2012 IL App (4th) 100941-U

Filed 5/14/12

NO. 4-10-0941

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
AARON WILBERT BOOTH,	)	No. 05CF107
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's postconviction petition failed to set forth a constitutional claim of actual innocence, the trial court did not err in summarily dismissing the petition. Also, where defendant did not raise the issue of prosecutorial jury indoctrination in his petition, that issue is forfeited.

¶ 2 In October 2006, the trial court found defendant, Aaron Wilbert Booth, guilty of criminal sexual assault and battery. In February 2007, the court sentenced him to 15 years in prison on the criminal-sexual-assault conviction and imposed a concurrent 364-day jail term on the battery conviction. Defendant appealed, and this court affirmed. In June 2009, defendant filed a petition for postconviction relief, which the trial court dismissed as frivolous and patently without merit.

¶ 3 On appeal, defendant argues (1) the trial court erred in summarily dismissing his postconviction petition and (2) he should be granted a new trial because he was forced to give up

his right to a jury trial through prosecutorial jury indoctrination. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2005, a grand jury indicted defendant on the offense of aggravated domestic battery (count I) (720 ILCS 5/12-3.3(a) (West 2004)), alleging he knowingly and without legal justification caused great bodily harm (facial bruising) to N.S., a family or household member, by hitting her. In January 2006, a grand jury indicted defendant on the offense of criminal sexual assault (count II) (720 ILCS 5/12-13(a)(1) (West 2004)), alleging he knowingly and unlawfully committed an act of sexual penetration with N.S. by the use of force or threat of force in that he inserted a whiskey bottle in her vagina. The grand jury also indicted defendant on the offense of battery (count III) (720 ILCS 5/12-3(a)(2) (West 2004)), alleging he knowingly and without legal justification made physical contact of an insulting or provoking nature with N.S. in that he grabbed her by the neck and choked her with his hands. Defendant pleaded not guilty.

¶ 6 In October 2006, the State moved to dismiss count I. Thereafter, defendant's bench trial commenced on counts II and III. Dr. Kathryn Bohn, an emergency-room physician, testified she examined N.S. on January 26, 2005. Dr. Bohn found her "in pain and upset." N.S. complained of pain to her face, her throat, her abdomen, and her vaginal area. N.S. stated her ex-boyfriend hit her in the face and neck, tried to choke her, penetrated her with his penis twice, and took a whiskey bottle and repeatedly introduced it into her vagina. During the examination, Dr. Bohn found a red mark on the victim's forehead, abrasions and lacerations to her neck, scratches on her breast, and a subconjunctival hemorrhage of the right eye. Dr. Bohn opined the lacerations to the neck could have been caused by choking. Dr. Bohn also testified a pelvic exam

revealed swelling of the labia majora. Dr. Bohn found it to be an unusual amount of swelling and not the type of swelling generally expected from regular intercourse. Dr. Bohn opined the injury could have been caused by a bottle.

¶ 7 On cross-examination, Dr. Bohn stated N.S. told her she had engaged in consensual sex earlier on the date of the incident. N.S. refused to have a rape kit examination performed.

¶ 8 N.S. stated she did not want to testify. She testified defendant was her ex-boyfriend but still a friend. She remembered going to the hospital on January 26, 2005, because she "was beat up or something real bad." N.S. did not recall talking to officers at her home. She did not remember telling the doctor her ex-boyfriend choked her or penetrated her with a whiskey bottle.

¶ 9 N.S. did remember going to a Motel 6 in Normal, Illinois, for a "little get-together." She reviewed People's exhibit No. 14, a transcript of her conversation with Detective Ryan Ritter. When asked if it jogged her memory, she said "not really." She also did not remember a three-way conversation on March 27, 2006, between her, defendant, and defendant's mother.

¶ 10 On cross-examination, N.S. stated she did not remember whether defendant sexually assaulted her on January 26, 2005. She testified there were "a lot of people there that day." When asked by the trial court why her memory was so poor regarding what happened that day, N.S. stated it was a long time ago and she "was on all types of medication."

¶ 11 Normal police officer Dwayne Harris testified he and Officer Mike Chiesi talked with the victim on January 26, 2005. Harris found her to be "very upset" and "visibly shaken."

