2014 IL App (5th) 120392-U

NO. 5-12-0392

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Christian County.
	)	
v.	)	No. 06-CF-63
	)	
JOHN GRAHAM,	)	Honorable
	)	Ronald D. Spears,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the defendant's petition for postconviction relief.

¶ 2 BACKGROUND

¶ 3 In 1992, the defendant's first wife, Rebecca, gave birth to their only child, a daughter, S.G. In 1994, the defendant and Rebecca divorced, and Rebecca and S.G. moved from Illinois to Arkansas. Rebecca later remarried and gave birth to a second child, who was born with spina bifida. In December 2000, S.G. moved to Mattoon to live with the defendant and his second wife, Monica. In 2004, the defendant and Monica separated, and the defendant began committing various acts of sexual penetration with

S.G., who was 11 or 12 at the time. The abuse occurred frequently until March 2006, when S.G. reported it to a friend whose mother contacted the Department of Children and Family Services (DCFS).

¶ 4 In May 2006, a Christian County grand jury indicted the defendant on multiple counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)). In November 2008, the grand jury returned an amended indictment charging six specific counts. Three of the counts alleged acts of coitus (counts I, II, and III), two alleged acts of fellatio (counts IV and V), and one alleged act of cunnilingus (count VI). In February 2009, the cause proceeded to a jury trial, where the following evidence was adduced.

¶ 5 Monica testified that before she and the defendant separated in 2004, he had driven a semitruck with a "sleeper," delivering grain to places such as ADM in Decatur. Monica stated that S.G. had frequently accompanied the defendant on overnight delivery trips and that when S.G. would not want to go, "most of the time he would make her go." Monica indicated that the defendant would sometimes say that he had to stay on the road overnight, because he "had to get in line early at ADM." Monica testified that the defendant was a "hard disciplinarian."

¶ 6 S.G. testified that her mother had sent her back to Illinois to live with the defendant because her baby sister had been born with spina bifida and required an extensive amount of care. S.G. testified that when she and the defendant were living in Mattoon, he had "forced" her to accompany him on many of his overnight trips to ADM. After Monica and the defendant split up, he and S.G. lived in his truck for about a month before getting a one-bedroom apartment in Assumption.

¶ 7 S.G. testified that the defendant had first sexually assaulted her during one of the overnight trips that they had taken during the summer of 2004. The event occurred at night in the sleeper compartment of the defendant's truck, while parked near a grain elevator in Westervelt. S.G. had sat on and damaged the defendant's glasses earlier that day, and he indicated that she had to be punished for what she had done. S.G. testified that after slapping her and holding her down, the defendant had forcibly penetrated her vagina with his penis and had ejaculated onto her stomach following intercourse. She further testified that the defendant had ignored her complaints that "it hurt a lot" and that she "bled" after the incident.

¶ 8 S.G. indicated that for nearly two years following the Westervelt incident, the defendant had routinely made her engage in sexual acts with him as a form of punishment or as a means of letting her do things that she wanted to do. Explaining that the sexual assaults had become more frequent after she and the defendant had moved into their apartment, S.G. estimated that they had engaged in sexual activity "two or three times a week." She indicated that whether they had intercourse or he had her perform oral sex on him "depended on how he felt." S.G. testified that the defendant had sometimes worn a condom when they had intercourse, while other times he would ejaculate on her. She further indicated that the defendant's ejaculate had tasted "salty" and "nasty."

¶ 9 S.G. testified that the defendant had sometimes used a bottle to penetrate her vagina and that he had later purchased a vibrator that he had used on her and himself. She identified the vibrator as People's Exhibit No. 1, and she acknowledged that she had sometimes used it or a bottle on herself. She indicated that she had learned "these things"

from the defendant. S.G. further indicated that before the defendant had purchased the vibrator, she had been unaware that "such a thing existed."

¶ 10 S.G. recalled that sometime around July 4, 2005, as punishment, she and the defendant had intercourse in his truck while it was parked near a grain elevator in Pana. S.G. stated that she recalled that it was around July 4, because "[t]here were fireworks going on." S.G. testified that in February 2006, the defendant had forced her to perform oral sex on him, after she had asked him if she could go to a Valentine's dance with her friends. S.G. indicated that sometime after that, the defendant had taken away her video games and had made her perform oral sex on him to get them back. S.G. indicated that around the same time, the defendant had kissed her and placed his mouth on her vagina.

