ 5 Sammie Smith testified he was Marie's husband and they were separated at the time of her death. He lived in a different apartment in the building where she lived. On the night of July 4, 2007, he was outside watching fireworks. At 10:30 p.m., he observed a crowd of people outside the building calling Marie's name. Sammie entered Marie's apartment by breaking open a locked gate at the rear entrance. Inside the apartment, Sammie found Marie on the floor of her bedroom.

¶ 6 Korderro Green testified he was at Marie's building at 4 p.m. on July 4, 2007, to meet his girlfriend. Marie let him wait in her unit. Green observed a bicycle in the hallway and observed a black male in Marie's bedroom. In court, Green identified defendant as the man he observed in

¹ Edna Marie Smith is referred to as "Marie" because several witnesses called her by that name. Some of those witnesses also have the surname Smith and will be referred to by their first names.

Marie's bedroom. Green waited in Marie's guest bedroom until his girlfriend called at 7 p.m. and he left.

¶ 7 Jessica Ford testified she knew Marie and was near Marie's building at about 4 p.m. on July 4, 2007. Ford observed Marie let a man with a bicycle in through the front door; she identified that man in court as defendant. That night, Ford and several friends, including DeEdna Porter, were standing on the corner outside the building. Porter pointed out Marie's bedroom window, and Ford observed a man climbing out of that window. Ford said it was "getting dark" but the area was lit by two streetlights. The man was hanging from the window ledge and facing the building. The man dropped to the ground, dropped a knife and picked it up before running toward an alley. Ford identified defendant in court as the man she observed hanging from the window. Ford attempted to enter Marie's apartment but the front door was locked. Ford went to the rear entrance of Marie's apartment and found the gate had been forced open. Once inside the apartment, Ford saw Marie's body.

¶ 8 On cross-examination, Ford was asked if it was "nighttime" when she observed the man coming out of Marie's window. The following exchange then occurred:

"A. It was getting dark. It was still a little bit light, but it was getting dark.

Q. It was actually around like 11:00 when this happened, right?

A. No, it was around 7:00.

Q. It was 7:00 *** when this person came out of the window?

A. Around like 7:00, 8:00 ***, yes."

¶ 9 Porter also testified at trial. Porter stated she knew Marie and had been in her apartment before. At about 9 p.m. on July 4, 2007, she was at the corner near Marie's building. Porter

observed a man sitting on the ledge outside what she thought was Marie's living room window. Porter testified the man jumped to the ground, dropped a knife and picked it up before running toward an alley. Porter ran after the man but stopped because he had a knife. Porter identified defendant in court as the man she observed outside Marie's window.

¶ 10 Chicago police forensic investigator Paul Presnell testified Marie's body was found on the floor of a bedroom. The window curtain and window ledge in that room were blood-stained. A blood-stained towel was recovered from the kitchen. Deoxyribonucleic acid (DNA) taken from that towel matched defendant's DNA profile.

¶ 11 William Kelley, defendant's brother, testified for the State that defendant lived with him and borrowed his bicycle at times. At 10 p.m. on July 4, 2007, he observed defendant outside his house and defendant asked that William take him to a hospital. Defendant's hands were wrapped. William dropped defendant off at Mercy Hospital.

¶ 12 Chicago police officer Alexander Parrilla testified that at 3:28 a.m. on July 5, 2007, he responded to a call at Mercy Hospital, where he met with defendant. Defendant told him that at 9:30 p.m. that night, he was approached by three black males who wanted his bicycle. Defendant's hand was cut after fighting with one of the men. Defendant had scratches on his right hand and arm.

¶ 13 Dr. Stephen Cina, the chief medical examiner of Cook County, testified that he had reviewed the record of Marie's autopsy. Marie had 93 external injuries, including 47 incised wounds. Some of her injuries were consistent with defensive wounds. The cause of Marie's death was injuries to her skull and brain due to blunt force impacts to the head. Cina testified the

multiple incised wounds were a “significant contributory condition” and the manner of death was homicide.

