

2019 IL App (1st) 162058-U

No. 1-16-2058

Order filed August 13, 2019

Second 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. 11 CR 9804
)	
DARREN REMMER,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge, presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Presiding Justice Lavin and Justice Hyman 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 present a particular witness.

¶ 2 Defendant Darren Remmer appeals the circuit court's summary dismissal of his *pro se* petition brought under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant contends his petition raises an arguable claim that his trial

counsel was ineffective for failing to present a witness whose testimony would have weakened the victim's credibility. We affirm.

¶ 3 Following a jury trial in 2012, defendant was convicted of home invasion while armed with a dangerous weapon other than a firearm (720 ILCS 5/12-11(a)(1) (West 2010)) and armed robbery with a weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2010)). The State presented evidence that on May 21, 2011, defendant entered the home of April Pugh armed with a box cutter, threatened her with the box cutter, and took a portable safe and Pugh's cell phone.

¶ 4 At trial, Pugh testified that in May 2011, she and Reginald Steele, her fiancé, lived on 38th Place in Chicago. On May 12 or 13, 2011, two men from Dolton Furniture arrived to deliver a bedroom set she had ordered. Pugh testified that one of the men was "an older guy, dark, a little pudgy, bald" and the other was "a younger guy, thin, maybe in his teens." Pugh identified defendant in court as the older man.

¶ 5 Pugh told defendant where to park the delivery truck and where to put the furniture. Defendant and the other deliveryman carried the items upstairs to the bedroom of Pugh's daughter. Pugh waited downstairs during the time the men were assembling the furniture. After defendant began assembling the furniture, he told Pugh "he didn't have the screws to the headboard and that I could either go to the store to get the screws or someone else can bring them" on another day. Specifically, defendant would contact her when the screws came in. Pugh, who was nine months pregnant, told defendant she preferred that the parts be delivered and the assembly completed on another day. She signed a receipt acknowledging delivery of the furniture. Defendant was at Pugh's house for about 45 minutes.

¶ 6 On May 21, 2011, defendant arrived at the back door of Pugh's residence unannounced. Pugh recognized him as the "older" deliveryman who came to her house before. He carried yellow "slips" that resembled the documentation she saw when the furniture was delivered.

¶ 7 Defendant asked Pugh if anyone had given her screws to complete the furniture assembly. When she told him no, he asked whether she wanted him to put the screws into the headboard. Pugh said yes. During that conversation, Pugh viewed defendant's entire body and his face as she stood face to face about one foot away from him.

¶ 8 Pugh let defendant inside and they went upstairs to her daughter's bedroom. After starting to attach the headboard, defendant told Pugh he needed to go down to his truck and then asked to use the bathroom. Pugh directed defendant to a bathroom on that floor, waited at the top of the stairs, and made a call on her cell phone.

¶ 9 Defendant came out of the bathroom with a silver box cutter and held it to Pugh's neck. He told Pugh to end her phone call, which she did, and asked her about a ring she wore during his first visit. Pugh said she could not wear the ring because her fingers were swollen from her pregnancy.

¶ 10 Defendant told Pugh that "he knew there was money or a safe or something in that house" and she "needed to give him something." Pugh responded she did not have money but said there was a safe in the master bathroom. Pugh testified the safe contained \$7,200 in cash that belonged to Steele, along with several checks. Defendant told Pugh to open the safe, and she responded that she did not have the combination. Pugh told defendant she could call to get the combination.

¶ 11 Defendant took Pugh's cell phone and told her to pick up the safe. The steel safe weighed about 20 pounds and was about 18 inches by 15 inches by 12 inches in size. After Pugh carried the safe downstairs at defendant's direction, he took the safe from her and walked out the door.

¶ 12 Pugh locked the door and called police. Pugh told the officers who arrived at her house that she was robbed by a man who delivered furniture. Pugh described the offender to officers as "an African-American male, five [feet], ten [inches], maybe 180, 190 pounds, bald." While officers were there, she called Steele and told him the "guy that delivered the furniture" had returned and robbed her. Pugh also called her brother, Michael.

¶ 13 During a subsequent conversation with Steele, he gave Pugh defendant's first name. Pugh gave that information to the police officer who was still at her home. Steele later gave Pugh a copy of defendant's driver's license. Steele had gone to Dolton Furniture and obtained the copy from the store.

¶ 14 On May 22, 2011, Pugh went to the police station and gave them the copy of defendant's driver's license. Pugh viewed a police photo array and identified defendant as the man who "put the box cutter to my neck and took the safe out of my house." On May 26, 2011, Pugh returned to the police station and selected defendant from a lineup of five or six men. On cross-examination, Pugh said that when a detective asked why the safe contained that amount of money, she told him Steele did not have a bank account because he had filed for bankruptcy.

¶ 15 Steele testified that in May 2011, he and Pugh were newly engaged and he had given her a diamond ring. Steele had filed for bankruptcy in connection with divorce proceedings.