¶ 11 S.G. testified that the defendant's final act of sexual assault had occurred at their apartment in late March 2006, a few days before she reported that the defendant had been abusing her. She explained that she and the defendant had argued about her having her own bedroom, and he had torn down some Star Wars posters that she had hung on a wall. Later that night, the defendant undressed S.G., and they had intercourse. S.G. stated that the defendant had worn a condom.

¶ 12 S.G. testified that on March 28, 2006, she had told her best friend Elizabeth what had been happening. Elizabeth then told her mother, and Elizabeth's mother talked to S.G. about it. Thereafter, DCFS became involved, and S.G. was examined by a physician. S.G. testified that after being temporarily placed in foster care, she had moved back to Arkansas to live with her grandparents.

¶ 13 S.G. testified that she was not falsely accusing the defendant and that she would have reported the abuse earlier, but she was afraid that she might have been permanently placed in a foster home. She acknowledged that she had attempted suicide several times since March 2006 and had since been diagnosed with "[b]ipolar and depression."

¶ 14 When cross-examined, S.G. acknowledged that the defendant had caught her using the vibrator and a bottle on herself, but she denied having used "any other items." She further acknowledged that leaving her mother to live with the defendant was a "tough transition" and that before moving to Illinois, she "didn't even know [she] had a father." In March 2006, S.G. was optimistic about possibly spending Easter break with her mother, whom she had not seen in two or three years, and was admittedly upset when she learned that the defendant could not afford the cost of the visit. S.G. testified that she was aware that Monica had a daughter who had once made claims of sexual assault against a family member.

¶ 15 On redirect, S.G. denied that she had reported that the defendant had sexually assaulted her because she was mad about not being able to visit her mother. She further indicated that she had no reason to continue to lie about something that she had allegedly fabricated years ago. S.G. testified that she had finally reported the defendant's abuse because she was "tired" of it and did not want it "to happen anymore."

¶ 16 DCFS Investigator Mike Parkin testified that on March 29, 2006, he had interviewed S.G. after speaking with Elizabeth's mother. He then interviewed the defendant regarding S.G.'s allegations. The defendant denied ever having had sexual relations with S.G., but he acknowledged that on at least one occasion, she had witnessed

him masturbate while he sat at his computer. With respect to the vibrator, Parkin explained that the defendant had first claimed that he had bought it for himself and that when it went missing, he "figured [S.G.] had gotten it." He then claimed that after suspecting that S.G. had been masturbating with a bottle, he had purchased the vibrator for her personal use. The defendant suspected that S.G. had fabricated her allegations against him because she was upset that he did not have the finances to send her to her mother's house for Easter. He also suspected that S.G.'s "family down in Arkansas [had] put her up to saying [the] stuff."

¶ 17 Dr. Victoria Nichols-Johnson testified that on April 13, 2006, she had examined S.G. for signs of sexual abuse. S.G. told Victoria that "over the past two years[,] her father had been molesting her" and "had used his penis down below." Victoria's examination revealed that S.G.'s hymen was present but "disrupted" and that her posterior fourchette, "which is usually very smooth," had an "irregular surface." Victoria testified that these findings were consistent with vaginal penetration, as were S.G.'s reports of burning and irritation in her vaginal area. Victoria acknowledged that she could not determine whether S.G.'s vagina had been penetrated by "a penis or some other type of object."

¶ 18 Investigator Jeffrey Brown of the Christian County sheriff's department testified that on April 7, 2006, he and another investigator had executed a search warrant at the defendant's apartment in Assumption. Brown testified that a purple vibrator (People's Exhibit No. 1), a cone-shaped item that appeared to be the top of a lava lamp with a condom attached (People's Exhibit No. 2), a box of condoms, a tube of lubricant, and a

bottle of "anti-bacterial toy cleaner" were found in a shoebox in the bedroom closet. Brown further testified that biological standards had later been obtained from S.G. and the defendant for DNA testing purposes. Brown identified Defendant's Exhibit No. 1 as a yellow highlighter pen that he had received from defense investigator Mark Ford. Brown testified that he did not know where the highlighter came from or how it came to be in Ford's possession. Brown explained that the vibrator, the lava lamp, and the yellow highlighter had all been submitted to a private lab for DNA testing.

