2019 IL App (2d) 161005-U
No. 2-16-1005
Order filed June 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-3126
KENNETH TURNER,	)	Honorable Rosemary D. Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant set forth gist of a claim of ineffective assistance of counsel where defense counsel allegedly took no action after learning that a juror was allegedly sleeping during trial and where a witness allegedly heard the victim state that the perpetrator of the crime was white while defendant was black.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Kenneth Turner, appeals the first-stage dismissal of his petition filed pursuant to the Postconviction Hearing Act (Act) (see 725 ILCS 5/122─1 *et seq.* (West 2008)). For the reasons that follow, we reverse and remand.

¶ 4 II. BACKGROUND

¶ 5 Defendant stands convicted of two counts of armed robbery and one count of aggravated battery of a senior citizen. This conviction was based on events taking place during the robbery of a jewelry store in Rockford on March 7, 2009. The facts underlying defendant's convictions are set forth in our order resolving defendant's direct appeal. They can be found in *People v. Turner*, 2015 IL App (2d) 130744-U, ¶ 4. We need not repeat them in this disposition.

¶ 6 III. ANALYSIS

¶ 7 As this appeal comes to us following the first-stage dismissal of a postconviction petition, the following standards apply. To avoid dismissal, a petition must only set forth the gist of a constitutional claim. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). This is a low standard. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition may be dismissed if it is frivolous and patently without merit. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To be frivolous and patently without merit, the petition must have no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). All factual allegations are to be taken as true unless they are affirmatively rebutted by the record. *People v. Gerow*, 388 Ill. App. 3d 524, 526 (2009). The allegations must be liberally construed. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Moreover, the petition stands or falls as a whole. *People v. Johnson*, 377 Ill. App. 3d 854, 858 (2007). In other words, if any one claim survives, the entire petition survives. *People v. Rivera*, 198 Ill. 2d 364, 371 (2001). A postconviction petition need only contain a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). A petitioner need not set forth legal argument, and no citation to authority is required. *Brown*, 236 Ill. 2d at 184. Finally, the petition "need not set forth the claim in its entirety." *Edwards*, 197 Ill. 2d at 244.

¶ 8 Defendant raises two arguments. First, he contends that trial counsel was ineffective in that defendant informed his trial attorney that a juror was sleeping during the trial and that his attorney ignored his request to move for a mistrial. Second, he asserts that trial counsel was ineffective for failing to call a witness who would have impeached the victim's testimony regarding the identity of the perpetrator of the robbery. We will address these claims in turn.

¶ 9 In both claims, defendant contends trial counsel was ineffective. Our supreme court has explained, "To prevail on a claim of ineffective assistance ***, a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *Hodges*, 234 Ill. 2d at 17. Hence, "[a]t the first stage of postconviction proceedings under the Act, 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." *Id.* While counsel's actions that amount to trial strategy generally cannot form the basis of an ineffectiveness claim, making such an assessment typically requires an evidentiary hearing. *People v. Tate*, 2012 IL 112214, ¶ 22 ("The State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced.").

¶ 10 A. THE SLEEPING JUROR

¶ 11 Defendant first contends trial counsel was ineffective in failing to move for a mistrial based on one of the jurors sleeping during the trial. In *People v. Jones*, 369 Ill. App. 3d 452, 456 (2006), the reviewing court held that where a juror was "half asleep through most of the trial," the trial court had an affirmative duty to reopen *voir dire* to "ensure that the defendant receives a

fair trial." See also *United States v. Freitag*, 230 F.3d 1019, 1023 (7th Cir. 2000) ("If sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial, the sleeping juror should be removed from the jury."). While a trial court has discretion regarding how to deal with a sleeping juror, if the juror's slumber deprives a defendant of his due process or jury trial rights (U.S. Const., amends. V, VI), reversal is required. *Id*.

¶ 12 Defendant points to the following allegations in support of this argument. His petition stated:

> "[O]ne of the jury [*sic*] fell asleep during testimony [and] the defendant emediately [*sic*] let his trial lawyer know that one of the jury members is asleep, trial lawyer told the defendant maybe thats [*sic*] how she thinks. The defendant complained again that the female jurymember is asleep, around that time the court room audience started saying she is asleep! Seconds later, the Judge stopped the proceeding and asked both starting with the defence [*sic*] Do you see anything wrong with any member of the jury? Both sides said no, the trial judge Rosemary Collins then responded by saying maybe her eyes are playing tricks on her."

