2019 IL App (4th) 160609-U

NO. 4-16-0609

FILED
January 29, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JAMES H. DAVIS,	)	No. 11CF1058
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's summary dismissal of defendant's postconviction petition, concluding defendant failed to set forth the gist of a constitutional claim that he was denied the effective assistance of counsel.

¶ 2 In June 2013, defendant filed a *pro se* postconviction petition claiming his appellate counsel was ineffective for failing to raise on direct appeal the issue that trial counsel was ineffective for failing to present at trial expert testimony on eyewitness identifications. In July 2013, the trial court summarily dismissed the petition, finding that any alleged errors concerning the eyewitness identifications were addressed on direct appeal and appellate counsel was not ineffective.

¶ 3 Defendant appeals, asserting his postconviction petition stated the gist of a constitutional claim sufficient to overcome a first-stage dismissal. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On direct appeal, this court diligently set forth all of the facts involved in this case. Accordingly, we discuss below only the facts relevant to this appeal.

¶ 6 A. The Charges

¶ 7 In July 2011, the State charged defendant by information with predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/11-1.40(a)(1) (West 2010)) (count I), and indecent solicitation of a minor, a Class 1 felony (720 ILCS 5/11-6(a) (West 2010)) (count II). In count I, the State alleged defendant, who was 17 years of age or older, committed an act of sexual penetration with T.P. (born April 20, 2006) in that he placed his sex organ on her mouth. In count II, the State alleged defendant, who was 17 years of age or older, with the intent to commit predatory criminal sexual assault, knowingly solicited K.P. (born January 3, 2003) to perform an act of sexual penetration. The informations alleged both offenses occurred on July 4, 2011.

¶ 8 B. Defendant's Jury Trial

¶ 9 In October 2012, the case proceeded to a jury trial. With the permission of the trial court, the State presented an audio-visual recording of T.P.'s and K.P.'s interviews with Barbara Traylor, an investigator with the Department of Children and Family Services (DCFS). In the interviews, which took place at the Children's Advocacy Center (CAC), T.P. and K.P. discussed the events of July 4, 2011.

¶ 10 In K.P's interview, she informed Traylor that on July 4, 2011, she was home with her mother, sister, and brother. She told Traylor she saw a man on the couch in the front room. She said she did not know what time it was but believed it was around 1 a.m. She told Traylor the man asked her to "come here" and "suck his 'd.' " K.P. described the man's outfit: shorts

and a "do-rag." She said she "didn't actually got to see him, like, like really really see him" but that she "saw him a little."

¶ 11 In T.P.'s interview, she informed Traylor that on July 4, 2011, she was home with her mother, sister, and brother. She told Traylor that around 6 a.m., a man named "Avion" or "Raveon" took "his stuff out and then he put them on my lips." Using a diagram of a man's body typically used in this type of interview, T.P. indicated the man's "stuff" was his penis. She specifically stated she knew what time it happened because she looked at the clock and she knows her numbers. T.P. stated she remembered seeing the man in her house on prior occasions and that he did this to her while she was in her bedroom. T.P. said the man wore a black shirt, black jeans, and black shoes but did not remember seeing anything on the man's head. After the incident, T.P. went to her mother's room to tell her what happened.

¶ 12 The State called K.P. to testify, who was nine years old at the time of her testimony. K.P.'s testimony was largely consistent with what she told Traylor. K.P. additionally testified that seven months after the incident, she met with Detective Robb Morris of the Champaign police department, who showed her an array of photos. She identified the photo of defendant as her attacker. When asked on direct examination whether she saw her attacker in the court room, she replied that she did not. On cross-examination, K.P. stated she did not know what time the man entered her house but admitted she told Traylor it was around 1 a.m. K.P. also testified that at the time of the attack, the man was wearing blue jeans, a black t-shirt "with the little skulls on the front," and a black "do-rag" on his head. K.P. could not remember whether defendant was wearing "full-length" jeans or jean shorts. When asked about her prior statement to Traylor that she did not "really" see her attacker, and thus how she knew to choose

the photo of defendant from the array, K.P. stated that she "actually did see him" once her eyes got used to the light.

¶ 13 The State also called T.P. to testify, who was six years old at the time of her testimony. T.P.'s testimony was also largely consistent with what she told Traylor. T.P. testified that she also met with a detective at the Champaign police department and he showed her some pictures. T.P. testified she picked the photo of defendant and signed her initials. When asked whether her attacker was in the courtroom, T.P.'s testimony was vague. On cross-examination, T.P. stated she remembered telling Traylor she first saw the man in her apartment at 6 a.m., and that the man wore a "do-rag" and "blue jeans." T.P. explained the jeans were black and red but "mostly black" with an alligator design.