¶ 19 The parties stipulated that forensic testing had revealed the presence of S.G.'s DNA on the vibrator, the lava lamp, and the highlighter, but the testing "could not determine the type of bodily fluid the DNA was extracted from." The parties further stipulated that the defendant had given his attorney the highlighter following his arrest. The jury heard testimony that a person's DNA can be transferred onto an object by placing the object in the person's mouth.

¶ 20 For the defense, the defendant's sister, Jacqueline Graham, testified that the defendant had worked for her company, J & C Trucking, from April 2003 through May 2006. She stated that the defendant had driven a grain truck and had generally worked 10-hour days picking up and delivering grain. Jacqueline never heard S.G. complain about having to ride in the defendant's truck with him, but she was aware that S.G. had wanted to go to her mother's house for Easter 2006. Jacqueline testified that her company's trucking records showed that on the weekend between July 1 and 5, 2005, the defendant's truck had been in Westervelt.

¶ 21 When cross-examined, Jacqueline acknowledged that her company's records also showed that on July 6, 2005, the defendant's truck had been in Dunkel, which is located between Pana and Assumption. Jacqueline also testified that truckers never have to wait in line to drop off grain at ADM. When asked if the defendant's trucking duties had ever required him to "go out overnight," Jacqueline stated, "Maybe sometimes." Jacqueline denied that the defendant was a "strict disciplinarian."

¶ 22 Investigator Parkin was also called as a witness for the defense. Parkin testified that S.G. had indicated that the defendant's final act of abuse had involved sexual intercourse without a condom. Parkin stated that S.G. had described seeing "white stuff coming out of the end of [the defendant's] penis" after he had "put his penis on her stomach."

¶ 23 During closing arguments, the State maintained that its case "boil[ed] down" to whether S.G.'s allegations of abuse were credible. The State argued that the medical evidence and the items found in the defendant's apartment corroborated S.G.'s allegations. The State further argued that given her age and familial situation, it was understandable that it had taken S.G. several years to get "the guts" to report what had been happening. The State suggested that the defendant's claims that he had purchased a vibrator for his 12-year-old daughter's personal use and that her accusations stemmed from her resentment regarding her Easter vacation plans were nonsensical.

¶ 24 Referencing Parkin's testimony regarding S.G.'s account of the defendant's final act of alleged abuse, defense counsel argued that S.G.'s trial testimony was "completely inconsistent" with what she had initially reported about the incident. Referencing

Jacqueline's testimony regarding J & C Trucking's records, counsel suggested that the defendant could not have abused S.G. in Pana on July 4, 2005, as S.G. had indicated. With respect to the medical evidence, counsel noted that although it had been determined that "some type of penetration [had] occurred," it was not known whether "the penetration was by a sexual assault or [was] self-inflicted by [S.G.,] who had admitted to sexual experimentation with inanimate objects that she had used on her own to masturbate." Counsel noted that despite S.G.'s claims that the defendant had used the vibrator on himself, only her DNA had been found on the vibrator, lava lamp, and highlighter. Counsel emphasized that the defendant had maintained his innocence when interrogated and that there was no evidence that he had ever possessed child pornography. Counsel suggested that S.G. might have been suffering from bipolar disorder before moving to Illinois and that her forced separation from her mother had had a profound effect on her as she entered puberty. Counsel further suggested that influenced by her knowledge that one of Monica's daughters had once made allegations of sexual abuse against a family member, S.G. had reached her "breaking point" when she realized that she was not going to be able to see her mother over Easter break. Counsel maintained that S.G. had falsely accused the defendant so that she could "reunite with her family in Arkansas."

¶ 25 In rebuttal, the State acknowledged that S.G.'s testimony that the defendant had used a condom that last time they had intercourse was inconsistent with what she had said "[w]hen she was interviewed three years before." The State argued that such discrepancies were understandable, however, and did not prove that S.G. was lying.

Noting that S.G. had recalled specific incidents of abuse by referencing things such as fireworks, a Valentine's dance, and the time the defendant had taken away her video games, the State maintained that it was further understandable that S.G. could not remember specific dates. The State suggested that even if S.G. had wanted to return to Arkansas, she had no reason to "lie and embarrass herself publicly by having to disclose all of this."

¶ 26 After due deliberation, the jury found the defendant guilty on all counts. In December 2010, the defendant's convictions were affirmed on direct appeal. *People v. Graham*, 406 Ill. App. 3d 1183 (2011).

