2014 IL App (2d) 120951-U
No. 2-12-0951
Order filed March 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-359
ADRIAN A. RUCKER,	)	Honorable Charles R. Hartman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed.

¶ 2 Defendant, Adrian A. Rucker, appeals the trial court's first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). Specifically, defendant argues that his petition presented an arguable claim that his counsel on direct appeal was ineffective for failing to challenge the admission at trial of spontaneous declarations that, in his view, violated the confrontation clause. U.S. Const., amend. VI.

Defendant argues we should reverse the dismissal of his petition and remand for further proceedings. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 27, 2006, after a jury trial, defendant was convicted of two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2004)), aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2004)), aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2004)), and unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1 (West 2004)).

¶ 5 At trial, the State presented evidence that, on November 7, 2004, at around 1 a.m., Freeport police responded to reports of a shooting.[1] When they arrived, Isaac Hall was lying on the ground between two parked cars. Hall suffered five gunshot wounds and bled to death. A total of 11 shell casings were found at the scene: 5 casings from a .45-caliber gun and 6 casings from a .38-caliber gun. A firearms expert summarized that the evidence he analyzed came from at least two different guns and that, while it was possible that more than two weapons were involved, the evidence "definitely" did not come from one weapon.

¶ 6 Various witnesses testified at trial that Hall was shot after leaving an apartment party with two companions. Witnesses reported that defendant also attended the party, wearing a dark, hooded sweatshirt, but that defendant was not present in the apartment when Hall left the party.

¶ 7 One witness, Krisana Patrick, testified that she saw defendant, wearing a dark, hooded jacket, shoot Hall. Other witnesses to the shooting testified that the shooter was wearing a dark, hooded jacket, but they did not specifically identify defendant as the shooter.

[1] A more detailed recitation of the trial evidence may be found in our decision resolving defendant's direct appeal. *People v. Rucker*, 2-06-0694 (2008) (unpublished order under Supreme Court Rule 23).

¶ 8 Three witnesses testified that defendant's girlfriend, Aisha Meeks, argued with one of Hall's companions at the party. Hall and the two men left, and shooting erupted outside. Over defendant's hearsay objection, the trial court admitted under the spontaneous declaration (excited utterance) exception to the hearsay rule testimony that, immediately after the shooting, indeed, about two seconds later, Meeks entered the apartment and said something to the effect that her "baby daddy ain't punk, he'll ride. He got two of them thumpers."[2] Three witnesses interpreted the word "thumpers" as referring to guns. Outside of the jury's presence, one witness informed the trial court that, when Meeks made the statement, she was excited, yelling, and acting like she was not concerned about who was being shot. Meeks apparently did not testify at trial.

¶ 9 On direct appeal, defendant argued that the trial court erred in admitting Meeks's statements because they were inadmissible hearsay that did not qualify under the spontaneous declarations exception to the hearsay rule. We rejected this argument, concluding that the trial court did not abuse its discretion in admitting the statements as spontaneous declarations. *People v. Rucker*, 2-06-0694, at 7-10 (2008) (unpublished order under Supreme Court Rule 23). In addition, we disagreed that admission of the statements, in light of the other trial evidence (such as the numerous witnesses who testified to seeing defendant that evening wearing specific clothing, coupled with at least three witnesses testifying that the shooter was wearing the same clothing), greatly impacted the outcome of the trial. *Id.*

¶ 10 Defendant filed a *pro se* postconviction petition raising multiple allegations, only one of which is the subject of this appeal. Specifically, defendant alleged in his petition that appellate

[2] Other witnesses quoted Meeks as having stated: "[w]hat they think, my guy was a punk; he had two things, he had two thumpers" and "[m]y baby daddy is a rider; what y'all thought he was a lame; he got two a them thumpers."

counsel was ineffective for failing to challenge the trial court's error in admitting Meeks's statements. Defendant alleged that the statements were hearsay, but also that appellate counsel erred because "the court's ruling deprived [defendant] from receiving a fair and impartial trial and also the opportunity to cross-examine Meeks concerning her alleged statement against [defendant]." Defendant's petition cited *Crawford v. Washington*, 541 U.S. 36 (2004) (testimonial out-of-court statements may be admitted as evidence at trial only if the declarant testifies or the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant), and the Sixth Amendment's guarantee that defendants "be confronted with the witnesses against them." Further, defendant's petition alleged that out-of-court statements that are testimonial in nature are generally barred under the confrontation clause.

¶ 11 On August 7, 2012, the trial court dismissed defendant's petition as frivolous and patently without merit. As to the petition's claim regarding Meeks's statements, the court found:

> "[Defendant's] fourth claim of constitutional error is that appellate counsel was ineffective for failing to raise the issue of the admission of hearsay statements as a spontaneous declaration. Once again, appellate counsel did raise that issue and the Court of Appeals concluded the trial court did not error [*sic*]. Accordingly, [defendant's] claim in this regard likewise fails."