¶ 14 The victims' mother, Gloria, also testified. She stated that on July 3, 2011, she went to a party in Danville, where she had two drinks. She left around 2 or 3 a.m. to return home. Upon her return, she went to bed, and did not wake up until approximately 8:45 a.m. when she heard a knock at the door. A man she met several weeks ago in her neighborhood, "James" or "Ten Cent," was at the door. She later found out the man's last name was "Davis." When asked whether "James" was in the courtroom, Gloria identified defendant. Gloria testified that defendant had visited the home on several other occasions when the children were not present.

¶ 15 Gloria testified that defendant claimed he could not get into his home, so she invited him in and they went to sleep in her bedroom. At some point, defendant asked to use the bathroom, and Gloria gave him permission. She testified that later that morning, K.P. ran into her bedroom and told her " 'that man out there just told me to suck his dick.' " She then went to

the living room to confront defendant, who she thought had left, and found him on the couch with his zipper down. After their confrontation, she told defendant to leave.

¶ 16 Once defendant left, Gloria went back to her room and continued questioning K.P. T.P. then came into the room and told Gloria that "the man on the couch tried to stick his pee-pee in her mouth." Gloria became upset and went out looking for defendant in the area in which she thought he lived. After searching unsuccessfully for 10 to 15 minutes, Gloria returned to her apartment and called the police. When the police arrived around 11 a.m., Gloria told them the incident "had just happened" approximately "five minutes ago." The next day, on July 5, 2011, Gloria took both K.P. and T.P. to CAC for their interviews with Traylor.

¶ 17 On cross-examination, Gloria admitted that the officers later told her the incident could not have taken place at the time she originally told them because defendant was at Family Dollar. On redirect, Gloria explained that when she said the incident happened "five minutes ago," it was an "estimate," and that when she initially spoke with the officers it seemed like "everything happened in a matter of minutes."

¶ 18 The State then presented testimony of Detective Robb Morris from the Champaign police department; Officer Timothy Atteberry, also from the Champaign police department; Dana Pitchford, a forensic scientist from the Illinois State Police; and Barbara Traylor from DCFS. On cross-examination, Detective Morris admitted that T.P. and K.P. did not come to the police station for the photo array until seven months after the incident.

¶ 19 After the State rested, defendant presented testimony from multiple witnesses, including Maurice Conley, Tyrone Jasper, Sharnita Patrick, and Stephanie Davis. Each witness claimed they were with defendant at various points beginning on the evening of July 3, 2011, and into the late morning on July 4, 2011.

¶ 20 During closing argument, defense counsel presented the following relevant facts to the jury: (1) during her testimony, K.P. did not identify defendant as her attacker; (2) T.P's identification of defendant was ambiguous; (3) Gloria, T.P., and K.P. all had differing timelines regarding the attack; (4) Gloria, T.P., and K.P. all gave different descriptions as to what the attacker was wearing; and (5) T.P. testified she did not see her attacker's face.

¶ 21 At the conclusion of this evidence, the jury found defendant guilty on both counts.

¶ 22 C. Posttrial Proceedings

¶ 23 In November 2012, defendant filed a posttrial motion for a new trial. Later that month, the trial court denied defendant's motion and sentenced him to consecutive prison terms of 35 years on count I and 15 years on count II. In January 2013, the court denied defendant's motion to reconsider sentence.

¶ 24 D. The Direct Appeal

¶ 25 Defendant filed a timely notice of appeal, arguing the State failed to prove his guilt beyond a reasonable doubt. Specifically, defendant argued that (1) the State presented no physical evidence connecting him to the offenses; (2) his alibi defense was corroborated by both testimonial and physical evidence; (3) the victims could not identify defendant in court and their out-of-court identifications were not reliable; and (4) Gloria's testimony was incredible and inconsistent. This court affirmed. *People v. Davis*, 2015 IL App (4th) 130019-U.

¶ 26 E. Postconviction Proceedings

¶ 27 On June 13, 2013, defendant filed a *pro se* postconviction petition, arguing that appellate counsel was ineffective for failing to raise on direct appeal the issue that trial counsel was ineffective for failing to present at trial expert testimony on eyewitness identifications. On

July 22, 2013, the trial court summarily dismissed the petition, finding that this court addressed any error in the eyewitness identifications on direct appeal.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant asserts the trial court erred when it summarily dismissed his postconviction petition during the first stage of proceedings. Specifically, defendant argues his appellate counsel was ineffective for failing to raise on direct appeal the issue that trial counsel was ineffective for failing to present at trial expert testimony on eyewitness identifications.