¶ 16 On May 21, 2011, Pugh called Steele at work and told him to come home because she had been robbed. She described the offender to Steele.

¶ 17 Steele went home, where Pugh was speaking with police, and he and two other men went to Dolton Furniture. There, they spoke to the manager, who gave Steele a copy of defendant's driver's license and said "[t]his is him." Steele called Pugh and told her defendant's name. Steele and the two men went to the address on defendant's driver's license but were told defendant was not there. Steele went home and gave the copy of the driver's license to police, who were still with Pugh. On cross-examination, Steele said he did not call or return to the address on defendant's license or speak to a member of defendant's family.

¶ 18 Rajeh Jibawi, the sales manager of Dolton Furniture, testified that defendant delivered furniture to Pugh's home in May 2011. Jibawi identified defendant in court. Defendant was the store's only deliveryman but might be accompanied by another employee if a delivery was large. Tools, including a box cutter, were kept in the delivery truck.

¶ 19 On the day of Pugh's delivery, defendant left the store by himself to deliver the furniture. Defendant returned and gave Jibawi the receipt Pugh had signed. Defendant did not mention that he was missing screws for Pugh's furniture. Jibawi testified that in such a case, the store would contact the customer to set up another appointment to complete the job. After the day on which the furniture was delivered to Pugh, defendant did not show up for work again, and his employment was terminated.

¶ 20 Chicago police officer Goodner testified she was the first officer to arrive at Pugh's residence on May 21 and that the incident had occurred several minutes earlier.¹ Pugh told Goodner she recognized the offender because he had been to her house before. Pugh described her assailant as "about six feet, 220 pounds, dark complexion, brown eyes and bald" and between

¹ Goodner's first name does not appear in the record.

45 and 50 years old. Later, while Goodner was still at the residence, Pugh gave her a possible name for the offender. Goodner learned there might be a driver's license photo of the offender.

¶ 21 Chicago police detective Joel Krettek testified he showed Pugh a photo array on May 22, 2011. She identified defendant and told Krettek his name, saying he was the man who threatened her with a box cutter and stole the safe. After selecting defendant's picture in the photo array, Pugh remarked that he looked younger and skinnier than he did in person.

¶ 22 Chicago police detective Kevin Dwyer testified that on or around May 26, 2011, Pugh viewed a lineup and immediately selected defendant. Dwyer said defendant matched the physical description that Pugh gave Goodner. Pugh told him the other delivery person was a black male "around 18 years old."

¶ 23 The defense presented no evidence. The jury found defendant guilty of home invasion and armed robbery. The trial court sentenced defendant to concurrent 25-year terms and entered an order imposing various fines, fees and costs.

¶ 24 On direct appeal, defendant asserted: (1) he was denied a fair trial because the prosecution's rebuttal closing argument diminished the State's burden from proof beyond a reasonable doubt to merely "reasonable"; (2) the trial court improperly considered his possession of a weapon and taking of property in aggravation of his sentence where they were factors inherent in the offenses, and (3) the trial court failed to consider his rehabilitative potential and other mitigating circumstances. This court rejected those contentions and affirmed defendant's convictions and sentences but directed that the fines and fees order be modified. *People v. Remmer*, 2015 IL App (1st) 130886-U, ¶ 34.

¶ 25 On April 4, 2016, defendant filed a *pro se* petition under the Act alleging, *inter alia*, that his trial counsel was ineffective for failing to call his cousin, Dyland Weather, as a defense witness at trial.² Defendant asserted that Weather would have testified about a phone call that Weather received from Steele and Pugh's brother, Michael, in which they offered to have the criminal charges against defendant dismissed in exchange for money.

¶ 26 Attached to defendant's petition was an affidavit by Weather that states, in its entirety:

"I, Dyland Weather, state that I received Brother Michael and her fiancé, Reginald Steele, to negotiate paying them \$10,000 to drop all charges against [defendant]. I told them I didn't have that kind of money and I have to talk to [defendant]. [Defendant] told me don't pay them because he didn't commit that crime.

After relaying that to Michael and Reginald, they said, 'We know it was one of the delivery men who delivered the furniture because it was two of them.' I said, 'How do you know it wasn't the other guy? Well, we know that he knew who the other guy is and if [defendant] get[s] our money back we will drop charges. If not, we are willing to accept \$5,000.00, final offer.'

[Defendant] then informed his attorney [] and gave her my phone number, but she never called me and I called her but she hasn't returned my calls. I live in Racine, WI and took the day off of work to attend the jury trial for [defendant.] The jury trial was in Chicago on December 4, 2012. I introduced myself to [defendant's] attorney [] and informed her of my previous conversations with the Pugh family. Attorney [name] informed me that I needed to wait outside the courtroom, in the designated area, before

² Defendant raised a myriad of claims of ineffective assistance of trial and appellate counsel in his postconviction petition. On appeal, he challenges only the dismissal of this particular claim.

the trial began. Then as the trial began she would call upon me to take the witness stand.

