2019 IL App (1st) 163227-U

No. 1-16-3227

Order filed February 13, 2019.

Second 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. 07 CR 12137
	)	
DONELL PARKER,	)	The Honorable
	)	Allen F. Murphy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's *pro se* postconviction petition is affirmed over his contention that he presented an arguable claim that trial counsel was ineffective for failing to honor his demand to proceed with a bench trial.

¶ 2 Defendant Donell Parker appeals from the first-stage 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, defendant contends that summary dismissal was improper because he raised an

arguable claim that trial counsel was ineffective for failing to honor his demand to proceed with a bench trial, rather than a jury trial. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the June 2007 beating death of his girlfriend's four-year-old son. Defendant was tried twice for first degree murder. The first jury trial, in 2010, resulted in a hung jury. The second jury trial, in 2012, resulted in a guilty verdict. The trial court initially sentenced defendant to 27 years in prison. Subsequently, the court granted defendant's motion to reconsider sentence and reduced the term of imprisonment to 25 years.

¶ 4 On direct appeal, defendant contended that the trial court erred in refusing to instruct the jury on the definition of "knowledge" and in failing to answer the jury's note requesting clarification of the term "reckless" in a timely manner, *i.e.*, before it returned its verdict. This court affirmed defendant's conviction and sentence. *People v. Parker*, 2015 IL App (1st) 131374-U. In our order, we set forth the underlying facts of the case in detail. Given the nature of defendant's current claim, we need not repeat those facts here.

¶ 5 On September 27, 2016, defendant filed the *pro se* postconviction petition at issue in the instant appeal. In the body of the petition, he set forth three claims asserting that he was denied his right to a fair trial. "Claim One" alleged that the jurors were allowed to view him in jail clothing as they walked past the courtroom in a hallway. "Claim Two" alleged that when the prosecutor stated, "You don't have to have premeditation for murder," it confused the jurors and caused them to ask for a "clearer understanding of 'knowledge' " in a note. "Claim Three" alleged that the prosecutor continued to make inappropriate and misleading statements in closing arguments after 17 of defense counsel's 18 objections were sustained. Defendant attached a self-

executed affidavit to the petition. The handwritten portions of the affidavit provided, in total, as follows:

> "Everything in this Post-Conviction Petition is true to the best of my knowledge.
>
> Petitioner brings forth conversation between Donell Parker and counsel Jean Herigodt. Defendant asked counsel to go with a bench trial, but she decided a jury trial would be better, especially since they had just gotten a hung jury on the first trial."

¶ 6 On October 3, 2016, the trial court dismissed the *pro se* postconviction petition as frivolous and patently without merit. In its oral ruling, the court explained that defendant's first claim was speculative and that his second and third claims were barred by *res judicata*. The court did not mention the affidavit that was attached to the petition or its allegation that defendant "asked trial counsel to go with a bench trial, but she decided a jury trial would be better."

¶ 7 On appeal, defendant contends that his petition should not have been summarily dismissed because it set forth the gist of a claim that trial counsel was ineffective for failing to honor his demand to proceed with a bench trial, rather than a jury trial. Defendant asserts that trial counsel could not waive his State constitutional right to a bench trial without obtaining his consent. He further argues that prejudice is presumed because there is a reasonable probability that he would have waived a jury trial absent trial counsel's deficient performance.

¶ 8 In cases not involving the death penalty, the Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2016); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently

assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2016).

¶ 9 A petition may be dismissed as 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 has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Id.* A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Id.* at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9. Pursuant to this standard, we review the trial court's judgment, not the reasons given for it. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 10 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "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.

¶ 11 As an initial matter, we address the State's argument that because defendant did not raise a claim of ineffectiveness based on the failure to honor his demand to proceed with a bench trial in the body of the petition – but rather, merely set forth facts related to a conversation he had with counsel about whether to proceed by a jury or bench trial in the affidavit attached to his postconviction petition – the claim he is asserting on appeal has been forfeited and cannot be considered by this court. The State argues that the language of the affidavit does not constitute a claim of ineffectiveness where it does not state that after counsel expressed her professional opinion that a jury trial would be better, defendant still wanted a bench trial and that counsel refused his request. In support of its arguments, the State cites section 122-2 of the Act, titled "Contents of Petition," which provides that a petition "shall *** clearly set forth the respects in which petitioner's constitutional rights were violated," and section 122-3 of the Act, titled "Waiver of Claims," which provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-2, 122-3 (West 2016). The State also cites five cases, all of which involved claims that were deemed waived or forfeited because they were raised for the first time on appeal. See *People v. Pendleton*, 223 Ill. 2d 458, 469-70, 475 (2006); *People v. Jones*, 213 Ill. 2d 498, 502, 505-06 (2004); *People v. Shief*, 2016 IL App (1st) 141022, ¶¶ 49, 53; *People v. Williams*, 2015 IL App (1st) 131359, ¶¶ 20, 24; *People v. Reed*, 2014 IL App (1st) 122610, ¶¶ 63, 82.