¶ 31 A. Standard of Review

¶ 32 The Post-Conviction Hearing Act (Postconviction Act) provides a means for a defendant to collaterally attack a conviction or sentence based on an alleged violation of federal or state constitutional rights. 725 ILCS 5/122-1 to 122-7 (West 2016). The trial court may dismiss a postconviction petition during the first stage of proceedings if it finds the petition to be frivolous or patently without merit. *Id.* § 122-2.1(a)(2). "A petition is considered frivolous or patently without merit when the allegations in the petition fail to present the gist of a constitutional claim." *People v. Youngblood*, 389 Ill. App. 3d 209, 214, 906 N.E.2d 720, 724 (2009). The "gist" standard is a "low threshold," and the postconviction petition "need only present a limited amount of detail[.]" (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001).

¶ 33 In a postconviction proceeding, issues that could have been presented on direct appeal but were not are waived. *People v. Richardson*, 189 Ill. 2d 401, 407-08, 727 N.E.2d 362, 367 (2000). Additionally, "determinations of the reviewing court on the direct appeal are *res judicata* as to issues actually decided ***." *Id.* A defendant may not avoid the bar of

res judicata simply by rephrasing the issues addressed on direct appeal. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105 (2000). We review the trial court's summary dismissal of a postconviction petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 34 As noted *supra*, the trial court dismissed defendant's petition without an evidentiary hearing. In his petition, defendant argued appellate counsel was ineffective for failing to raise the issue of trial counsel's performance on direct appeal. A defendant is guaranteed the effective assistance of counsel on direct appeal as of right, and a claim of ineffective assistance of appellate counsel is cognizable under the Postconviction Act. *Simms*, 192 Ill. 2d at 361. Thus, the doctrine of waiver does not apply where the alleged waiver "stems from incompetency of appellate counsel in failing to raise the issue on appeal." *Id.* at 361. On direct appeal, appellate counsel did not argue defendant's trial counsel was ineffective. This court did not and could not have addressed defendant's claim of ineffective assistance of appellate counsel. Accordingly, defendant's claim is not barred. We next consider whether defendant sufficiently complied with the Postconviction Act's evidentiary requirements.

¶ 35 B. Evidentiary Requirements

¶ 36 As an initial matter, the State contends defendant's petition is procedurally flawed because he failed to attach an affidavit from a potential expert witness in eyewitness identifications.

¶ 37 The trial court may summarily dismiss a defendant's postconviction petition at the first stage of proceedings if he fails to attach "affidavits, records, *or other evidence*" supporting the petition's allegations or an explanation of why supporting documents were not attached. (Emphasis added.) 725 ILCS 5/122-2 (West 2016). Specifically, "[w]hen a defendant attacks competency of counsel for failing to call or contact certain witnesses, he must attach affidavits of

these witnesses to his post-conviction petition and explain the significance of their testimony." *People v. Carmickle,* 97 Ill. App. 3d 917, 920, 424 N.E.2d 78,80 (1981). The purpose of this evidentiary requirement is to ensure a defendant's postconviction allegations are "capable of objective or independent corroboration." *People v. Hall*, 217 Ill. 2d 324, 333, 841 N.E.2d 913, 919 (2005).

¶ 38 The State contends defendant's failure to attach an affidavit from a potential expert witness alone supports the trial court's summary dismissal, citing *People v. Hanrahan*, 132 Ill. App. 3d 640, 641, 478 N.E.2d 31, 33 (1985) (upholding the second-stage dismissal of a defendant's postconviction petition claiming trial counsel was ineffective for failing to produce expert toxicological testimony where the petition was completely devoid of affidavits or supporting evidence) and *People v. Delton*, 227 Ill. 2d 247, 258, 882 N.E.2d 516, 522 (2008) (upholding the summary dismissal of defendant's postconviction petition based on ineffective assistance where he failed to produce affidavits or other evidence from the witnesses that trial counsel allegedly failed to interview).

