2013 IL App (1st) 101931-U

SECOND DIVISION
August 13, 2013

No. 1-10-1931

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
v.	)	
	)	No. 00 CR 14092
DUSTIN CLAY,	)	
	)	Honorable
Defendant-Appellant.	)	Thomas M. Tucker
	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

O R D E R

¶ 1 HELD: The circuit court erred by dismissing defendant's postconviction petition at the first stage of proceedings because defendant's actual innocence claim was not frivolous or patently without merit, as our supreme court's decision expanding the scope of the defense of involuntary intoxication has been held to apply retroactively to postconviction claims and defendant's assertion that he was in a drugged condition due to the unexpected side effects of prescription drugs taken under a doctor's orders at the time he committed the crimes at issue is neither fanciful nor delusional.

¶ 2 Defendant Dustin Clay appeals the first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), contending that the circuit court erred by dismissing his petition because his actual innocence claim had an arguable basis in law and fact and that the court failed to comply with the requirements of the Act by dismissing his petition without addressing his claims in a written order. For the reasons that follow, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with the first degree murder of his girlfriend, Nicole Lafin, and his two-year-old daughter, Jade. Prior to trial, a hearing was conducted regarding defendant's fitness to stand trial at which the trial court heard the testimony of Dr. Roni Seltzberg and Dr. Alexander Obolsky. Dr. Seltzberg and Dr. Obolsky were each board-certified in psychiatry and forensic psychiatry and each had interviewed defendant several times and reviewed various related police reports and medical records. Dr. Seltzberg opined within a reasonable degree of medical and psychiatric certainty that defendant was fit to stand trial with a daily dosage of Zoloft, an antidepressant, and Dr. Obolsky opined within a reasonable degree of medical and psychiatric certainty that defendant was unfit to stand trial without antipsychotic medication because he suffered from paranoid schizophrenia and experienced delusions which rendered him unable to meaningfully assist in his defense. The court gave more weight to the testimony of Dr. Seltzberg than Dr. Obolsky and found defendant fit to stand trial.

¶ 5 A bench trial ensued, in which the State presented evidence showing that defendant lived with Lafin and Jade in a condominium owned by his mother, Dinah Clay (Mrs. Clay). Lafin was

last seen alive on the evening of May 18, 2000, and Lafin's mother, work supervisor, and Mrs. Clay called the condominium to try and reach Lafin a number of times between May 19 and May 22. On May 22, 2000, defendant answered a call by Lafin's mother and told her that Lafin was not home and answered a call by Lafin's work supervisor and told her that he had not seen Lafin and did not know where she was. That same day, police officers went to the condominium to check on Lafin and met Mrs. Clay at the building. The officers and Mrs. Clay announced their presence and knocked on the doors and windows, but did not receive a response until defendant emerged from the condominium about 15 minutes later and closed the door behind him. When asked why it had taken him so long to answer the door, defendant responded that he had been sleeping. An officer entered the condominium and found the bodies of Lafin and Jade on the living room floor. Lafin's body was covered by a sheet and Jade's body was covered by a shirt, nearby which a bloody knife was found. There were no signs of forced entry. The officer then went outside, at which time defendant jumped off the porch and ran for a couple of feet before he was tackled by another officer and placed into custody. A forensic pathologist testified that Lafin and Jade both died of multiple stab wounds and that, based on the extent to which their bodies had begun to decompose, they were probably killed between May 18 and May 19, 2000. The State also presented evidence showing that on May 20, 2000, defendant rented a room at a Motel 6 in Arlington Heights and requested that he be given a room near an exit.

¶ 6 Defendant presented an insanity defense and Dr. Obolsky testified that he believed within a reasonable degree of medical and psychiatric certainty that defendant was insane at the time he killed Lafin and Jade because defendant was unable to appreciate the criminality of his conduct

due to his mental illness. Dr. Obolsky relied on the records from defendant's four psychiatric hospitalizations between February and October 1999 in reaching his opinion and testified that defendant exhibited all the symptoms of paranoid schizophrenia during those hospitalizations. Dr. Obolsky also testified that the evidence of defendant's behavior after the killings, which showed that defendant spent a night in a hotel then returned to and stayed at the condominium with the dead bodies, indicated that defendant did not appreciate the criminality of his conduct. Dr. Obolsky further testified that defendant was prescribed Risperdal in the spring of 1999 and that the records from defendant's October 1999 hospitalization indicated that he had stopped taking his medications. On cross-examination, Dr. Obolsky stated that defendant last received medication or treatment in November 1999.