¶ 12 Defendant responds that the State's claim is "too technical" to survive scrutiny under the liberal pleading standard applied to *pro se* petitions. He further asserts that this court has twice ordered an evidentiary hearing where a defendant's postconviction claim of ineffective assistance of counsel was raised in an affidavit. However, in one of these cases, *People v.*

Barkes, 399 Ill. App. 3d 980, 982 (2010), the defendant actually raised the claim in the body of his petition. As such, *Barkes* does not support defendant's argument. In the other case, *People v. Nix*, 150 Ill. App. 3d 48, 49 (1986), the defendant filed a petition that alleged, *inter alia*, that trial counsel had been ineffective in refusing to allow the defendant to testify in his own defense. In a supporting affidavit, the defendant "stated that counsel did not inform him that he had the right to testify and the right to decide whether to testify." *Id.* This court determined that the petition required a hearing, as it presented a substantial showing of a constitutional violation and its allegation of incompetence of counsel was supported by factors outside the record, "particularly by the petitioner's statement that counsel failed to inform him that he had the right to decide whether to testify." *Id.* at 51. However, this court's opinion in *Nix* did not detail how much or how little overlap existed between the claim of ineffectiveness in the petition and the supporting facts in the affidavit. As such, the opinion's application to the current case is not clear-cut.

¶ 13 The State is correct that the statement in defendant's affidavit, "Defendant asked counsel to go with a bench trial, but she decided a jury trial would be better, especially since they had just gotten a hung jury on the first trial," does not actually include an assertion that defendant wanted a bench trial despite counsel's advice and that she overrode his demand. Yet, our supreme court has held that *pro se* petitions must be given a liberal construction and that courts should review such petitions " 'with a lenient eye, allowing borderline cases to proceed.' " *Hodges*, 234 Ill. 2d at 21 (quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983)). In light of our supreme court's direction that petitions should be construed liberally, we find that in this particular case, the issue of whether defendant's *pro se* petition could be said to have included a claim that counsel was ineffective for failing to honor his demand to proceed with a

bench trial is a "borderline" question which, under a liberal construction, should be answered in defendant's favor. See *id.*

¶ 14 We now turn to the question of whether the petition, to the extent that it raised the claim defendant advances on appeal, should have survived summary dismissal. We answer this question in the negative.

¶ 15 Under the Illinois constitution, a defendant has the right to waive a jury trial. *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 222 (1988). It follows that the prerogative to choose a bench trial over a jury trial belongs to the defendant and not to counsel. *People v. McCarter*, 385 Ill. App. 3d 919, 943 (2008). As such, the onus to assert the right to a bench trial is on a criminal defendant. *People v. Brown*, 2013 IL App (2d) 110327, ¶ 21; *People v. Powell*, 281 Ill. App. 3d 68, 73 (1996). Thus, where a defendant fails to inform the trial court that he wants a bench trial while sitting through jury selection and completion of the trial, his later, after-the fact claim that he really wanted a bench trial all along will not be entertained. *Brown*, 2013 IL App (2d) 110327 ¶ 21; *Powell*, 281 Ill. App. 3d at 73.

¶ 16 Defendant contends that his petition should not have been summarily dismissed because it set forth an arguable claim that trial counsel was ineffective for failing to honor his demand to proceed with a bench trial. As noted above, in the affidavit attached to his petition, defendant alleged that he "asked counsel to go with a bench trial, but she decided a jury trial would be better." Relying on *Barkes*, 399 Ill. App. 3d at 980, *McCarter*, 385 Ill. App. 3d at 919, and *People v. Holley*, 377 Ill. App. 3d 809 (2007), defendant contends that this allegation was sufficient to set forth an arguable claim of ineffective assistance of counsel. We disagree.