¶ 14 Chicago police sergeant John Foster testified that he was assigned to Marie’s case on July 4, 2007, and received information on August 24, 2007, that led him to seek out defendant as a suspect. On August 31, 2007, Ford identified defendant in a police photo array. On September 17, 2007, Porter identified defendant from the same photo array.

¶ 15 In May 2008, Foster obtained an arrest warrant for defendant after the DNA from the bloody towel was tested against DNA obtained from defendant’s son. Foster met with defendant at the Los Angeles County jail on June 21, 2008, and defendant agreed to speak after waiving his *Miranda* rights. Defendant told Foster he went to his friend Marie’s apartment at 4:30 p.m. on July 4, 2007, and they had sex. Another man, who defendant believed to be Marie’s boyfriend, entered the apartment, and defendant fought with him. The man cut defendant’s hand with a knife. Defendant tried to leave through the bedroom window but it was locked. Marie gave him a towel to wipe his hand and distracted the boyfriend while defendant left through the back door. Defendant told Foster that he went to a hospital at about 8 p.m. When Foster told defendant that he had been informed the robbery occurred at 9:30 p.m., defendant said he was not sure what time he went to the hospital.

¶ 16 The defense presented one witness. Jamie Jett, an Illinois State Police forensic scientist, testified as an expert in microscopy and hair comparison. Jett stated that hair recovered from Marie’s hands did not match that of defendant and in 98% of cases where hair was found on a victim, the hair belonged to the victim.

¶ 17 The jury convicted defendant of first-degree murder. The trial court sentenced defendant to 35 years in the IDOC.

¶ 18 On direct appeal, defendant contended: (1) the State impermissibly shifted the burden of proof to the defense by asking its expert witnesses if defendant could have requested testing of certain evidence; (2) the State's remarks in closing and rebuttal closing argument attacked the integrity of defense counsel and represented prosecutorial misconduct; and (3) his 35-year sentence was excessive. Rejecting those arguments, this court affirmed defendant's conviction and sentence. *Kelley*, 2015 IL App (1st) 132782, ¶ 99.

¶ 19 On March 6, 2016, defendant filed a *pro se* postconviction petition, asserting he was actually innocent of the crime. He contended Ford and Porter gave contradictory testimony about the time they observed a man leaving Marie's apartment; a third person who lived upstairs from Marie heard a disturbance involving Marie at 11 p.m.; and a police report listed Marie's time of death as 11:10 p.m. Defendant also contended in the petition, among other arguments, that his trial counsel was ineffective for failing to interview the witness in the police report (whose name was redacted), who heard the argument involving Marie at 11 p.m.

¶ 20 Attached to defendant's petition was a police report with numerous details redacted. The relevant portion of the report states (with redacted portions indicated by asterisks):

"R/D's then proceeded to interview [name redacted] who *** was home all day of the 4th of July and that *** the victim coming and going to her apartment a few times that day. *** sometime during the early evening *** a male black subject with the victim on the stairs. *** heard the name say that the victim owed her some dope since she sold him

some bulls***. *** they went inside her apartment. *** the victim was selling drugs out of her apartment because different people were always coming and going.

*** around 2300 hours, *** heard a loud disturbance by the victim's back door. The incident involved a male yelling he wanted his money and a female yelling *** whom *** confirmed is the victim's nickname *** the victim's burglar gates being rattled and the victim telling him not to start anything. *** and after a few minutes ***, more noise then heard the victim screaming, 'Don't stab me.' *** didn't call the police at that time because there were always problems with her and *** didn't think anything of it. *** doesn't know any of the victim's acquaintances."

¶ 21 On May 12, 2016, the circuit court dismissed defendant's petition, stating, in part, that evidence did not provide defendant with an alibi, implicate anyone else or "conclusively establish the precise time the murder occurred." Defendant now appeals that ruling.

¶ 22 On appeal, defendant contends his petition presented an arguable claim of ineffective assistance of trial counsel based on counsel's failure to interview the witness whose name was redacted and to present at trial that person's account as described in the police report. He argues the account that the victim was heard screaming "don't stab me" at around 11 p.m. on the night of the offense would have cast doubt on the State's case and supported his defense.

