2019 IL App (1st) 162300-U

No. 1-16-2300

Order filed May 10, 2019

Fifth 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 23654
	)	
ANDRES BAUTISTA,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition and denial of his supplementary motion to reconsider is affirmed where he did not state arguable claims of ineffective assistance of counsel or actual innocence.

¶ 2 Defendant Andres Bautista appeals from the summary dismissal of his *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, he contends that (1) his petition stated an arguable claim that trial counsel was ineffective for failing to investigate and call an eyewitness, James Ardzeck, and (2) his

supplementary motion to reconsider the dismissal of his petition, which the circuit court characterized as a successive postconviction petition, stated an arguable claim of actual innocence based on an affidavit from his co-offender, Robert Daray. Alternatively, defendant maintains that trial counsel provided ineffective assistance by failing to obtain Daray's statement before trial. We affirm.

¶ 3 Defendant and Daray were charged by the same information with one count of burglary (720 ILCS 5/19-1(a) (West 2012)) stemming from an incident in which they allegedly took property from a garage in Chicago. On March 6, 2014, Daray pled guilty.[1] Defendant's case proceeded to a bench trial on May 14, 2014, where he was represented by private counsel.

¶ 4 At trial, Chicago police officer Korwin testified that he and his partner, Officer Berg,[2] responded to a call of "a burglary in progress" on West 54th Place on November 24, 2013. When they arrived, Korwin observed defendant sitting in a white van parked in front of the garage at that address. Korwin also saw another man exit the garage and load an object into the back of the open van. There were "[m]ultiple items" already in the van. Korwin identified a photograph of these items, which included a welder, a grinder, an air compressor, and tires. He also noticed that the lock on the side door to the garage was "cracked off." On cross-examination, Korwin stated that he did not observe defendant outside of the van before apprehending him.

¶ 5 Jose Garcia, the owner of 3021 West 54th Place, testified that police officers came to his door and told him that his garage was being robbed. He walked outside and saw a van parked in

[1] The date of Daray's guilty plea is taken from comments by the circuit court in denying defendant's supplemental motion to reconsider. The date of the plea and the precise offense to which Daray pled do not appear elsewhere in the record. However, in defendant's brief on appeal, he does not contest the date stated by the circuit court.

[2] The transcript does not contain Korwin or Berg's first name.

the adjacent alley. Inside the van were Garcia's air compressor, tires, welding machine, tool boxes, and grinder that were in his garage earlier that morning. The lock on the garage door, which had been intact that morning, was broken. Garcia did not give anybody permission to take the property from his garage.

¶ 6 The defense rested without presenting evidence. At closing, defense counsel argued that there were "any number of reasonable hypothesis [*sic*] of innocence," and that the State had failed to prove beyond a reasonable doubt that defendant knew that Daray was committing a burglary. In particular, defense counsel contended that "there is really nothing in the case that shows that [defendant] took any action to aid and abet this offense."

¶ 7 The court found defendant guilty of burglary. In so finding, the court mentioned that the lock "had to make some noise when that was kicked in or pushed in." Additionally, the court opined that:

> "Most telling is the [photograph of] the back of the van which is just stacked full of property. The victim indicated that there were tires. These are mag tires which I should note *** are large and heavy, welder's machine, tool boxes, a grinder and air compressor all were loaded in the back of this van. It's certainly *** a reasonable inference that the defendant was indeed helping the second person remove these items unlawfully from the garage.
>
> As [defendant was] sitting behind the drive[r]'s seat there is no question that he was aiding and abetting.
>
> * * *

> This is powerful circumstantial evidence based on reasonable inferences that the defendant was assisting someone in unlawfully taking equipment. *** [W]ith the huge number of property items here I don't think it's reasonable that he was unaware of what was going on."

¶ 8 Following a hearing, the court sentenced defendant to six years in prison. On direct appeal, defendant was represented by the same private attorney who appeared at trial, and again argued that there was insufficient evidence to prove that he knew Daray was taking the property without consent. *People v. Bautista*, 2015 IL App (1st) 141810-U, ¶ 8. We affirmed, noting that the circumstantial evidence established defendant's accountability for the offense where, *inter alia*, "he was literally sitting in the driver's seat during the commission of the burglary." *Id.* ¶ 11. Moreover, in rejecting defendant's argument that the trial court improperly shifted the burden of proof, we found instead that the trial court "considered, tested, and tried to sustain the defense theory that defendant's actions were innocent, but found that theory wanting." *Id.* ¶ 15.