¶ 17 The instant case involves a first-stage postconviction dismissal. At the first stage, the trial court is charged with, among other things, examining the record to determine whether the allegations in the petition are positively rebutted by the record. *People v. Jones*, 399 Ill. App. 3d 341, 356-57 (2010). Where the record from the original trial proceedings contradicts a defendant's allegation, the dismissal of a postconviction petition will be upheld. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 18 In this case, there is no indication in the record that defendant wanted or expressed a desire for a bench trial at any time, including during pretrial appearances, jury selection, trial, posttrial appearances, and sentencing. As explained above, the burden to assert the right to a bench trial is on the defendant and, as here, where a defendant sits through jury selection and an entire jury trial without ever informing the trial court that he wants a bench trial, his later, after-the fact claim that he really wanted a bench trial all along will not be considered. *Brown*, 2013 IL App (2d) 110327 ¶ 21; *Powell*, 281 Ill. App. 3d at 73. As this court explained in *Powell*, "[W]e have no sympathy for this defendant or any other who sits through that entire process and – while supposedly wishing for a bench trial – says *nothing* to the trial court even though, as defendant claims here, his trial counsel has failed to request a bench trial in accordance with defendant's wishes." (Emphasis in original.) *Powell*, 281 Ill. App. 3d at 73.

¶ 19 Defendant never indicated to the trial court that he wanted a bench trial. As such, defendant's underlying postconviction claim is rebutted by the record and will not support a claim of ineffective assistance of counsel. The claim hinges on a factual allegation that is contradicted by the record, and is founded in a legal theory that is belied by the record. Therefore, the claim of ineffectiveness has no arguable basis in fact or in law. *Morris*, 236 Ill. 2d

at 354; *Hodges*, 234 Ill. 2d at 16. In these circumstances, we find that summary dismissal of the petition was proper. See *Rogers*, 197 Ill. 2d at 222.

¶ 20 The three cases cited by defendant do not convince us otherwise.

¶ 21 *McCarter* was a direct appeal in which the defendant contended the trial court did not perform a sufficient inquiry into his *pro se* posttrial motion alleging that his trial counsel failed to heed his wish for a bench trial. *McCarter*, 385 Ill. App. 3d at 921, 926. This court held that the trial court's "cursory" examination of the defendant's allegation was insufficient, and remanded the case to the trial court to clarify whether the defendant's claim was spurious or required further inquiry. *Id.* at 943-44. Similarly, *Holley* was a direct appeal challenging the trial court's failure to inquire into his *pro se* posttrial allegation that trial counsel was ineffective for not proceeding with a bench trial. *Holley*, 377 Ill. App. 3d at 810-12. This court found that although the trial court denied the posttrial motion generally, it did not rule on that specific allegation, and thus remanded for a hearing to determine the factual basis of the defendant's claim concerning requesting a bench trial. *Id.* at 812. As the State notes, this court did not hold either in *McCarter* or in *Holley* that a defendant's mere claim that his attorney denied him a bench trial would be sufficient to state the gist of a constitutional claim under the Act. As such, defendant's reliance on these cases is case misplaced.

¶ 22 *Barkes*, unlike *McCarter* and *Holley*, was a postconviction case. In *Barkes*, the defendant alleged in his *pro se* petition that his trial counsel was ineffective because he told counsel that he wanted a bench trial, but counsel refused and told defendant that he was "running the show and [defendant] was getting a jury trial." *Barkes*, 399 Ill. App. 3d at 982. The case proceeded to second stage proceedings, where it was eventually dismissed on motion of the State. *Id.* at 982-

83. On appeal, this court determined that, taking the allegations in the petition and supporting affidavit as true, the defendant was entitled to an evidentiary hearing on the claim of ineffectiveness. *Id.* at 988. Here, defendant argues that he made "an identical allegation" to the one raised in *Barkes*, and that therefore, he raised the gist of a claim that his attorney, like the attorney in *Barkes*, was ineffective for failing to honor his wish to proceed with a bench trial.

¶ 23 *Barkes* is distinguishable and does not dictate the result in this case. First, the allegations in the two cases are not identical. In *Barkes*, the defendant averred that he told counsel he wanted a bench trial but counsel refused. Here, defendant has not actually alleged that counsel refused. Moreover, unlike *Barkes*, the instant case involved a first-stage postconviction dismissal. As discussed above, first-stage proceedings involve examining the record to determine whether the allegations in the petition are positively rebutted by the record (*Jones*, 399 Ill. App. 3d at 356-57), and here, where the record from the original trial proceedings contradicts defendant's allegation, summary dismissal was proper (see *Rogers*, 197 Ill. 2d at 222).

¶ 24 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 25 Affirmed.