2019 IL App (3d) 160598-U

Order filed July 1, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0598 Circuit No. 11-CF-348
RAUNCHINO JAMES,	)	Honorable Amy M. Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The court erred by dismissing defendant's postconviction petition at the first stage.

¶ 2 Defendant, Raunchino James, appeals the first-stage dismissal of his postconviction petition, arguing that the case should be remanded for second-stage proceedings where his petition stated the gist of a constitutional claim. We reverse.

¶ 3 I. BACKGROUND

¶ 4 In 2013, defendant and his two codefendants were convicted of home invasion (720 ILCS 5/12-11 (West 2010)), armed robbery (*id.* § 18-2), and residential burglary (*id.* § 19-3) after a bench trial. The evidence established that at approximately 1:15 a.m. on February 19, 2011, Dorothy Fullilove heard banging on her door and three men entered her home wearing dark clothing and masks, and carrying handguns. The men all had dreadlocks, two had dark skin, one was lighter-skinned, and one of the men had hazel eyes and was cross-eyed. They took 10 $20 bills, an Xbox, a backpack, a camera, a camcorder, a computer, and a $2500 money order. They then ran into the woods nearby. Dorothy's son, Michael Fullilove, was also present in the home and thought that one of the men sounded like B.G., who lived down the street.

¶ 5 An officer responded to the other side of the woods to look for the subjects. Around 2 a.m., he saw three men wearing dark clothing exit the woods and directed them to stop. The three men walked quickly away. The officer followed them and observed them enter an apartment complex. He saw shadows moving up the stairs. Other officers arrived at the apartment complex, and they began knocking on apartment doors and asking residents if anyone had entered their residences recently. One officer testified that a man on the second floor had let him into his apartment and said the officers could look around. The name of the resident was never revealed at trial, but he was described as an uncle or cousin of one of the defendants. Three men wearing dark colored clothing, including defendant, were sitting on the couch. According to the officers, they all looked disheveled and had dirt, branches, and leaves on their clothes and in their hair. They were perspiring and appeared out of breath. The three men were arrested.

¶ 6 During booking, 10 $20 bills, 4 $5 bills, and 2 $1 bills were recovered from the men. In the woods, officers found a backpack, an Xbox, three loaded handguns, and a camcorder. A

mask was found outside the apartment complex. DNA evidence was found on the mask that was a mixture of at least three people. A major DNA profile matched one of the codefendants and did not match defendant. The forensic scientist could not exclude anyone from the minor DNA profiles.

¶ 7 Dorothy and Michael were each shown a six-person photograph lineup, which did not include B.G. Dorothy was unable to make an identification, but said that one of the men looked familiar and another had hazel eyes similar to one of the intruders. The officer told Dorothy that the man she said looked familiar was not one of the "perps." Prior to Michael's identification, the officers told him that three men had been arrested, two were brothers and had just been photographed. The photographic lineup included one man with hazel eyes and five men with dark-colored eyes. Michael chose the man with the hazel eyes and two of the other five photographs because they looked newer and the individuals looked similar, as brothers would. Defendant and his two codefendants were the three that Michael chose. However, before trial the identification was suppressed because the lineup was too suggestive.

¶ 8 On direct appeal, defendant argued that (1) the court failed to admonish him of the conflict of interest inherent in the joint representation of him and his codefendants, (2) it was improper for the State to present Michael's identification to the grand jury, (3) his arrest was not supported by probable cause, (4) he was not proved guilty beyond a reasonable doubt, and (5) his counsel was ineffective for failing to present exculpatory DNA evidence. *People v. James*, 2016 IL App (3d) 130640-U, ¶ 50. This court affirmed. *Id.* ¶ 2.