¶ 9 On January 5, 2016, defendant filed a *pro se* postconviction petition, alleging, in pertinent part, that his trial counsel was ineffective for failing to investigate various sources that could have established that he was at a McDonald's when Daray first broke into the garage, and provided "a reasonable explanation for [his] mere presence at the scene *** after [the] garage was already broken into." Relevant here, defendant claimed that trial counsel "failed to present *** available evidence" from Ardzeck that could have shown he was not present when Daray broke the lock. Defendant attached a police report summarizing a statement Ardzeck gave to police on November 24, 2013, the day of the burglary. According to the report, Ardzeck stated that he was sitting on his second-story porch overlooking 3021 West 54th Place when he saw a

man with a flashlight, later identified as Daray, in Garcia's garage. Daray left the garage, walked three houses down, and jumped a fence. Then, a white van pulled up and parked by the garage. Ardzeck observed Daray and defendant carry items out of the garage and load them into the van. Ardzeck called the police, who arrested the men.

¶ 10 Defendant also attached an investigative report dated April 23, 2014. The record does not establish the origins of this report, but based on the language and operative dates, it appears to have been generated by two investigators for the defense in anticipation of defendant's trial. The report states that "[t]he client" requested that the unnamed investigators interview Ardzeck. According to the report, the investigators went to Ardzeck's home on April 18, 2014, but were unable to make contact with him. An investigator spoke to Ardzeck via telephone later that day, "identified himself and whom he represented," and conducted an interview. Ardzeck gave a substantially similar account to what he told police on the day of the incident. Notably, he stated that the van pulled up "minutes" after Daray left the garage, and that "there clearly were two people removing items from the garage." In addition, Ardzeck "acknowledged" that he attended court the previous day, but the State's Attorney told him that nothing was going to happen that day and he was not needed. Ardzeck also mentioned that he learned that one of the offenders "was found guilty" and sentenced to eight years in prison.

¶ 11 In a written order dated March 18, 2016, the circuit court summarily dismissed defendant's petition, finding in relevant part that "[a]ll of the issues involve evidence that would have been known to [defendant] at the time of trial and his appeal. Thus, these issues are waived." Defendant mailed a *pro se* motion to reconsider on April 6, 2016, followed by a *pro se* notice of appeal on April 12, 2016.

¶ 12 In his motion to reconsider, which was filed-stamped April 15, 2016, defendant argued that he did not waive his ineffective assistance of counsel claim. He attached his own signed affidavit averring that the same private attorney represented him both at trial and on direct appeal, and alleged that counsel could not have been expected to argue his own ineffectiveness.

¶ 13 On April 18, 2016, the clerk of the circuit court filed-stamped defendant's notice of appeal. Subsequently, on April 29, 2016, the circuit court entered an order striking the notice of appeal as premature in light of the open motion to reconsider.

¶ 14 On May 11, 2016, before the circuit court ruled on defendant's motion to reconsider, defendant filed a *pro se* document entitled "Supplemental Motion to Re-consider." The document alleged that defendant's wife sent him an affidavit by Daray on April 13, 2016. In the affidavit, which was attached and dated December 30, 2015, Daray averred that he alone broke into the garage and stole some items on the "spur of the moment" after defendant had dropped him off in the area to go to a friend's house. Because Daray could not carry the stolen property by himself, he called defendant, told him that he was "helping out a friend," and asked for a ride. Defendant arrived in his van, and Daray loaded the stolen property into the van until the police pulled up. Daray explained to the police that defendant "had nothing to do with this burglary," but they told him that he "was full of sh**," and refused to take his statement because he would not implicate defendant.

¶ 15 On May 25, 2016, the court orally pronounced that it denied defendant's initial motion to reconsider. The court acknowledged that defendant filed the document entitled "supplemental motion to reconsider," and stated that "I am going to take a date to review it. I am not sure how it

fits in. I have to treat it as a successive post-conviction, nevertheless, let's give it a date of July 1st."

¶ 16 On July 1, 2016, the court made an oral pronouncement stating that defendant's original motion to reconsider and the supplemental motion to reconsider were both denied. In so ruling, the court noted that defendant failed to file Daray's affidavit "in a timely manner," as it was not presented until five months after his original postconviction petition was filed. The court further noted that Daray pled guilty on March 6, 2014, and that his affidavit was dated December 30, 2015. Thus, the circuit court ruled that the affidavit "fails as newly discovered evidence as [defendant] did not exercise due diligence."