The judge allowed the trial to continue, which, defendant asserts, rendered his trial fundamentally unfair. Defendant attached an affidavit to his petition from Eddie Roger III, stating that he observed the trial and saw a female juror sleeping.

¶ 13 The State first points out that the trial court rejected this claim:

> "He also makes a claim that a juror was asleep, nobody did anything about it and the trial court had things stricken from the record regarding this. This, of course, is

> absolutely false and unsubstantiated by any evidence about what actually occurred at trial.
>
> "[Defendant] cannot just make false allegations that are totally unsupported to support a postconviction petition and expect the Court to proceed as if it was, in fact, true."

Surprisingly, the trial court does not mention the affidavit from Roger here. Moreover, the law is clear that "all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true." *People v. Coleman*, 183 Ill. 2d 366, 385 (1998).

¶ 14 The State argues that the record does rebut this claim. It points to defense counsel's statement, "maybe that's how she thinks," and the fact the neither attorney responded affirmatively when asked if they noticed a problem with any member of the jury. We fail to see how these assertions *positively* rebut defendant's allegations or the Roger affidavit. While they may create a question of fact, such fact finding is not appropriate during first-stage proceedings. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002) ("The court is further foreclosed from engaging in any fact finding or any review of matters beyond the allegations of the petition."). The State also argues that the trial judge could rely on her "personal knowledge" in dismissing defendant's claim; however, this is not the law (see *People v. Couch*, 2012 IL App (4th) 100234, ¶¶ 15-17).

¶ 15 In short, keeping in mind the low standard that governs first-stage proceedings, defendant has presented an arguable claim that the trial court should have addressed this issue and that, if counsel had, there is an arguable chance that counsel would have prevailed. As such, this claim should have been allowed to go forward.

¶ 16 B. IMPEACHMENT OF THE VICTIM

¶ 17 We also hold that defendant's second claim should have been permitted to proceed. The affidavit from Roger that defendant submitted in support of his petition also contained the following averments:

> "I spoke with owner Kenneth Sims[, the victim,] telling him about me observing a jury member fall asleep. Kenneth Sims then began telling me that it was a white man who robbed his store. I then asked him if that was true, why is Kenneth Turner on trial for it. Kenneth Sims said he don't [*sic*] know, and that he felt something was wrong and out of place, because the person that robbed his store was a white man. I then explained to Mr. Sims that he said on the stand that it was a black man who robbed his store. Mr. Sims then told me he was confused. I told Mr. Sims it isn't right to let an innocent man go down for this crime and Mr. Sims agreed. I then told Mr. Turners [*sic*] lawyer what Mr. Sims told me. Mr. Turners [*sic*] lawyer only nodded his head, like he was already aware of the information and said he waud [*sic*] take care of it. As trial proceeded, Turner [*sic*] lawyer never brought up the conversation between me and him."

Defendant asserts his trial attorney was ineffective for not presenting this testimony. Defendant notes that "the theory of defense at trail was misidentification." Roger's testimony, therefore, would have been extremely relevant.

¶ 18 The trial court stated that it had "no information about [Roger's proposed testimony] other than what [defendant] says." Again, the trial court seems to disregard the Roger affidavit. The trial court did note that other "contradictory statements regarding a white male versus a black male were brought up throughout the trial." For example, one victim stated the perpetrator was black while a witness on the street testified that she saw a white man run from the jewelry store. While true, we note that Roger's proposed testimony would have arguably corroborated

other evidence that the perpetrator was white or at least undermined some of the testimony the he was black.

¶ 19 The State asserts that defendant's claim is "positively rebutted by the record." *People v. Jefferson*, 345 Ill. App. 3d 60, 76 (2003). However, where, as here, there is conflicting evidence in the record regarding the point at issue—that is, some evidence actually corroborates it—we certainly cannot say that it has been positively rebutted.

¶ 20 In sum, it is arguable that testimony indicating that the victim believed that the perpetrator was of a race other than defendant should have been presented. *People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005) ("Failure to present available witnesses to corroborate a defense has been found to be ineffective assistance."). Moreover, given that identification was at issue in the trial, it is arguable that such evidence would have affected the outcome of the proceedings. Thus, this claim should have been allowed to go forward as well.

¶ 21 IV. CONCLUSION

¶ 22 This petition should have been allowed to proceed to the second stage of postconviction proceedings. As noted, if either claim stated the gist of a constitutional claim, the entire petition was entitled to proceed. *Rivera*, 198 Ill. 2d at 371. Here, both claims stated the gist of a constitutional claim.

¶ 23 Reversed and remanded.