¶ 23 The State responds that defendant did not set forth an arguable claim of counsel's ineffectiveness because he did not provide an affidavit from the individual indicating there was no contact by trial counsel and that he or she would have testified consistently with the substance of the police report. The State further asserts that person's account, even had it been offered, would not have changed the result at trial.

¶ 24 The Act provides a method by which a defendant may challenge his conviction or sentence based on a substantial denial of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of review, a defendant need only plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The circuit court may dismiss the petition if the allegations therein, taken as true, render the petition “frivolous or patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 12. This court reviews *de novo* the circuit court’s summary dismissal of a postconviction petition. *Hodges*, 234 Ill. 2d at 9.

¶ 25 In reviewing a first-stage dismissal under the Act, this court does not consider whether trial counsel’s choice of witnesses was a decision based on trial strategy. *People v. Tate*, 2012 IL 112214, ¶ 22. When considering a claim of the ineffective assistance of trial counsel in a postconviction petition, the defendant must show both that: (1) it is arguable that counsel’s performance was deficient, *i.e.*, it fell below an objective standard of reasonableness; and (2) it is arguable that defendant was prejudiced by counsel’s deficient performance, namely, that it affected the outcome of his trial. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 26 The Act requires a postconviction petitioner to support the allegations in the petition by attaching “affidavits, records or other evidence” to the petition or explain the absence of those materials. 725 ILCS 5/122-2 (West 2014); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). That requirement enables the petitioner to demonstrate that the allegations in the petition are capable of independent corroboration and to identify “with reasonable certainty the sources, character,

and availability of evidence alleged to support the petition's allegations." *People v. Allen*, 2015 IL 113135, ¶ 34; *Delton*, 227 Ill. 2d at 254. When a petitioner raises a claim of ineffective assistance of trial counsel for failing to call a particular witness, that claim generally must be supported by an affidavit from the proposed witness. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). However, our supreme court has recently found that in this situation, an affidavit from the potential witness is not necessarily required under section 122-2 if the claim is supported by other evidence. *People v. Dupree*, 2018 IL 122307, ¶ 34; see also *Allen*, 2015 IL 113135, ¶ 36 ("[t]he use of 'other evidence' [in section 122-2] indicates the legislature contemplated a wide range of documentary evidence that would satisfy the evidentiary requirements of the first stage" of postconviction review). Here, defendant attached a police report containing the statements of an individual who told police that she heard Marie arguing with a man at about 11 p.m. The content of the potential testimony can be determined from that document.

¶ 27 That said, even if we proceed to the merits of defendant's ineffective assistance contention, he has not raised an arguable claim of ineffective assistance of counsel where he cannot show prejudice, *i.e.*, that the outcome of his trial would have been different had counsel presented the account of the witness described in the police report. Defendant contends the potential testimony would "severely undermine[]" the timeline of events described by the State witnesses by establishing that the victim was alive at 11 p.m., which was after he was seen by Ford and Porter leaving the victim's apartment.

¶ 28 Whether the failure to investigate a witness constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26. In this case, the

evidence presented at trial was not close. On the date of the murder, Green observed defendant inside the victim's apartment at 4 p.m. Ford and Porter observed defendant holding a knife and leaving Marie's apartment through a window sometime between 7 and 9 p.m. Sammie, Marie's husband, entered her apartment after 10:30 p.m. and found her on the floor. She had been cut dozens of times with a knife. Defendant's DNA was recovered from a bloody towel in Marie's kitchen. Given that the potential testimony set out in the police report would be considered alongside this strong evidence of defendant's guilt, we cannot say that the outcome of defendant's trial would have been different had this testimony been presented. Accordingly, defendant cannot show that he was prejudiced by counsel's failure to present this evidence.

¶ 29 For the reasons stated, the circuit court's order summarily dismissing defendant's postconviction petition is affirmed.

¶ 30 Affirmed.