¶ 17 On appeal, defendant argues that the trial court erred in summarily dismissing his postconviction petition, which alleged ineffective assistance of counsel, and in denying his supplementary motion to reconsider, which alleged, for the first time, a claim of actual innocence. Because defendant did not allege actual innocence until after his initial petition was dismissed, the supplementary motion is rightly characterized as a successive postconviction petition, and is therefore subject to a more stringent standard than an initial petition. See *People v. Edwards*, 2012 IL 111711, ¶ 24. Consequently, we will first address the relevant claim contained in defendant's original postconviction petition, *i.e.*, that trial counsel was ineffective for failing to investigate and call Ardzeck.

¶ 18 The Act provides a three-stage procedural mechanism whereby a defendant may assert that his conviction was the product of a substantial deprivation of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2016). The first stage requires the circuit court to take the defendant's allegations as true and determine whether the petition is "frivolous or is patently

without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Our supreme court has interpreted this standard to mean that summary dismissal is warranted "only if the petition has no arguable basis either in law or fact," as when it relies on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. A legal theory is indisputably meritless when, for example, it is "completely contradicted by the record." *Id.* A reviewing court considers the summary dismissal of an initial postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 19 The right to effective assistance of counsel is protected by the sixth amendment to the United States Constitution (U.S. Const., amend. VI). *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Whether the failure to investigate a potential witness constituted ineffective assistance of counsel depends on the closeness of evidence presented at trial and the value of the evidence not presented because of counsel's performance. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland*, 466 U.S. at 687-88. *People v. Tate*, 2012 IL 112214, ¶ 19. However, the more lenient "no arguable basis" standard remains applicable to first-stage postconviction proceedings. *Id.* ¶ 20. Thus, to survive summary dismissal, a petition must state a claim that counsel's performance *arguably* fell below an objective standard of reasonableness and that defendant was *arguably* prejudiced by counsel's deficiency. *Id.* ¶¶ 19-20.

¶ 20 To the extent defendant contends that trial counsel failed to investigate Ardzeck's November 2013 statement to the police, we reject this argument because the record suggests that counsel did conduct such an investigation. Attached to defendant's initial postconviction petition was an investigatory report dated April 23, 2014, apparently commissioned by the defense. The

report states that investigators interviewed Ardzeck at "[t]he client[']s]" request, after Ardzeck's statement to the police and Daray's guilty plea. Thus, the record refutes the notion that defense counsel failed to investigate what evidence Ardzeck could provide, and nothing in defendant's petition suggests that a more thorough investigation was warranted.

¶ 21 Defendant's contention that he was arguably prejudiced by counsel's failure to call Ardzeck as a witness is also meritless. See *Tate*, 2012 IL 112214, ¶ 22 (although it is inappropriate at the first stage to determine if counsel's decision was strategic, a defendant must still demonstrate that he was arguably prejudiced). The record shows that Ardzeck would have testified that he observed a man, presumably Daray, in Garcia's garage. The man left, jumped over a fence, and returned "minutes later" with another man in a van. Ardzeck saw the two men loading items from the garage into the van, and called the police.

¶ 22 Even construed liberally, Ardzeck's statement does nothing to contradict the State's evidence, and in fact corroborates it in material ways. Defendant nevertheless maintains that he was arguably prejudiced because Ardzeck could have supported his theory that he was not present when Daray initially broke into the garage. In making this argument, defendant focuses on the trial court's statement that the lock on the garage "had to make some noise when that was kicked in or pushed in." Accordingly, defendant contends that Ardzeck's testimony would have "greatly diminished the evidence suggesting [his] knowledge" of the burglary because it would have established that he was not present when Daray broke the lock. However, the trial record clearly shows that defendant's presence during the initial break-in was not essential to his conviction. Rather, the circumstantial evidence as a whole overwhelmingly showed that

defendant was aware of the burglary because he was present as numerous heavy items were loaded into the back of his van.

¶ 23 Consequently, we cannot say that defendant's trial arguably would have ended differently had Ardzeck testified, and defendant cannot show that he was prejudiced by counsel's failure to call Ardzeck as a witness. The circuit court therefore did not err in summarily dismissing defendant's original postconviction petition.