Unfortunately, she never called me to the stand, on the trial day of December 4, 2012.”

¶ 27 On June 8, 2016, the circuit court summarily dismissed defendant’s petition in a written order. The court concluded, in relevant part, that the petition did not state the gist of a meritorious claim as to Weather’s attestations because even if he had testified at trial, his account would not have affected the credibility of Pugh’s testimony identifying defendant as her assailant.

¶ 28 On appeal, defendant contends his petition stated an arguable claim of trial counsel’s ineffectiveness for failing to present Weather as a witness. He argues that Weather’s testimony about the conversation described in his affidavit would have weakened the credibility of Pugh and Steele.

¶ 29 The Act provides a three-stage method by which a defendant may challenge a 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). The court here dismissed defendant’s postconviction petition at the first stage of review. At the first stage, 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 summarily 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 the circuit court’s summary dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶ 30 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.*, that 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)). This court can resolve ineffectiveness claims under *Strickland* by reaching only the prejudice prong, because if prejudice is lacking, the issue of counsel’s performance is irrelevant. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 31 Defendant asserts Pugh’s credibility would have been challenged had counsel called Weather to testify at trial that Steele spoke to him and offered to drop the charges against defendant in exchange for money. He argues this testimony would have countered Pugh’s identification of defendant as the offender and established that she had a motive to testify falsely.

¶ 32 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. “Whether the failure to investigate or present 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. Lewis*, 2017 IL App (1st) 150070, ¶ 18 (quoting *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26). After considering both of those factors, we conclude defendant was not prejudiced by counsel’s failure to call Weather as a witness.

¶ 33 At trial, Pugh testified two delivery men initially came to her house: an “older” bald man and a “younger” man who was “maybe in his teens.” Pugh had ample time and opportunity to

observe her assailant during his two visits to her house. After the assailant left with her phone and the safe, Pugh called police, who arrived within minutes. Pugh testified that she described the offender to officers as “an African-American male, five [feet], ten [inches], maybe 180, 190 pounds, bald.” She testified the other deliveryman who came to her house was “a younger guy” who was “thin” and “maybe in his teens.” Goodner, the first officer who arrived at Pugh’s house, testified that Pugh described her attacker as “about six feet, 220 pounds, dark complexion, brown eyes and bald” and between 45 and 50 years old, and that Pugh provided that description before she learned the name of the attacker or of a possible driver’s license. Even though Pugh’s recollection at trial of the height and weight of her attacker varied from the description she gave Goodner shortly after the offense, the descriptions are not fatally dissimilar. Pugh consistently testified her assailant was the older of the two men who delivered the furniture. Additionally, Pugh identified defendant in a police photo array and a lineup within a week of the offense. Dwyer, the detective present when Pugh selected defendant from the police lineup, testified that defendant matched the physical description that Pugh had given to Goodner. The State also presented the testimony of Jibawi, defendant’s manager at the furniture store, that defendant delivered furniture to Pugh’s home and did not report for work after that date.

¶ 34 In short, Pugh gave defendant’s physical description to police shortly after the attack, before she knew defendant’s name, and that description matched the man she identified in the lineup. Weather’s potential testimony that Steele and Pugh’s brother, Michael, spoke to Weather about dropping the charges against defendant does not cast doubt on Pugh’s identification of defendant. Although defendant argues the account of his cousin Weather would have impeached

Steele's testimony that he never spoke with a family member of defendant, any impeachment of Steele would not have diminished the strength of Pugh's repeated identifications.

¶ 35 Defendant also argues Pugh's testimony was weak because, by the time she identified him in the police photo array and lineup, she had already seen defendant's driver's license, which would have featured his name and photograph. However, Pugh described her assailant to Goodner before Steele obtained the copy of the drivers' license from defendant's manager.

¶ 36 Defendant further asserts it can be presumed from Weather's affidavit that Steele's use of the plural pronouns "we" and "our" indicates Steele was referring to himself and Pugh and was speaking on behalf of Pugh in offering to drop the charges. That is a strained interpretation of Weather's account, given it involved a purported conversation that Weather had with Steele and Pugh's brother and "we" could have referred to those two men.

¶ 37 In conclusion, given Pugh's immediate description of defendant to the police officer who responded to her house, her identification of defendant as the offender in a police photo array and lineup, and the totality of the evidence presented, the outcome of defendant's trial would not have been different had Weather offered the testimony described in his affidavit. Therefore, defendant has not made an arguable claim that he was prejudiced by counsel's failure to present Weather as a witness and his ineffective assistance of counsel claim is frivolous and patently without merit. Accordingly, the circuit court's order summarily dismissing defendant's postconviction petition is affirmed.

¶ 38 Affirmed.