¶ 9 In 2016, defendant filed a *pro se* postconviction petition, which is the subject of this appeal. In the petition, defendant alleged, *inter alia*, that the apartment he was found at on the night in question belonged to his uncle, Roger Allen. Defendant stated that he arrived at Roger's

apartment before 12:30 a.m. that night. Defendant stated that he had told his attorney that Roger would be a "favorable alibi witness[ ]," but that he would have to be subpoenaed because of his work schedule. Defendant alleged that Roger's "testimony was favorable and material, to the outcome of the case." He alleged that counsel was ineffective for failing to call Roger as a witness. Attached to the petition was an affidavit from Roger, which stated that defendant and two of his friends had arrived at his apartment around 12:10 a.m. for a visit. Roger said that this was not uncommon as they have a big family. Later, officers came to his door and asked if anyone had arrived recently, to which Roger responded, "no" and asked what was going on. The officers asked defendant and his codefendants if they had been at the apartment for a while, and they said they had. The officers began searching the apartment without permission. The affidavit further averred that Roger and his wife, Kimberly Allen, were never contacted by the State or defense counsel, defendant and his codefendants did not arrive at the apartment out of breath, they did not have any leaves or dirt on their persons, an officer would not have been able to see someone walking up the stairs at the apartment complex, he was never subpoenaed, and he was willing and available to testify. The record shows that defendant's petition and affidavit were file-stamped the same day.

¶ 10 In a written order, the court dismissed the petition at the first stage, stating:

> "The Petitioner made several claims including that this trial attorneys did not call two alibi witnesses, Roger and Kimberly Allen. Petitioner does not provide an affidavit as to their proposed testimony or any argument as to the nature of the alibi testimony. ***
>
> *** The Court has reviewed the allegations and along with the other issues raised, find that the Petition is frivolous and patently without merit."

Defendant refiled his affidavits, stating that they had been attached to his petition originally and that his petition stated the gist of a constitutional claim and should have survived the first stage. The court entered another order stating, "Upon review of the affidavits presented and the issues raised in the petition, the Court's original dismissal stands. The issues raised could have been raised before the appellate court and were not, therefore Petitioner has waived issues."

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues that his petition set out the gist of a constitutional claim of ineffective assistance for counsel's failure to investigate and call Roger as a witness. We find that defendant's petition should advance to the second stage where it was arguable that failing to call Roger as a witness amounted to deficient performance and prejudiced defendant. To warrant second-stage proceedings, defendant's petition must show "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 13 Here, defendant's *pro se* postconviction petition was dismissed at the first stage. At the first stage, the court reviews the petition and takes the allegations therein as true. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Based on its review, the court determines whether the petition is frivolous or patently without merit. *Id.* Defendant's *pro se* petition alleged that he received ineffective assistance of counsel. While at the second stage "it is appropriate to require the petitioner to 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense," the standard at the first stage is lower and "lenient." *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 14 Defendant's *pro se* petition alleged that defense counsel did not contact a potential alibi witness, Roger. Defendant attached an affidavit from Roger. Roger stated that defendant and his

friends had arrived at Roger's apartment approximately one hour before the armed robbery occurred. He further averred that he had never been contacted by defense counsel or the State, he was not subpoenaed, and he was available and willing to testify. Moreover, Roger's affidavit contradicted some of the State's evidence. The officers stated that defendant was out of breath and had dirt and leaves on his clothing when they saw him at Roger's apartment. Based on this, the officers believed that defendant had run from the woods to Roger's apartment moments previously. However, Roger's affidavit averred that defendant did not have dirt or leaves on his clothing and was not out of breath. This would support the theory that defendant had been at the apartment before the robbery occurred. Roger also stated that he did not give the officers permission to enter his home, contrary to the testimony at trial. It is arguable that defense counsel's failure to call Roger as a witness amounted to deficient performance and prejudiced the defendant. The identification of the intruders was at issue at trial. Roger's testimony may have cast some doubt on the State's case where he contradicted the officers' testimony.

¶ 15 In coming to this conclusion, we reject the State's contention, and the circuit court's conclusion, that defendant should have raised this issue on direct appeal.

> "An ineffective assistance claim based on what the record discloses counsel did, in fact, do is subject to the usual procedural default rule. *People v. Erickson*, 161 Ill. 2d 82, 88 (1994). 'But a claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation.' *Id.* Thus, [the supreme court] has 'repeatedly noted that a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in

presenting a defense.' *People v. West*, 187 Ill. 2d 418, 427 (1999)." *Tate*, 2012 IL 112214, ¶ 14.

Defendant's allegation of ineffective assistance of counsel consisted of matters outside of the record, particularly the affidavit from Roger, and could not have been raised on direct appeal.

¶ 16 III. CONCLUSION

¶ 17 The judgment of the circuit court of Will County is reversed.

¶ 18 Reversed.