¶ 24 We next turn to defendant's claims in his supplemental motion to reconsider. On appeal, defendant argues that the document was not a successive postconviction petition because Daray's affidavit supports a claim made in his initial petition. Namely, he contends that his original ineffective assistance of counsel claim was based in part on counsel's failure to provide a "reasonable explanation" for his presence at the scene. On appeal, however, defendant argues that Daray's affidavit supports his claim of actual innocence, a claim that was not included in his initial postconviction petition. Thus, the circuit court correctly treated the supplemental motion as a successive postconviction petition. See *People v. Vilces*, 321 Ill. App. 3d 937, 939 (new issue raised in motion to reconsider could not be characterized as an amendment to the postconviction petition because the defendant did not raise the issue before the dismissal of his original petition).

¶ 25 The Act generally contemplates the filing of only one postconviction petition. See *Edwards*, 2012 IL 111711, ¶ 22. However, courts have relaxed the bar against successive postconviction petitions on two bases. *Id.* First, a defendant may establish cause and prejudice for his failure to raise certain claims earlier. *Id.* Second, in the interests of fundamental fairness, a defendant may assert a claim of actual innocence in a successive postconviction petition if he

sets forth a "colorable claim" of his innocence. *Id.* ¶ 24. Under the "colorable claim" standard, the question becomes whether a defendant's successive petition "raise[d] the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* ¶ 31.

¶ 26 Under Illinois law, a defendant's freestanding claim of actual innocence is cognizable as a matter of due process. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To obtain postconviction relief, the evidence supporting the claim of innocence must be newly discovered, material, noncumulative, and so conclusive that it probably would have changed the result of the trial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Evidence is newly discovered only if it was discovered after the defendant's trial *and* could not have been discovered earlier through due diligence. *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is generally not newly discovered if it only presents facts known to defendant prior to trial, even though the source of the facts may have been unavailable or uncooperative. *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 53.

¶ 27 Here, taking his allegations as true, defendant received Daray's affidavit on April 13, 2016. Defendant therefore did not discover it until after his trial, which was held in May 2014, and his initial postconviction petition, which was filed on January 5, 2016. However, the record clearly shows that defendant could have obtained Daray's statement sooner through due diligence. It is unquestionable, based on the trial evidence and the affidavit, that defendant was aware of Daray's involvement in the offense and would have known what Daray told him about the stolen property as far back as the date of the offense in November 2013.

¶ 28 Defendant nevertheless argues that the affidavit was newly discovered evidence because he could not have compelled Daray to waive his right against self-incrimination any sooner. Our

supreme court has held that an affidavit is not discoverable through due diligence if the affiant would have invoked the right against self-incrimination. See *Edwards*, 2012 IL 111711, ¶ 38; *People v. Molstad*, 101 Ill. 2d 128, 135 (1984) ("no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination"). However, this principle does not apply where, as here, the affiant was no longer in legal jeopardy at the time of defendant's trial. See *People v. Jones*, 399 Ill. App. 3d 341, 365 (2010). Defendant's reliance on *Molstad* is therefore misplaced, and we find *Jones* instructive for the present case. In *Jones*, we affirmed the summary dismissal of defendant's actual innocence claim that was based on a codefendant's affidavit taking sole responsibility for the offense. *Id.* at 373. In distinguishing *Molstad*, we noted that the codefendant's admission "could have no bearing upon his ultimate disposition" because his affidavit was executed 17 months after his own trial. *Id.* at 365. We also reasoned that, unlike *Molstad*, the codefendant's affidavit lacked an allegation that his criminal exposure prevented him from coming forward earlier. *Id.*

¶ 29 Here, Daray pled guilty on March 6, 2014, more than two months before defendant's trial. There is no allegation whatsoever that Daray sought to withdraw his plea, took a direct appeal, or filed a postconviction petition. Additionally, we note that Daray's affidavit was executed on December 30, 2015, some 21 months after his guilty plea, and more than three months before defendant obtained it on April 13, 2016. Moreover, as in *Jones*, Daray did not explain that he failed to come forward earlier because of his own legal jeopardy. Instead, the affidavit evinced Daray's willingness to exculpate defendant despite the risk of self-incrimination, as it alleged that Daray told the police that defendant "had nothing to do with this burglary" because Daray had deceived him.