¶ 7 Dr. Seltzberg testified in rebuttal for the State that while she believed defendant suffered from a mental disorder, it was not clear whether he was a schizophrenic, and that defendant was prescribed Risperdal and an antidepressant and received a medication refill in November 1999. Dr. Seltzberg also testified that, due to a lack of sufficient information, she could not reach an opinion within a reasonable degree of medical and psychiatric certainty as to defendant's sanity at the time of the killings. The State also called Dr. Stafford Henry, a forensic psychiatrist, who testified that he disagreed with Dr. Obolsky's opinion that defendant was psychotic between May 18 and June 1, 2000, and that he did not have sufficient information upon which to reach an opinion to a reasonable degree of medical and psychiatric certainty regarding defendant's sanity at the time of the killings.

¶ 8 Based on this evidence, the court found defendant guilty of the murders of Lafin and

Jade, but mentally ill. Regarding defendant's insanity defense, the court found that while the evidence showed that defendant was suffering from a mental illness or disorder, the defense had not met its burden of presenting clear and convincing evidence that defendant did not appreciate the criminality of his actions at the time of the killings. Following a sentencing hearing, the court sentenced defendant to natural life imprisonment. On appeal, this court affirmed defendant's convictions and sentence, holding that the statute establishing the defense of insanity (720 ILCS 5/6-2 (West 2000)) did not violate the United States or Illinois Constitutions, the trial court's finding that defendant was fit to stand trial was not against the manifest weight of the evidence, and the trial court's determination that defendant had not established his insanity by clear and convincing evidence was not against the manifest weight of the evidence. *People v. Clay*, 361 Ill. App. 3d 310 (2005).

¶ 9 On February 5, 2010, defendant filed a motion for leave to file an untimely petition for postconviction relief and an accompanying *pro se* postconviction petition. Defendant alleged, *inter alia*, that he was entitled to a new trial at which he could assert the affirmative defense of involuntary intoxication based on evidence showing that he was taking Zoloft and Risperdal, an antipsychotic, pursuant to a doctor's prescription shortly before he committed the crimes at issue; that he was also using Tylenol, marijuana, and alcohol at that time; and that he was not warned that Zoloft and Risperdal would have the side effect of placing him in a drugged condition. Defendant maintained that in *People v. Hari*, 218 Ill. 2d 275 (2006), which was decided about three years after his trial, our supreme court changed the defense of involuntary intoxication to include the unwarned and unexpected side effects of medication taken under a doctor's orders.

Later, in *People v. Alberts*, 383 Ill. App. 3d 374 (2008), the appellate court in the Fourth District held that the *Hari* decision was fully retroactive and applicable to postconviction proceedings. Defendant further maintained that the *Hari* and *Alberts* decisions constituted newly discovered evidence which supported a claim of actual innocence under the defense of involuntary intoxication.

¶ 10 On March 12, 2010, the court orally denied defendant's petition as frivolous and patently without merit. On April 6, 2010, defendant filed a motion for reconsideration of the denial of his petition asserting that the court failed to dismiss his petition in a written order and failed to set forth its findings of fact and conclusions of law. On June 18, 2010, the court orally denied the motion to reconsider, stating that "it will be denied for the same basis that the original one was denied."

¶ 11 ANALYSIS

¶ 12 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). To be entitled to postconviction relief, a defendant must demonstrate that he has suffered a substantial deprivation of his constitutional rights in the proceedings that resulted in the conviction or sentence being challenged. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Proceedings may consist of as many as three stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006)) and summary dismissal of a petition is appropriate at the first stage if the circuit court determines that the petition is either frivolous or patently without merit (*People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). The dismissal of a postconviction petition is reviewed *de novo*. *People v.*

Coleman, 233 Ill. 2d 366, 388-89 (1998).

¶ 13 We initially consider defendant's claim that this court should reverse the circuit court's summary dismissal of his petition due to the circuit court's failure to specifically address any of his claims or issue a written order specifying its findings of fact and conclusions of law because, if defendant is correct, there would be no need to address the other issues raised in this appeal. The State asserts that the circuit court's dismissal of defendant's petition did not violate the Act because the court was not required to issue a written order explaining its reasons for dismissing defendant's petition.

¶ 14 The Act provides that the circuit court must examine a defendant's petition and enter an order within 90 days of its filing and docketing and that, if the court determines that the petition is frivolous and patently without merit, "it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(1) (West 2008). In *People v. Porter*, 122 Ill. 2d 64, 81 (1988), our supreme court held that while it was advisable that a circuit court state its reasons for dismissing a petition as frivolous and patently without merit, the use of the term "shall" in section 122-2.1(a)(1) of the Act "does not refer to the contents of the court's order of dismissal itself, but rather to the court's duty to dismiss a petition if it is frivolous or patently without merit." Although defendant maintains that the *Porter* decision only provides that a court is not required to explain its reasons for dismissing a petition, rather than that the court is not required to issue any written order at all, the supreme court's determination that the word "shall" in section 122-2.1(a)(1) of the Act only applies to the circuit court's duty to dismiss a petition that is frivolous or patently without merit dictates that the

Act does not require a circuit court to enter a written order in dismissing a petition as frivolous or patently without merit. As such, while it would have been preferable for the circuit court in this case to enter a written order specifying the findings of fact and conclusions of law it relied upon in dismissing defendant's petition and such an order would have benefitted this court's review of defendant's appeal, the circuit court's failure to enter such an order does not constitute a violation of the Act such that reversal is required on that basis.

