2019 IL App (1st) 162750-U

No. 1-16-2750

Order filed April 12, 2019

SIXTH 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. 03 CR 1190
	)	
DAVID HERNANDEZ,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition affirmed where his allegation of ineffective assistance of appellate counsel is without merit.

¶ 2 Defendant David Hernandez appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the court erred in dismissing his petition because he

presented an arguable claim that his appellate counsel rendered ineffective assistance when he did not argue on direct appeal that the trial court erred when it did not conduct an inquiry into defendant's pretrial allegation of ineffective assistance of trial counsel. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder. The jury also found that the victim was under the age of 12 years old, and that the murder resulted from exceptionally heinous and brutal conduct indicative of wanton cruelty. The trial court sentenced defendant to an extended term of 80 years' imprisonment.[1]

¶ 4 In the early morning hours of December 25, 2002, defendant repeatedly struck six-year-old Alma Manjarrez about her body, then put her outside their apartment in snowy 20 to 30 degree weather without a coat, wearing only a t-shirt and jogging pants. Alma died several hours later as the result of blunt trauma to her abdomen due to the assault, with hypothermia playing a contributing role in her death. Defendant was charged with first degree murder, aggravated battery of a child, aggravated domestic battery, aggravated battery and unlawful restraint.

¶ 5 The record shows that this case was pending in the trial court from January 2003, until the trial began on October 11, 2011. As pertinent to this appeal, in March 2010, defense counsel requested that defendant be reevaluated for his fitness to stand trial. A fitness hearing was held in October and November 2010. At the hearing, Dr. Fidel Echevarria, a staff psychiatrist with Forensic Clinical Services, testified for the State that during his fitness examination, defendant stated that he liked his counsel and expressed his willingness to work with counsel. Defendant's only concern about his ability to cooperate with counsel was his need for a Spanish interpreter.

[1] Although originally a death penalty case, Illinois abolished the death penalty during pretrial proceedings.

Echevarria opined that defendant was malingering, and concluded that defendant was mentally fit to stand trial.

¶ 6 Dr. Stafford Henry testified for the State that during his examination of defendant, defendant told him "my attorney tells me everything." Defendant stated "she is helping me, she is defending me." Defendant further stated "we stand up there" and that counsel was working on his defense "against death." He said counsel's job was "to find me not guilty." When asked about his relationship with counsel, defendant replied "I like her." Henry opined that defendant was a malingerer who chose what information to convey when he wanted to achieve a certain end. Henry testified that defendant "makes stuff up as he goes along." Henry opined that defendant was fit to stand trial and was able to assist in his own defense if he chose to do so.

¶ 7 The defense presented testimony from three doctors who evaluated defendant's fitness. Dr. Pablo Stewart, a psychiatrist from California, opined that defendant was not fit to stand trial. Stewart observed defendant interact with counsel and found that defendant was unable to adequately communicate with counsel, and could not understand counsel. Dr. Antonio Puente, a psychologist from North Carolina, also opined that defendant was not fit to stand trial. Counsel told Puente that they were having problems communicating with defendant. Puente concluded that it appeared defendant was unable to assist his attorneys with his case. Dr. Esperanza Salinas, a psychiatrist from DePaul University and Lutheran Social Services, testified that defendant did not appear to understand that his attorney was on his side. Salinas found that defendant was very distrustful of everyone, including his attorney. Defendant did not answer questions because he believed they were going to be used against him. Salinas testified, however, that when defendant

spoke about counsel, he stated "I get along well. She hasn't said anything bad or aggressive." Salinas opined that defendant was not fit to stand trial.

¶ 8 Following testimony and before arguments in the fitness hearing, defense counsel and co-counsel asked to submit affidavits to the court regarding their communication with defendant. Counsel explained that the affidavits would speak about their interactions with defendant, and the tactics they used to try to have him communicate with them regarding his case. The State objected, arguing that it knew of no authority that would allow the court to review affidavits from defense counsel. The court stated that it was concerned that counsel would be making themselves witnesses in the case, putting their own credibility at issue, which was not appropriate. The court pointed out that counsel could have told the experts that they were having problems communicating with defendant. The court noted that some of the experts had taken that information into account when making their evaluations. Counsel replied that they were in a unique situation, and wanted to inform the court about what they had done to try to get some type of communication from defendant. The court stated that it would allow counsel to prepare and present an affidavit, and would hear their argument that such action should be allowed. The court advised counsel, however, that it would likely deny their request.

