2020 IL App (1st) 172826-U

No. 1-17-2826

Order filed July 7, 2020

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. 14 CR 49
	)	
ISREAL VEAL,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's *pro se* postconviction petition is reversed and the cause remanded where defendant presented an arguable claim of ineffective assistance of counsel based on trial counsel's failure to present the testimony of a witness who could have contradicted the version of events presented by the State's sole witness.

¶ 2 Defendant Isreal Veal appeals from the trial court's summary dismissal of his petition for relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West

2016)).[1] On appeal, defendant contends that the trial court erroneously dismissed the petition because it stated an arguable claim of ineffective assistance of trial counsel. Specifically, the petition asserted that trial counsel (1) failed to investigate and present a witness at trial whose testimony would have directly contradicted that of the State's sole witness, and (2) erroneously advised defendant that he could address the trial court after trial which caused defendant to waive his right to testify. For the following reasons, we reverse and remand for further proceedings under the Act.

¶ 3 Following defendant's December 5, 2013 arrest, he was charged with one count of armed habitual criminal, four counts of unlawful use or possession of a weapon by a felon, and two counts of aggravated unlawful use of a weapon.

¶ 4 Prior to trial, the defense filed an answer to the State's motion for discovery which identified potential witnesses Jalen Searcy and Mark Compton, and a motion to quash arrest and suppress evidence. The trial court conducted a hearing on defendant's motion and denied it. The matter proceeded to a bench trial.

¶ 5 Officer Wojciech Kanski testified that on the evening of December 5, 2013, he and his partner curbed a vehicle after observing a seatbelt violation. As Kanski exited his vehicle, he observed the passenger sitting behind the driver making furtive movements with his hands as though he was trying to cover something. He identified defendant in court as this person. Kanski ordered the vehicle's occupants to raise their hands. While three of the occupants immediately complied, defendant did not. When Kanski repeated the order, defendant moved his hands up and

[1] Defendant's first name is spelled Isreal and Israel in the record on appeal.

down. Kanski ordered the driver out of the car and placed him in handcuffs. He then ordered defendant out of the car and opened the door for him.

¶ 6 As defendant exited the car, Kanski observed a firearm on the seat defendant had just vacated. Defendant was "basically sitting on top of the gun." Kanski secured defendant and the firearm, which was loaded. On cross-examination, Kanski admitted that he did not see the firearm in defendant's hand; rather, he observed defendant making furtive movements toward his waist area.

¶ 7 The State presented evidence establishing that defendant had been previously convicted of unlawful use of a weapon by a felon and armed robbery, and had not been issued a Firearm Owners Identification Card.

¶ 8 The State rested. The defendant moved for a directed finding, which was denied. After the defense rested, the following exchange occurred between the trial court and the defendant:

> THE COURT: [Defendant], your lawyer tells me you want to rest your case without you testifying. Is that your understanding?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I want to be sure you understand this. You have the constitutional right to testify. You have the right to not testify also. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I'm sure you've talked with your lawyer about whether or not it's a good idea or a bad idea for you to testify; is that correct?
>
> THE DEFENDANT: Yes.

THE COURT: Okay. I don't want to get into your personal conversation with him, but I want to talk about this. No matter what he told you, the final decision about whether or not you testify is yours and yours alone. Do you understand that?

THE DEFENDANT: Yeah. In a way. In a way, yeah.

THE COURT: In a way?

THE DEFENDANT: Yeah. Because like, my background is—

[DEFENSE COUNSEL]: Either you understand or don't.

THE DEFENDANT: My background, that's where they got me. You know?

THE COURT: It's an element in the case. That's all. But you can still testify if you choose to. Do you understand that? The final decision about whether or not you testify—let me put it this way—is yours and yours alone, no matter what. So you can make up your own mind as to whether or not you want to testify. Do you understand that?

THE DEFENDANT: Yes."

¶ 9 The trial court further inquired whether defendant had made up his own mind and he stated that he did not want to testify. The defendant denied being forced, coerced, or made any promises and acknowledged that he was "making the decision not to testify of [his] own free will."

¶ 10 The trial court found defendant guilty of all counts, noting, in pertinent part, that although no one testified that defendant physically possessed the firearm, there was a great deal of circumstantial evidence of his possession including his furtive movements, the delay in his response to the officer's orders, and the location from which the firearm was recovered.

¶ 11 At sentencing, after the parties argued in aggravation and mitigation, defendant addressed the court. He admitted that he had made mistakes and done "a little time," but claimed that he was

only charged in this case because he had a criminal background while the other passengers did not. He was not "out there trying to harm anyone," and did not have a gun because he was on parole. Defendant added that if he had done something wrong he would have admitted it.

¶ 12 The trial court merged its guilty findings and sentenced defendant to nine years in prison for armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)). We affirmed on direct appeal over defendant's contention that the trial court erroneously denied his pretrial motion to quash arrest and suppress evidence. See *People v. Veal*, 2017 IL App (1st) 150500.

¶ 13 On July 25, 2017, defendant filed a *pro se* petition for postconviction relief alleging that he was denied the effective assistance of counsel when trial counsel (1) waived a jury trial, (2) failed to fully advise defendant of his right to testify, and (3) rested without presenting any evidence. The petition also alleged that defendant was actually innocent. Attached to the petition were the affidavits of defendant and Mark Compton.