¶ 27 In June 2012, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The defendant's petition raised numerous ineffective-assistance-of-counsel claims, including the following:

> "Petitioner was denied effective assistance of counsel, in that defense counsel did not reveal in court the fact that DNA from another male person was found on objects that had been used by S[.]G[.], and also contained S[.]G[.]'s DNA, as was instructed to by petitioner to defense counsel."

¶ 28 In July 2012, the trial court entered an order summarily dismissing the defendant's postconviction petition as frivolous and patently without merit. In August 2012, the defendant filed a timely notice of appeal.

¶ 29 DISCUSSION

¶ 30 Referencing the yellow highlighter identified at trial as Defendant's Exhibit No. 1, the defendant argues that the trial court erred in summarily dismissing his petition for postconviction relief because it set forth the gist of a constitutional claim regarding his trial attorney's failure to "introduce potentially exculpatory DNA evidence indicating that another male could have been the perpetrator of the charged offenses." We disagree.

¶ 31 The Post-Conviction Hearing Act

¶ 32 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 33 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To survive the first stage, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "This is a purposely low threshold for survival because most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). A *pro se* petition for postconviction relief is considered 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, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 34 If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 35 Ineffective Assistance of Counsel

¶ 36 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "At the first stage of

postconviction proceedings under the Act, 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." *Hodges*, 234 Ill. 2d at 17.

¶ 37 The Defendant's Claim

¶ 38 As previously indicated, maintaining that "DNA from another male person" was found on the yellow highlighter identified at trial as Defendant's Exhibit No. 1, the defendant argues that trial counsel was ineffective for failing to "introduce potentially exculpatory DNA evidence indicating that another male could have been the perpetrator of the charged offenses." On appeal, the parties do not dispute that DNA from an unidentified male was found on the highlighter, but they disagree as to what the testing performed on the object revealed.

¶ 39 The State asserts that the test results were "inconclusive" and that the DNA "may have belonged to the defendant." The defendant maintains that the unidentified DNA was "inconsistent" with his DNA and thus "suggested that another male could have been responsible for the fact that [S.G.] had been sexually penetrated." We note that the parties draw their divergent conclusions from the transcribed pretrial discussions of the testing performed on the highlighter. We further note that the laboratory report of the test results is not included in the record on appeal, and the report was not attached as an exhibit to the defendant's postconviction petition. The defendant's failure to attach the report, by itself, arguably justified the trial court's summary dismissal. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 55; *People v. Addison*, 371 Ill. App. 3d 941, 947

(2007); *People v. Payne*, 336 Ill. App. 3d 154, 163-64 (2002). In any event, and even assuming that the male DNA found on the highlighter was not the defendant's, he is still unable to prevail on his ineffective-assistance-of-counsel claim.

¶ 40 Prior to trial, the State indicated that there was no evidence suggesting that S.G. had ever had sexual relations with anyone other than the defendant. The State nevertheless filed a motion *in limine* seeking to bar the introduction of any evidence regarding her prior sexual activity pursuant to Illinois' rape-shield statute (725 ILCS 5/115-7 (West 2006)). At the hearing on the motion, following the State's initial objection, it was generally agreed that evidence that could provide an "alternative explanation" for the medical findings that S.G. had been sexually penetrated would be admissible at trial. As a tentative offer of proof, defense counsel noted that S.G. had made statements "about masturbation."

¶ 41 As previously indicated, at trial, the defendant's defense was that S.G. had falsely accused him out of spite and that her admitted masturbatory activities explained the medical findings. At trial, the State used the stipulated DNA evidence to corroborate S.G.'s claims of abuse, while the defendant used the evidence to emphasize that despite S.G.'s testimony that the defendant had used the vibrator on himself, only her DNA had been found on the vibrator, lava lamp, and highlighter, which counsel suggested were some of the "inanimate objects that she had used on her own to masturbate." We note that the jury found the defendant guilty on all six counts of the amended indictment, but only three of the counts (I, II, and III) alleged vaginal penetration.