He stated her right eye was swollen shut and she had numerous scratches on her neck. N.S. told the officers she was beaten by defendant, her ex-boyfriend. She stated she was assaulted at a Motel 6 and "vaginally penetrated with a Hennessey bottle."

¶ 12 Normal police officer James Henderson testified he collected evidence at the Motel 6. He stated garbage had been collected and there was no way of knowing what room it came from. He examined the contents of the bags and found a Hennessey bottle. Officer Henderson noticed a phone in room 229 where the handset "had been taken apart." On cross-examination, Henderson stated no attempt was made to obtain fingerprints from the whiskey bottle or the phone.

¶ 13 Normal police officer Michael Chiesi testified he observed N.S. with a swollen right eye and several scratches on her face. Chiesi stated she was "very upset" and crying. N.S. stated she had consensual sex with defendant earlier in the evening and then she fell asleep. She later awoke to find defendant extremely angry about some phone numbers he found in her cell phone. N.S. stated she was sexually assaulted, slapped in the face, and penetrated with a Hennessey bottle by defendant. She told the officers defendant called her a "bitch" and a "ho" and told her several times he would kill her. When she tried to leave the motel room, defendant pulled her back by her hair.

¶ 14 Normal police sergeant Ryan Ritter testified he met with N.S. at the hospital in the afternoon of January 26, 2005. She did not show signs of being under the influence. He stated she was "very reluctant to speak to [him] at first." She also "seemed to be very sore" and "very shaken up." Her right eye was swollen and bloodshot, she had scratches on her neck and chest, and an injury to her pelvic region. Sergeant Ritter tape-recorded a conversation with N.S., and

the recording was played for the trial court. During the conversation, N.S. named defendant as her attacker. She later confirmed his identity through a photograph. Ritter stated N.S. gave no reason for refusing to have a rape kit done.

¶ 15 Joni Rudd, defendant's cousin, testified for the defense. She stated she lived in Dalton, Illinois. She recalled her surprise birthday party on January 28, 2005. Defendant had been staying with her since January 24th or 25th. Rudd stated she saw defendant every day when she left for work and when she returned home. When asked by the trial court, Rudd stated defendant was not at her party. She testified he did not have anything to wear. Christopher Rudd, Joni's husband, testified defendant came to their house on January 24 or 25, 2005.

¶ 16 On rebuttal, Sergeant Ritter testified he was outside the courtroom when he encountered Christopher Rudd, who agreed to speak with him. Ritter asked him how he could be certain defendant was with him at the time of the alleged offense. Rudd was uncertain of the actual date defendant arrived at his home. When defendant's attorney walked up and told Rudd he did not need to speak with Sergeant Ritter, Rudd declined to speak further with him.

¶ 17 Normal police officer Brad Park testified he arrested defendant on a traffic warrant shortly after midnight on January 23, 2005. Defendant was released on January 24, 2005, at 4:23 p.m.

¶ 18 On surrebuttal, Christopher Rudd testified he picked up defendant on Monday, January 24, 2005, at a time when the "sun was almost totally set." Rudd stated the sun "was red in the background, but the sky from the east was dark already." Rudd stated he picked him up at a shopping mall in Markham, Illinois. Asked by the trial court to estimate the time he picked up defendant, Rudd said between 6:15 and 6:30.

¶ 19 Defendant exercised his constitutional right not to testify. Following closing arguments, the trial court took the matter under advisement. The court found the Rudds' alibi testimony to be unreliable. Since defendant was released from jail at 4:23 p.m. on January 24, 2005, "he could not have been in the south suburbs of Chicago as the sun was setting, since the sun sets more in the 5 o'clock area as opposed to the 6:00 or 6:30 area in the wintertime." The court also found the victim did not testify truthfully. However, her statement to the police was consistent with the physical evidence. The court found her statement to the police to be true and accurate. The court found defendant guilty on counts II and III.

¶ 20 In November 2006, defendant filed a motion for a new trial. In February 2007, the trial court denied the motion. Thereafter, the court sentenced defendant to 15 years in prison on count II and 364 days in jail on count III. The sentences were to run concurrent to each other and consecutive to a 15-year sentence in case No. 04-CF-447.