¶ 14 In defendant's affidavit, he alleged that he "never possessed or knew that a gun was in the vehicle." Prior to waiving his right to a jury trial, he discussed his "desire" to tell his side of the story to a jury with his attorney. He believed that the judge was "already" convinced that he was guilty based on the denial of the motion to quash arrest and suppress evidence. However, his attorney told him that the judge was fair and advised against a jury trial. Defendant also claimed that his attorney made "all the decisions," never explained anything, and told defendant to trust him. Despite defendant's "strong desire" to testify, he relied on his attorney's advice that this was not in his best interests because the State "would use his background against [him] if he took the stand."

¶ 15 In Compton's affidavit, he asserted that defendant was a passenger in his vehicle on December 5, 2013, when the police stopped the vehicle and ordered everyone out. The police then searched the vehicle and recovered Compton's gun from underneath the driver's seat. The officer asked whose gun it was and "no one said anything so he . . . looked up our names in the police car and came back and asked [defendant] what he was doing around a gun on parole?" Defendant denied knowing anything about the gun and asked whether he was supposed to search every vehicle he entered. The officer called defendant a "smart ass" and stated that the gun belonged to him. When defendant asked Compton to "man up," he admitted that it was his gun. The officer said it was too late because the incident had already been called in. Defendant did not know about the gun and the police could not say "who had the gun at no point." Compton indicated that defendant told him he would be a witness at the motion or trial, but no one ever called him.

¶ 16 On October 5, 2017, the trial court dismissed the postconviction petition as frivolous and patently without merit in a written order finding, in pertinent part, that the facts alleged in Compton's affidavit suggested that he was willing to testify that he owned the gun, but not that he possessed it or that defendant did not possess it. In other words, Compton's testimony that he owned the firearm would not have been fatal to defendant's possession. Moreover, the decision whether to call a witness was a matter of trial strategy which generally does not support an ineffectiveness claim. Defendant filed a timely *pro se* notice of appeal.

¶ 17 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 *et seq*. (West 2016). A proceeding initiated under the Act is "not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *People v.*

Davis, 2014 IL 115595, ¶ 13. The Act allows inquiry into constitutional issues arising in the original proceeding that were not raised and could not have been adjudicated on direct appeal. *Id*. Issues raised and decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *Id.*

¶ 18 At the first stage of proceedings under the Act, a defendant files a petition, which the trial court independently reviews and, taking the allegations as true, determines whether it is frivolous or is patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition lacks an arguable basis in fact or law when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. Fanciful factual allegations are those which are "fantastic or delusional," and an indisputably meritless legal theory is one that is "completely contradicted by the record." *Id.* at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶ 19 When considering a claim of ineffective assistance of trial counsel at the first stage of postconviction proceedings, the defendant must show both that counsel's performance was arguably deficient, and that defendant was arguably prejudiced by counsel's deficient performance, namely, that it affected the outcome of his trial. *Id.* at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 20 Defendant first contends that his petition set forth an arguable claim that he was denied the effective assistance of counsel by counsel's failure to investigate and present Compton's testimony. He asserts that Compton would have testified that he told the officers that he owned the gun, that defendant did not know that there was a gun in the vehicle, and that the gun was recovered

underneath the driver's seat. The State argues that Compton was disclosed as a potential witness on defendant's answer to discovery, that counsel made a strategic decision not to call him to testify at trial, and that defendant was not prejudiced by Compton's absence.

¶ 21 Generally, decisions concerning what witnesses to call are considered matters of trial strategy that are immune from ineffective assistance claims. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). However, when reviewing a summary dismissal under the Act, this court does not consider whether trial counsel's choice of witnesses was a decision based on trial strategy. See *Tate*, 2012 IL 112214, ¶ 22 (arguments related to trial strategy are "inappropriate for the first stage" of postconviction proceedings). Rather, whether a defendant was denied the effective assistance of counsel by trial counsel's failure to investigate or present a witness "is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 22 Here, it is at least arguable that trial counsel was ineffective in failing to present Compton as a witness, given the potentially exculpatory nature of the facts set forth in his affidavit. Moreover, defendant was arguably prejudiced because testimony that Compton's gun was recovered from underneath his seat would have directly contradicted Kanski's testimony that defendant was "basically sitting on top of the gun" and corroborated defendant's claim that he was unaware that there was a gun in the vehicle. Thus, it is at least arguable that defendant was prejudiced by counsel's failure to present Compton's testimony at trial. See *People v. Wilson*, 2013 IL App (1st) 112303, ¶ 20 (at the first stage of proceedings, a defendant need only show that "it is *arguable* that his counsel was deficient and it is *arguable* that the outcome of his case would have been different absent the deficient representation" (emphasis in original)).

¶ 23 Because the Act does not permit the partial summary dismissal of a postconviction petition, we need not address defendant's additional claim regarding the reasons why he waived his right to testify at trial. See *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27 ("If a single claim in a multiple-claim postconviction petition survives the summary dismissal stage * * *, then the entire petition must be docketed for second-stage proceedings[,] regardless of the merits of the remaining claims in the petition."); *People v. White*, 2014 IL App (1st) 130007, ¶ 33 ("We have no need to address any of the other claims in the petition because partial summary dismissals are not permitted during the first stage of a postconviction proceeding.").

¶ 24 For the foregoing reasons, we reverse the summary dismissal of the instant postconviction petition and remand to the trial court for further proceedings under the Act.

¶ 25 Reversed and remanded.