¶ 42 "The evidentiary rationale for precluding a defendant from introducing evidence of the victim's sexual history with people other than the defendant is rooted in the fact that such evidence is irrelevant to the issue of whether the victim consented to sexual relations with the defendant." *People v. Freeman*, 404 Ill. App. 3d 978, 989 (2010); see also *People v. Summers*, 353 Ill. App. 3d 367, 373 (2004) (recognizing the "policy underlying the rape-shield statute"). "Exclusion of such evidence keeps the jury's attention focused on issues relevant to the controversy at hand and promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their past sexual activity brought before the public." *People v. Weatherspoon*, 265 Ill. App. 3d 386, 392 (1994). "[T]he mere theoretical possibility that the alleged victim had sex with someone else has little probative value compared to the danger of humiliating the alleged victim by calling into question his or her chastity—a tactic the rape-shield statute is intended to prevent." *People v. Maxwell*, 2011 IL App (4th) 100434, ¶ 87.

¶ 43 Nevertheless, "[t]he rape[-]shield statute's preclusion of prior sexual conduct is not absolute" and "should never be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence." *People v. Hill*, 289 Ill. App. 3d 859, 862 (1997). Evidence of a sexual assault victim's sexual history is therefore admissible, "despite the rape[-]shield law, when 'that history explains some physical evidence, such as semen, pregnancy, or physical indications of intercourse.' " *People v. Patterson*, 2012 IL App (1st) 101573, ¶ 44 (quoting *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 186 (2001)). "The true question is always one of relevancy" (*Hill*, 289 Ill. App. 3d at 864), however,

and to be admissible, the proposed evidence must "make a meaningful contribution to the fact-finding enterprise" (*Maxwell*, 2011 IL App (4th) 100434, ¶ 76) or be of such character that "the exclusion of the evidence [would] prevent[ ] the defendant from presenting his theory of the case" (*People v. Starks*, 365 Ill. App. 3d 592, 600 (2006)). Additionally, if alternative-explanation evidence is offered to suggest that a "different culprit" committed the charged offenses, a defendant "must be able to implicate a specific third party." *Maxwell*, 2011 IL App (4th) 100434, ¶ 78. "The defendant has no right to present evidence in support of the unenlightening truism that it is always 'possible,' theoretically, that some indefinite third party committed the crime instead of the defendant–who is presumed innocent." *Id.*

¶ 44 Here, evidence that DNA from a male other than the defendant had been found on the yellow highlighter identified at trial as Defendant's Exhibit No. 1 would not have been admissible at trial. Ostensibly, the defendant's unstated theory is that he could have used the evidence to establish that someone other than he had used the highlighter to penetrate S.G.'s vagina. The defendant fails to identify who that might have been, however, and he further fails to recognize the grossly speculative nature of his suggestion.

¶ 45 As previously indicated, nothing suggests that S.G. ever had sexual relations with anyone other than the defendant, and the salient issue at trial was whether the defendant had sexually assaulted S.G. or whether she was solely responsible for her vaginal trauma. We also note that DNA can be transferred onto an object by placing the object into a person's mouth and that other than stipulating that he had given the highlighter to his

attorney following his arrest, the defendant offers no evidence as to where, when, or how he obtained it. Under the circumstances, the evidence in question would have had no bearing on the defendant's guilt and would have been inadmissible under the rape-shield statute as "baseless innuendo." *Maxwell*, 2011 IL App (4th) 100434, ¶ 82.

¶ 46 Despite the defendant's intimations to the contrary, that DNA from a male other than him might have been found on the yellow highlighter is irrelevant, and evidence to that effect does not constitute evidence "indicating that another male could have been the perpetrator of the charged offenses." A victim's alleged sexual contact with a third-party must be "more than speculative or theoretical" (*Maxwell*, 2011 IL App (4th) 100434, ¶ 79), and an ineffective-assistance-of-counsel claim cannot be sustained on the failure to offer inadmissible evidence (*People v. Orange*, 168 Ill. 2d 138, 161 (1995); *People v. Denson*, 250 Ill. App. 3d 269, 281 (1993)). We accordingly affirm the trial court's summary dismissal of the defendant's postconviction petition. Given our disposition, we need not address the State's argument that the defendant has forfeited consideration of his present claim by not raising it on direct appeal. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010) (noting that because a postconviction proceeding is a collateral attack on the trial court proceedings, "issues that could have been raised on direct appeal but were not are forfeited").

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we hereby affirm the trial court's judgment summarily dismissing the defendant's petition for postconviction relief.

¶ 49 Affirmed.