¶ 12 On August 20, 2012, defendant filed his *pro se* notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that the trial court erred in dismissing his postconviction petition because he raised the gist of a constitutional claim that appellate counsel was ineffective. Specifically, defendant argues that, although counsel challenged Meeks's statements as inadmissible hearsay that did not satisfy the spontaneous declarations exception to the hearsay

rule, counsel failed to *also* challenge the statements as violating defendant's rights under the confrontation clause. He notes that the trial court's dismissal order did not address his allegation regarding the alleged confrontation clause violation. Defendant asks that we remand his petition for second-stage postconviction proceedings. While we agree with defendant that the trial court did not address his confrontation clause argument, we affirm on the basis that there was no constitutional violation and counsel was not ineffective for failing to raise the argument. See *People v. Munoz*, 406 Ill. App. 3d 844, 850 (2010) (we review the trial court's judgment, not its reasoning, in dismissing a postconviction petition and, if the judgment is correct, we may affirm on any basis).

¶ 15 The Act establishes a three-stage process for adjudicating postconviction petitions (725 ILCS 5/122-1 *et seq*. (West 2010)). *People v. Hommerson*, 2013 IL App (2d) 110805, ¶ 7. At the first stage (as here), the trial court considers, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). To do so, the court assesses whether the petition allegations, viewed liberally and taken as true, set forth a constitutional claim for relief. *Hommerson*, 2013 IL App (2d) 110805, ¶ 7. To survive dismissal at the first stage, the petition must present only "the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The "gist standard" presents "a low threshold;" the postconviction petition "need only present a limited amount of detail," does not need to set forth the claim in its entirety, and does not need to include legal arguments or citations to legal authority. *Id*. The question for the reviewing court is whether the petition had "no arguable basis either in law or in fact, *i.e.*, whether it was based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Summary dismissal

of a postconviction petition at the first stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 16 For a postconviction petition to state a constitutional claim of ineffective assistance of counsel, it must allege facts to show that counsel's performance was objectively unreasonable (*i.e.*, deficient performance) and that it is reasonably probable that, but for counsel's deficient performance, the result of the proceeding would have been different (*i.e.*, prejudice). *People v. DuPree*, 397 Ill. App. 3d 719, 735 (2010); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, the petition must allege facts to show that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). A petition alleging ineffective assistance of counsel may *not* be dismissed at the first stage if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; *and* (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 17 Here, defendant argues that appellate counsel's performance was objectively unreasonable where counsel did not challenge the admission of Meeks's statements as having violated the confrontation clause. For the statements to implicate the sixth amendment's confrontation clause, they must be testimonial in nature. See *Crawford*, 541 U.S. at 53-54 ("testimonial" out-of-court statements may be admitted at trial only if the declarant testifies or the declarant is unavailable and the defendant has had a prior opportunity for cross-examination); see also *People v. Cleary*, 2013 IL App (3d) 110610, ¶ 37 (non-testimonial hearsay statements are not subject to protection under the confrontation clause). Our supreme court has explained that a testimonial statement is one made in a solemn fashion and to establish a particular fact. *People v. Sutton*, 233 Ill. 2d 89, 111 (2009); *People v. Stelchy*, 225 Ill. 2d 246, 281 (2007). "In

general, a statement is testimonial if the declarant is acting in a manner analogous to a witness at trial, describing or giving information regarding events that have already occurred." *Sutton*, 233 Ill. 2d at 111.

¶ 18 Defendant asserts that Illinois courts have not reached a consensus on whether spontaneous declarations directed at persons other than State officials (as Meeks's statements were directed here) may be classified as testimonial. He cites, for example, *Stelchy*, *In re Rolandis G.*, 232 Ill. 2d 13, 31 (2008), and *People v. Lisle*, 376 Ill. App. 3d 67, 79-82 (2007), as reflecting that statements made to non-governmental personnel may be classified as testimonial in nature if the "objective circumstances indicate that a reasonable person in the declarant's position would have anticipated that his statement likely would be used in prosecution." *Stelchy*, 225 Ill. 2d at 292. Defendant acknowledges, however, there exist cases to the contrary. See *People v. Richter*, 2012 IL App (4th) 101025, ¶¶ 122-35 (if not directed at government officials or agents, hearsay statements are nontestimonial), and *People v. R.F.*, 355 Ill. App. 3d 992, 1000 (2005) ("statements made to nongovernmental personnel, such as family members or physicians," do not implicate *Crawford* or the Sixth Amendment). The fact that there is a split in authority, defendant argues, makes more apparent appellate counsel's objectively deficient performance in failing to raise the issue. Defendant asserts that, under *Stelchy*, if it is even arguable that a reasonable person in Meeks's position would have anticipated that her statements to non-governmental personnel would be used in prosecution, then counsel was arguably ineffective for failing to raise the Sixth Amendment issue on appeal.