¶ 21 Defendant appealed, arguing the State failed to prove him guilty of criminal sexual assault and battery beyond a reasonable doubt. This court disagreed and affirmed his convictions and sentences. *People v. Booth*, No. 4-07-0263 (Apr. 8, 2008) (unpublished order under Supreme Court Rule 23).

¶ 22 In June 2009, defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)), setting forth a claim of actual innocence. Therein, defendant claimed N.S. "remember[ed] the events" of January 26, 2005, and "her recollection completely contradicts her testimony at trial." Attached to the petition was a voluntary statement form signed by N.S. and dated June 11, 2009. N.S. stated she had sex with defendant at the motel before she decided to have a party. People were

"coming in and out" drinking and "smoking weed." N.S. stated she got into an argument with a woman named Varquisha. Thereafter, "some of the girls at the party started beating [N.S.] up." After the party was over, N.S. went to sleep. She awoke and proceeded to the Baby Fold so she could visit her children, who were in the custody of the Department of Children and Family Services. Because of bruises on N.S.'s face, a caseworker did not want the children to see her in that condition. N.S. left and went home. An aunt then called an ambulance, and N.S. was taken to the hospital.

¶ 23 N.S. stated she did not remember what she told the police at the hospital because she was in pain and on medication for her injuries. At trial, N.S. stated the prosecutor was "badgering" her and not interested in her version of the events. In her statement, N.S. stated defendant never raped or beat her.

¶ 24 In July 2009, defendant's counsel filed a motion to withdraw. On August 6, 2009, the trial court summarily dismissed the postconviction petition. The court noted the statement given by N.S. was "not verified, notarized or otherwise submitted under oath in any form that would constitute a proper affidavit." Even if N.S.'s statement was a proper affidavit, the court stated the petition would still be dismissed as frivolous and patently without merit. In part, the court stated N.S.'s statement "now purports to present yet another version from [her] claiming to now remember the event and alleging that her injuries were caused by certain females and that the defendant had nothing to do with them."

¶ 25 Upon receiving notice of the dismissal, defendant filed a *pro se* notice of appeal on August 31, 2009. On September 9, 2009, defendant sent a letter to the circuit clerk along with an affidavit from N.S. (dated August 14, 2009), which he stated he received too late to include

with his posttrial relief brief. In the affidavit, N.S. reiterated she had sexual intercourse with defendant, had been physically assaulted by "girls" at the party, and told defendant the rape charge was "bogus." Defendant requested to amend his brief and notice of appeal with the affidavit and asked that he be given another opportunity for a judgment on his postconviction petition.

¶ 26 On September 14, 2009, defendant filed a *pro se* "petition for posttrial 'amendment,' " seeking to add another additional affidavit and to present it to the trial court and also for his notice of appeal. Defendant appended a typed March 20, 2008, affidavit from N.S., wherein she stated she had falsely accused him as her attacker because of her uncontrollable "anger and vengefulness." The trial court did not rule on these matters.

¶ 27 On appeal, this court found defendant timely filed his letter, file-stamped September 9, 2009, seeking postjudgment relief as to the trial court's dismissal order. *People v. Booth*, No. 4-09-0667 (Sept. 3, 2010) (unpublished order under Supreme Court Rule 23). We also noted the documents file-stamped September 14, 2009, were a separate set of documents and were certified as placed in the prison mail on September 10, 2009, which was more than 30 days from the court's dismissal order. We ordered the notice of appeal stricken and remanded for a hearing on defendant's postjudgment motion.

¶ 28 In November 2010, the trial court issued an order on remand. The court noted it reviewed the September 9, 2009, filing containing N.S.'s August 2009 affidavit. "In the interests of fairness and justice," the court also considered the untimely September 14, 2009, filing, which contained the March 2008 affidavit from N.S. and a motion for reconsideration filed by defendant in April 2010.