¶ 39 While it is true defendant did not attach an affidavit from a potential expert witness, defendant did attach some supporting evidence to his petition. Defendant specifically argued that trial counsel should have called an expert to testify about the following issues:

> "the young ages, time of morning the allege [*sic*] crimes occurred, lighting in the home, the young girls had never met the petitioner *** prior to July 3rd or 4th, 2011[,] or during the allege [*sic*] crimes, and approximately 7-months had passed before [K.P. or T.P.] viewed a (photo array) to identify their alleged attacker."

In support of this assertion, defendant attached to his petition the transcripts of the testimony from K.P., T.P., and Gloria, and underlined the allegedly problematic portions of that testimony relating to eyewitness identifications.

¶ 40 We fail to see how highlighting alleged inconsistencies in the eyewitness testimony from the trial record supports defendant's allegation that trial counsel rendered ineffective assistance for failing to present an expert witness on the reliability of eyewitness identifications and thus that appellate counsel was ineffective for failing to raise the issue of trial counsel's competence on direct appeal. However, even assuming *arguendo* that defendant's supporting evidence is adequate, we nonetheless conclude defendant's constitutional claim fails on the merits as discussed below.

¶ 41 C. Defendant's Constitutional Claim

¶ 42 In order to prevail on a claim of ineffective assistance, the defendant must show that (1) counsel's performance fell "below an objective standard of reasonableness" and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, at the first stage of postconviction proceedings, "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." (Emphases added.) *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009). A defendant's claim will fail if he cannot establish both prongs. *Simms*, 192 Ill. 2d at 362.

¶ 43 This standard applies equally when a defendant's claim is based on counsel's failure to raise a particular issue on appeal. *Id.* "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues

which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000). Accordingly, the reviewing court must examine the merits of the underlying issue to determine whether appellate counsel's failure to raise it arguably resulted in prejudice to the defendant. *Simms*, 192 Ill. 2d at 362. Prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* This is not a purely " 'outcome-determinative' " test; rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1164 (1999).

¶ 44 Here, defendant argues his appellate counsel was ineffective for failing to raise on direct appeal the issue that trial counsel was ineffective for failing to present expert testimony on eyewitness identifications. The evidence in this case demonstrates that there is no reasonable probability that but for counsel's assumed error, the outcome of defendant's trial would have been different. Defendant argues that despite appellate counsel's challenge to the sufficiency of the State's evidence, which centered on the unreliability and inconsistency of the eyewitness identifications and testimony of T.P., K.P., and Gloria, expert testimony would have more fully highlighted and explained those flaws.

¶ 45 Even if we assume appellate counsel's decision not to raise the issue of trial counsel's performance on direct appeal was objectively unreasonable, defendant is unable to demonstrate prejudice. It is not likely that additional testimony from an expert in eyewitness identifications would have affected the outcome of defendant's trial. Trial counsel systematically explored the discrepancies between the girls' timelines and descriptions of their attacker during cross-examination and closing argument. Trial counsel also fully explored the

inconsistencies in Gloria's testimony on cross-examination and closing argument. The trial court then instructed the jury to review a witness's testimony with heightened scrutiny where that witness previously provided an inconsistent statement. It was the function of the jury as the trier of fact to resolve these inconsistencies, and they were permitted to resolve them against the defendant. *People v. Rojas*, 359 Ill. App. 3d 392, 398, 834 N.E.2d 513, 520-21 (2005).

¶ 46 Defendant argues an expert witness could have challenged the reliability of the identifications, specifically highlighting the girls' ages, the timelines, the lighting in the home, and the time elapsed between the incident and photo array. However, the record shows trial counsel addressed all of these factors in his cross-examination and in closing argument before the jury. Therefore, any expert testimony would have been duplicative. While it is true the supreme court has held a trial court may abuse its discretion in excluding expert testimony where the only evidence against defendant consists of eyewitness identifications (see *People v. Lerma*, 2016 IL 118496, ¶ 32, 47 N.E.3d 985), defendant cites no authority extending that holding to claims that an attorney's failure to offer such testimony amounts to ineffective assistance of counsel. We do not find appellate counsel's judgment was patently wrong, and therefore, defendant cannot show prejudice. Thus, appellate counsel was not ineffective for failing to raise this issue on direct appeal.

¶ 47 Because we find that defendant cannot demonstrate prejudice, we decline to address defendant's contention that appellate counsel's performance fell below an objective standard of reasonableness. See *People v. Turner*, 337 Ill. App. 3d 80, 93, 785 N.E.2d 879, 891 (2003). Accordingly, defendant's petition did not state the gist of a constitutional claim, and the trial court properly dismissed defendant's petition at the first stage of proceedings.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's judgment.

¶ 50 Affirmed.