¶ 19 Ultimately, we need not decide which of the foregoing line of cases governs here. Even if we accept that Meeks's statements are not automatically non-testimonial by virtue of her having directed them at non-governmental personnel, we must still consider whether they are

otherwise testimonial in nature and whether, regardless of to whom the statements were made, a reasonable person in Meeks's position would have anticipated that the statement would be used in a criminal prosecution. We cannot find that to be the case here. The objective circumstances do not arguably reflect *any* of the factors that typically accompany a statement considered testimonial in nature. For example, Meeks's statements were not made in a solemn fashion or to establish a fact, nor was she acting in a manner analogous to a witness at trial, describing or giving information regarding events that have already occurred. To the contrary, one witness explained to the court that, when Meeks made the statements (that her "baby daddy" was a "rider" and had two "thumpers") immediately after the shooting, she was excited, yelling, and acting like she was not concerned about who was being shot. See *Cleary*, 2013 IL App (3d) 110610, ¶ 58 (statements were non-testimonial where: (1) they were not clearly made in a solemn fashion; (2) they were made to family and friends, some of short acquaintance, in the course of discussing a relationship; (3) while the statements were serious, they were not made in a formal setting and there were no apparent consequences if the declarant was dishonest); see also *Stechly*, 225 Ill. 2d at 301-02 (child's statements to her mother about abuse, given in the car on the way to the hospital and in response to mother's question, "what happened?" were non-testimonial). We are not suggesting that a spontaneous declaration could never constitute a testimonial statement. See *e.g.*, *Sutton*, 233 Ill. 2d 89, 199 (2009) (declarations made by victim to police while in an ambulance qualified as both spontaneous and testimonial). However, the circumstances here do not even arguably reflect that Meeks made the statements to establish a fact or to provide information about the event. Further, given that Meeks and defendant were apparently in a relationship and had at least one child together (hence, the reference to her "baby daddy"), we do not find it arguable that Meeks provided the statements anticipating that they

would be used in defendant's prosecution. In sum, we disagree that it is even arguable that an objective, reasonable person in Meeks's position would have anticipated that her statements, given in an excited state to party attendees generally, would be used in a prosecution. Thus, we disagree that the confrontation clause was implicated and that counsel's performance arguably fell below an objective standard of reasonableness.

¶ 20 We further note that, even if counsel's performance was arguably objectively unreasonable, the claim was properly dismissed because defendant here was not also prejudiced such that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different.[3] *Hodges*, 234 Ill. 2d at 17. Defendant argues that he was prejudiced because the forensic evidence reflected that two guns were used in the shooting and that Meeks's statements about two "thumpers" was the only evidence linking defendant to two guns. However, defendant ignores that, even without Meeks's statements, one witness identified

[3] Defendant asserts that the question of prejudice is whether, under the harmless-error standard of review applicable to *Crawford* violations, the admission of Meeks's statements contributed to the verdict. See, *e.g.*, *In re Rolandis G.*, 232 Ill. 2d at 43; *Stelchy*, 225 Ill. 2d at 304-05; *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). We disagree. None of the cases defendant cites concern ineffective-assistance claims or a postconviction setting. Here, we are not reviewing the alleged error in the first instance but, rather, under the purview of an ineffective-assistance analysis. As such, the question of prejudice concerns whether *counsel's* error so prejudiced the defendant that, without the error, the trial outcome might have been different. *Hodges*, 234 Ill. 2d at 17. (We note, however, that even under a harmless-error analysis, prejudice is not established here because the properly-admitted evidence overwhelmingly supported the conviction).

defendant as Hall's shooter, and others testified to having seen only one shooter, whom they described as wearing the same clothing that defendant was wearing that evening. Thus, even without Meeks's statements, the evidence was overwhelming that, at a minimum, defendant was *a* shooter.

¶ 21 In sum, we disagree that there is an arguable basis to objectively conclude that a reasonable person in Meeks's position would have anticipated that his or her statements would be used in a prosecution. Thus, we reject defendant's argument that the statements were testimonial in nature and implicated the Sixth Amendment. As such, there is no existing "arguable" constitutional violation and appellate counsel was not ineffective for failing to raise a confrontation clause argument on direct appeal. We affirm the summary dismissal of defendant's postconviction petition.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Stephenson County.

¶ 24 Affirmed.