¶ 9 On December 3, 2010, defense counsel presented an evidentiary affidavit to the court, but declined to tender it to the State. The court refused to engage in an *ex parte* communication and returned the affidavit to counsel without reading it. The court asked counsel to verbally summarize the type of information that was included in the affidavit. Counsel explained that they were asking to present information regarding their observations of defendant during their visits with him, as well as their attempts to communicate with him. Counsel asserted that such

information was relevant to the court's fitness determination. Counsel acknowledged that the communication was protected by the attorney-client privilege, which only defendant could waive. Therefore, the affidavit confined the evidence within the parameters of protecting that privilege. Counsel asked that the information in the affidavit be considered for the sole purpose of determining defendant's fitness. The State objected, asserting that there was no authority that allowed counsel to submit an affidavit at a fitness hearing. The State pointed out that five doctors had already testified regarding defendant's ability to communicate with counsel.

¶ 10 The court found that allowing the affidavit would make counsel witnesses in the case, and would pierce the attorney-client privilege. The court found that defendant would have to waive the privilege, which would open many areas to cross-examination involving their work product, which was not appropriate. The court noted that defendant's experts testified about counsel's inability to communicate with defendant, which was the reason for the fitness evaluation. The court denied counsel's request to file the evidentiary affidavit. It stated, however, that counsel could seal and impound the affidavit to make it part of the record for purposes of appeal. The affidavit is not included in the record before this court.

¶ 11 Following arguments, the court found that defendant was malingering. The court found that defendant was able to understand the nature and purpose of the proceedings against him, and that he could cooperate with his attorneys if he chose to do so. Consequently, the court found defendant fit to stand trial.

¶ 12 On the morning of October 11, 2011, after the jury had been selected and trial was about to begin, defendant tendered a note to the court asking to fire his lawyers. The court read defendant's note into the record, which stated as follows:

"Dear Honorable Judge. With all due respect I would like to inform you that I would like to fire my present public defender lawyer and assistant also. ***

I want to proceed with my trial but with another P.D. assigned to me that's going to actually defend me and not work against me. Every time [defense counsel] comes to see me, she always argues with me and yells at me, which was witnessed by the officer on duty on the 7 to 3 p.m. shift on 10-9 of 11.

Also, she has called me out my name on that date and several other occasions, and last, but not least, I have received extremely poor counseling assistance and, most of all, defense. I would appreciate it if my request were taken into consideration."

¶ 13 The trial court responded as follows:

"Mr. Hernandez, at this juncture, I do completely disagree with your assessment of your attorneys. They have fought, I would say, harder and certainly longer than any other attorney representing anybody in my courtroom on your behalf. They have hired psychologists to travel to a small village in Mexico, all on your behalf, to find out about your background and how it would possibly help your case.

When we were dealing with the fitness issues, [defense counsel] indicated on a recent court date that during the course of the case she, herself, has traveled all the way down there with respect to investigating this case and doing the best they could. I have never had a case before where the attorneys have gone to such lengths, quite literally, in an airplane to go to such lengths and hired people to do the same thing all on behalf of representing you.

At this very late juncture, this case has been – occurred on December 25th of 2002. It is without exception the oldest case in the courtroom. Dare I say the building, although I don't really want that dubious distinction of having that case, but it very well may be the oldest case in the building that has never gone up on a reversal or anything of that nature.

* * *

By my count, looking at the half sheet, this case has been on the court call no less than 125 times since the date of January 30th of 2003. For the last five and a half years there has basically been uninterrupted representation by [defense counsel] on this particular case.

This is not the kind of case where I could put another lawyer in and go to trial today. How can we go to trial today with a brand new lawyer. There are boxes and boxes and boxes of depositions, of transcripts, of testimony, of police reports with respect to this incident. It would be, of course, completely impossible for me to just substitute anybody in on the case. At this juncture there would be no reason to do so.

I find that after 125 continuances, this being the first that anybody has ever heard with respect to your dissatisfaction, I find that it's a dilatory tactic, and your request for any lawyer other than the two lawyers who are already on the case is going to be respectfully denied. We're proceeding with the attorneys who know the case and who have worked very diligently on your behalf for all of these years."