¶ 30 In light of the foregoing, defendant's reliance on *People v. Parker*, 2012 IL App (1st) 101809, is similarly misplaced. In *Parker*, the defendant, who was 18 years old at the time of the offense, was convicted of murder based almost entirely on a videotaped confession given after multiple interrogations and nearly 15 hours in custody. *Id.* ¶ 10. More than five years after sentencing, defendant filed a *pro se* postconviction petition claiming, *inter alia*, actual innocence based on an affidavit from a codefendant. *Id.* ¶¶ 62-63. In the affidavit, the codefendant confessed to the murder, and averred that he had never seen defendant before the offense and that defendant was not involved. *Id.* ¶ 64. Codefendant further averred that he was now willing to testify on defendant's behalf, and had not come forward earlier because he did not want to incriminate himself while his own appeal was pending. *Id.*

¶ 31 The circuit court nevertheless summarily dismissed defendant's petition without addressing the affidavit, mistakenly stating in part that defendant raised "[n]o claims about actual innocence or anything of the sort." *Id.* ¶ 67. On appeal, we reversed the summary dismissal with little discussion of whether the codefendant's affidavit was newly discovered. Citing *Molstad* and *Edwards*, we simply rejected the State's erroneous argument that "a codefendant's exculpatory affidavit can *never* constitute newly discovered evidence." (Emphasis added.) *Id.* ¶¶ 83-84. However, *Parker* is readily distinguishable from the present case because, here, there is no allegation that Daray was prevented from coming forward because of his own legal jeopardy. Accordingly, under these circumstances, Daray's affidavit does not qualify as newly discovered evidence.

¶ 32 The record also belies defendant's claim that "he could not have discovered that Daray pleaded guilty before trial with due diligence." While there is no mention of Daray's guilty plea

in the trial record, defendant and Daray were charged with the burglary in the same information. It is undisputed that defendant was aware of Daray's name and involvement in the case. Thus, he or his counsel could have followed Daray's case with due diligence.

¶ 33 We also note that, even if Daray's affidavit was newly discovered, it does not exonerate defendant. To state a claim of actual innocence, a defendant must present new evidence that is "of such conclusive character that it would probably change the result on retrial." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). The affidavit alleged that defendant was present when the stolen property was loaded into the van, but had been told that Daray took the property with the owner's permission. Taken as true, this would not have prevented defendant from forming the requisite mental state for the offense. See *Edwards*, 2012 IL 111711, ¶ 39 (affirming the denial of leave to file a successive postconviction petition because a codefendant's averment that defendant was present, but otherwise " 'had nothing to do with' " the offense, did not exonerate defendant, who was convicted by accountability); see also *People v. Miranda*, 2018 IL App (1st) 170218, ¶ 26 (affirming the denial of leave to file a successive petition because co-offenders' affidavits, which averred that defendant unwittingly served as their getaway driver, were not conclusive).

¶ 34 Alternatively, defendant argues that trial counsel was ineffective for failing to discover Daray's statement earlier. As noted, defendant must at least establish that counsel's performance was arguably unreasonable and that he was arguably prejudiced by counsel's deficiency. *Tate*, 2012 IL 112214, ¶ 19. However, the record rebuts the notion that Daray's testimony could have changed the result in defendant's case. The trial evidence established that defendant was sitting in the driver's seat of a van parked next to Garcia's garage. The garage had a visibly broken lock,

which had been intact that morning. A police officer watched Daray load an item into the back of defendant's open van, and subsequently found that numerous items missing from the garage were already in the van. The evidence of defendant's guilt was therefore overwhelming.

¶ 35 Even so, defendant's theory at trial was that there was no direct evidence "that he took any action to aid or abet this offense" and that there were "any number of reasonable hypothesis [*sic*] of innocence" that explained his presence at the scene. The trial court rejected this theory, declaring that "I don't think it's reasonable that [defendant] was unaware of what was going on" in light of the "powerful circumstantial evidence" of his knowledge. On direct appeal, defendant again argued that there was no evidence that he knew Daray was stealing the property from the garage. *People v. Bautista*, 2015 IL App (1st) 141810-U, ¶ 8. We affirmed, finding that it was reasonable to infer that he knew about the crime where "he was literally sitting in the driver's seat during the commission of the burglary." *Id.* ¶ 11. Additionally, we found that the record showed the trial court "considered, tested, and tried to sustain the defense theory that defendant's actions were innocent, but found that theory wanting." *Id.* ¶ 15. Under these circumstances, there is no question that Daray's testimony would not have changed the result. We therefore conclude that defendant's claim of prejudice lacks any arguable basis, and that the circuit court did not err in summarily dismissing this argument.

¶ 36 For the foregoing reasons, we affirm the summary dismissal of defendant's postconviction petition, as well as the denial of his successive postconviction petition stylized as a supplemental motion to reconsider.

¶ 37 Affirmed.