¶ 29 The trial court reaffirmed its previously ruling. The court found "significant inconsistencies" in N.S.'s various statements and affidavits, which "only strengthened" the conclusion that her affidavits were not newly discovered evidence. The court found it clear from N.S.'s inconsistencies "that she continues in an effort, as she did at trial, to mislead the Court and manipulate the outcome of this proceeding." The court dismissed defendant's motion for postjudgment relief. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. First-Stage Dismissal

¶ 32 Defendant argues the trial court erred in summarily dismissing his postconviction petition where an affidavit by the complainant, who had allegedly recovered her memory, supported his assertion of actual innocence. We disagree.

¶ 33 The Act "provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934, 945-46. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 34 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-

2.1(a)(2) (West 2008). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 35 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2008).

¶ 36 Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394, 398 (citing *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754). "Although the trial court's reasons for dismissing a petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment." *People v. Jones*, 399 Ill. App. 3d 341, 359, 927 N.E.2d 710, 724-25 (2010).

¶ 37 In the case *sub judice*, defendant filed his postconviction petition and attached N.S.'s voluntary statement form of June 2009. In his motion for posttrial relief, defendant included N.S.'s affidavit of August 2009. Because defendant's September 14, 2009, filing,

containing N.S.'s March 2008 affidavit, was not timely filed, it will not be considered. We will also not consider defendant's April 2010 *pro se* motion for reconsideration, as it was beyond the scope of what was to be considered on remand.

¶ 38 Defendant's postconviction petition set forth a claim of actual innocence. Our supreme court has stated a claim of actual innocence based on newly discovered evidence is cognizable in a postconviction petition. *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004).

> "To win relief under that theory, the evidence adduced by the defendant must first be 'newly discovered.' That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. The evidence must also be material and noncumulative. In addition, it must be of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154, 817 N.E.2d at 527.

"[T]he hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636, 900 N.E.2d 396, 403 (2008) (quoting *People v. Savory*, 309 Ill. App. 3d 408, 414-15, 722 N.E.2d 220, 224-25 (1999).

¶ 39 A review of the trial proceedings indicates N.S. did not want to testify against defendant, whom she still considered a friend. She claimed she did not remember whether defendant sexually assaulted her and blamed her memory on the passage of time and the medications she was on. In her voluntary statement, N.S. stated she had sexual intercourse with

defendant but claimed he never raped or beat her. In her affidavit, N.S. stated she did not remember what she told the police because she was "under the influence of so many drugs." She stated she tried several times to correct "the mistaken belief" that defendant raped her but nobody would listen to her.

¶ 40 Here, neither N.S.'s voluntary statement nor her affidavit can be said to be of such conclusive character that they would probably change the result on retrial. In finding defendant guilty of criminal sexual assault and battery, the trial court found N.S.'s testimony was not credible and convicted defendant based on the statements N.S. made to medical personnel and police officers. N.S.'s statement and affidavit do not exonerate defendant.

¶ 41 In her voluntary statement, N.S. offered her version of the incident, claiming she "was never given an opportunity" to do so. She did not state her description of other events of that day was due to any recovery of or improvement in her memory. In her affidavit, N.S. stated she had "full recollection of the events of January 26, 2005," but she did not state how that was so. She claimed some girls physically assaulted her but she did not identify any injuries. She did not state in her affidavit that defendant did not rape her. Moreover, despite her full recollection of the events, she still claimed she could not remember what she said to the police. The "evidence" offered by defendant does not constitute newly discovered evidence and does not support his claim of actual innocence. Thus, his petition was properly dismissed.

¶ 42 B. Prosecutorial Jury Indoctrination

¶ 43 Defendant also argues this court should grant him a new trial as a matter of fundamental fairness because the record shows he was forced to give up his right to a jury trial through prosecutorial jury indoctrination. We find this issue forfeited.

¶ 44 "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2008). Moreover, "claim[s] not raised in a petition cannot be argued for the first time on appeal." *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004). Our supreme court has made it clear that an "appellate court is not free *** to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *Jones*, 213 Ill. 2d at 508, 821 N.E.2d at 1099. The arguments defendant raises now before this court were not presented to the trial court in the postconviction proceedings. Thus, defendant has forfeited review of the issue on appeal, and we will not address the merits.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 47 Affirmed.