¶ 14 The case proceeded to trial. The evidence presented at trial was detailed in our prior order on direct appeal. See *People v. Hernandez*, 2014 IL App (1st) 120212-U. The jury found

defendant guilty of first degree murder. The jury also found that the victim, Alma, was under the age of 12 years old, and that the murder resulted from exceptionally heinous and brutal conduct indicative of wanton cruelty. The trial court sentenced defendant to an extended term of 80 years' imprisonment.

¶ 15 On direct appeal, defendant argued that the trial court abused its discretion when it denied jury instructions on the lesser offenses of involuntary manslaughter and second degree murder, and that he was improperly assessed $50 in fees. This court rejected defendant's challenge to the jury instructions, finding that the severity of the beatings suffered by six-year-old Alma negated any suggestion of recklessness, and that there was no evidence of mutual combat to support a second degree murder instruction. We vacated the $50 assessment, and affirmed defendant's conviction and sentence in all other respects. *Hernandez*, 2014 IL App (1st) 120212-U.

¶ 16 On May 31, 2016, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). On appeal, defendant only challenges his claim that appellate counsel rendered ineffective assistance when counsel did not argue on direct appeal that the trial court erred when it denied his pretrial request for substitute counsel without conducting any inquiry into defendant's claim of ineffective assistance of counsel. Defendant asserts in his petition that over the years, counsel did not keep him reasonably informed of his status, or comply with his reasonable requests. Defendant claims that *prima facie* showings by him and trial counsel disclosed a lack of communication. Defendant points out that trial counsel attempted to file an evidentiary affidavit concerning his fitness, and declared that there was a problem due to their inability to communicate with him. Defendant argues that contrary to the trial court's finding, his request was not a dilatory tactic.

¶ 17 In summarily dismissing defendant's postconviction petition, the circuit court found no merit in defendant's claim that counsel's alleged inability to communicate with him was a sufficient basis to warrant substitution of counsel. The court noted that defendant referred to the proceeding on December 3, 2010, which concerned his fitness to stand trial. The court found that defendant had misstated the record. The court stated that on that date, counsel did not state that there were communication problems with defendant. Instead, counsel sought to use private communications with defendant, without violating the attorney-client privilege, as evidence to show that defendant was unfit to stand trial. The court found that the purported evidence presented by defendant had no bearing on his argument that counsel should have been replaced. The court pointed out that in ruling on defendant's motion to substitute counsel, it had noted that counsel had gone to exceptional lengths to represent defendant and prepare for trial. The court again found that defendant's request was "a meritless dilatory tactic," and that it had correctly denied his motion to substitute counsel. The court concluded that the allegations raised by defendant were frivolous and patently without merit, and summarily dismissed his postconviction petition.

¶ 18 On appeal, defendant contends that the circuit court erred when it dismissed his postconviction petition because he presented an arguable claim that appellate counsel rendered ineffective assistance when he did not argue that the trial court erred when it did not conduct an inquiry into his pretrial allegation of ineffective assistance of counsel. Defendant argues that pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny, the trial court was required to ask him about the underlying factual basis for his claim. He further argues that the court should have asked counsel about the facts and circumstances surrounding the alleged

ineffective representation. Defendant claims that it was improper for the court to deny his motion based on its observations of counsel during the years leading up to trial because his allegation was related to matters outside the record, including that counsel failed to work with him and was actively working against him. Defendant maintains that the allegations in his *pro se* motion to substitute counsel, and counsel's attempt to introduce an affidavit during the fitness hearing attesting to communication problems, suggests that there was a "complete breakdown" in the attorney-client relationship that warranted a preliminary inquiry by the court.

¶ 19 The State responds that the circuit court's summary dismissal of defendant's petition was proper because defendant's allegation is without arguable merit. The State argues that the trial court correctly recognized that defendant's request to substitute counsel was a manipulative dilatory tactic. It argues that the court had no obligation to make any further inquiries into defendant's claim. The State asserts that because there was no factual or legal basis for defendant's claim, appellate counsel's failure to raise it on direct appeal was not ineffective assistance.

¶ 20 We review the circuit court's summary dismissal of defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2016); *Coleman*, 183 Ill. 2d at 378-79. Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual

allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 21 Claims of ineffective assistance of appellate counsel are evaluated using the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Harris*, 206 Ill. 2d 293, 326 (2002). To succeed, defendant must show that counsel's failure to raise the issue on direct appeal was objectively unreasonable, and that he was prejudiced by this decision. *Id.* In other words, defendant must establish that, but for counsel's error, there is a reasonable probability that his appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). However, at the first stage of postconviction proceedings, allegations of ineffective assistance of counsel are judged by a lower pleading standard, and a petition raising such claims may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶¶ 19-20.

¶ 22 Appellate counsel is not required to raise every conceivable issue on direct appeal, and if counsel concludes an issue is without merit, then his decision to refrain from raising it is not incompetence, unless his appraisal of the merits was patently erroneous. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Generally, counsel's decision not to raise an issue on appeal is given substantial deference. *Harris*, 206 Ill. 2d at 326. Unless the underlying issue is meritorious, defendant was not prejudiced by counsel's failure to raise it on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 523 (2001).

¶ 23 Our supreme court has expressly held that a trial court is not required to conduct an inquiry into a defendant's pretrial *pro se* claim of ineffective assistance of counsel. *People v.*

Jocko, 239 Ill. 2d 87, 93 (2010). In *Jocko*, the court explained that a *Strickland* claim cannot be addressed prior to trial because the outcome of the proceeding has not yet been determined. *Id.* The court further rationalized that it is not possible for a trial court to engage in a pretrial *Strickland* analysis because there is no way for the court to determine if counsel's errors have affected an outcome that has not yet occurred. *Id.*

¶ 24 Consequently, here, defendant's claim that appellate counsel rendered ineffective assistance when he did not argue that the trial court erred when it failed to conduct a *Krankel* inquiry into his pretrial allegation of ineffective assistance of trial counsel has no arguable basis in law. As explained in *Jocko*, it was not possible for the court to conduct a *Krankel* analysis prior to trial because there was no way for the court to determine if defendant had been prejudiced by counsel's alleged errors where the trial had not yet occurred. If appellate counsel had raised this issue on appeal, it would not have been successful. Therefore, as defendant was not prejudiced by counsel's failure to raise the issue (*Barrow*, 195 Ill. 2d at 523), counsel's failure to do so did not constitute ineffective assistance of appellate counsel (*Smith*, 195 Ill. 2d at 190).

¶ 25 We reject defendant's assertion that the trial court was required to conduct a *Krankel* inquiry in this case because the allegations in his *pro se* motion to substitute counsel, and counsel's attempt to introduce an affidavit during the fitness hearing attesting to communication problems, suggests that there was a "complete breakdown" in the attorney-client relationship. Defendant incorrectly attempts to equate an alleged "breakdown" in his relationship with counsel with a complete deprivation of counsel. In doing so, we find that defendant has misconstrued the holding in *Jocko*.

¶ 26 Defendant claims that in *Jocko*, our supreme court held that the trial court is obligated to conduct a *Krankel* inquiry into a defendant's pretrial allegation that there was a complete deprivation of counsel (citing *United States v. Cronic*, 466 U.S. 648 (1984)) or a potential conflict of interest (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978)). Defendant is incorrect. In *Jocko*, the court merely noted that the State acknowledged that in such instances, a trial court may conduct a pretrial inquiry because the court does not need to consider whether there was a prejudicial effect on the outcome of the proceedings. *Jocko*, 239 Ill. 2d at 92. In such circumstances, a showing of prejudice under *Strickland* is not required.

¶ 27 In this case, the record shows that defendant's *pro se* pretrial motion to substitute counsel was based on his allegation that counsel had rendered ineffective assistance by providing him with "extremely poor counseling assistance." As such, the trial court was not required to conduct any pretrial inquiry into his *Strickland* claim. *Jocko*, 239 Ill. 2d at 93. The record shows that the trial court determined that defendant's last-minute motion, tendered to the court as trial was about to begin, was nothing more than a dilatory tactic.

¶ 28 Based on this record, we conclude that the trial court was not required to conduct any inquiry into defendant's pretrial claim of ineffective assistance of counsel. Consequently, appellate counsel's failure to raise the issue on direct appeal was not patently erroneous. *Smith*, 195 Ill. 2d at 190. Had counsel raised the issue, it would not have been successful. As a result, defendant's claim that appellate counsel was ineffective for failing to raise the issue on direct appeal provides no arguable basis that counsel's performance fell below an objective standard of reasonableness, or that he suffered prejudice. *Tate*, 2012 IL 112214, ¶¶ 19-20. Accordingly, the circuit court's summary dismissal of defendant's postconviction petition was proper.

¶ 29 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* postconviction petition.

¶ 30 Affirmed.