¶ 15 Defendant contends that the circuit court erred by dismissing his *pro se* postconviction petition at the first stage of proceedings because his actual innocence claim based on the defense of involuntary intoxication was not frivolous or patently without merit. A petition may only be dismissed as frivolous or patently without merit if it has no arguable basis in law or fact, which is the case when the petition "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In considering whether a petition is frivolous or patently without merit, all allegations set forth therein shall be taken as true and liberally construed in favor of the defendant. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 16 The State responds that the summary dismissal of defendant's petition was proper because the affidavit attached to his petition verifying that the statements set forth therein were true and correct was not properly notarized. Postconviction proceedings are commenced by the filing of a petition, verified by affidavit, in the court in which the conviction occurred. 725 ILCS 5/122-1(b) (West 2008). Unlike an affidavit filed pursuant to section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)), which shows that the allegations set forth in the petition can be objectively and independently corroborated, the affidavit required by section 122-1(b) merely confirms that

the allegations are brought truthfully and in good faith. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 21. As such, courts in this district and the Fourth District have held that a defendant's failure to properly notarize an affidavit filed under section 122-1(b) of the Act does not render the accompanying petition frivolous or patently without merit. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 85; *People v. Parker*, 2012 IL App (1st) 101809, ¶ 76-77; *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 72; *Henderson*, 2011 IL App (1st) 090923, ¶ 36; *People v. Terry*, 2012 IL App (4th) 100205, ¶ 23. While courts in the Second District have held that a petition which is not accompanied by a properly notarized affidavit filed under section 122-1(b) should be dismissed at the first stage of proceedings (*People v. Hommerson,* 2013 IL App (2d) 110805, ¶ 11, *appeal allowed* (May 29, 2013); *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011)), we agree with the prior holdings of this district and the Fourth District that the lack of a properly notarized affidavit under section 122-1(b) does not affect the substantive merit of the defendant's postconviction claims and that the failure to properly notarize such an affidavit is not a proper basis for a first-stage dismissal of a petition (see *Henderson*, 2011 IL App (1st) 090923, ¶ 34).

¶ 17 We now address whether defendant's claim has an arguable basis in law and fact. Defendant asserts that his claim has an arguable basis in law because following his conviction our supreme court held that the involuntary intoxication defense applies to a person's drugged condition from an unwarned and unexpected side effect caused by prescription drugs taken under a doctor's orders and that holding applies retroactively to his postconviction claim. In *Hari*, 218 Ill. 2d 275, our supreme court expanded the scope of the involuntary intoxication defense to include a person's drugged condition from an unwarned and unexpected side effect caused by

prescription drugs taken under a doctor's orders and in *Alberts*, 383 Ill. App. 3d 374, an appellate court in the Fourth District held that the *Hari* decision should be applied retroactively to a postconviction actual innocence claim. As such, defendant's claim is not indisputably meritless and any consideration of whether *Alberts* was wrongly decided, as the State claims, is reserved for the second stage of proceedings.

¶ 18 Defendant asserts that his actual innocence claim has an arguable basis in fact because his allegation that he was in a drugged condition at the time of the offenses due to the unexpected and unwarned side effects of prescribed drugs is neither fanciful nor delusional. A claim that has no arguable basis in fact is one that is based upon factual allegations that are either fantastic or delusional. *Brown*, 236 Ill. 2d at 185.

¶ 19 The State maintains that defendant's claim does not have an arguable basis in fact because he admitted in his petition that he had stopped taking Zoloft and Risperdal months before he committed the crimes at issue. The record shows that defendant alleged in the actual innocence claim in his petition that he was taking Zoloft and Risperdal "shortly before the crimes." While defendant also asserted in a separate claim of ineffective assistance of counsel that he stopped taking those drugs at some point prior to the crimes, we must liberally construe all allegations in defendant's favor at this stage in the proceedings (*People v. Harris*, 224 Ill. 2d 115, 126 (2007)). As such, we resolve the conflict between the factual allegations in those two claims in favor of defendant by accepting his assertion that he was taking the drugs "shortly before the crimes" as true.

¶ 20 While the State maintains that defendant's claim does not have a factual basis because his

assertion that he was taking the drugs at issue shortly before the crimes is contradicted by the evidence presented at trial, he has not established that he experienced adverse side effects from taking Zoloft and Risperdal, and evidence of his conduct before and after the commission of the crimes indicate that he was not in a drugged condition at the time, those claims relate to possible bases for the dismissal of defendant's petition at the second stage, rather than the first stage, of proceedings. As our supreme court recently reiterated, a court acts in an administrative capacity at the first stage of proceedings by screening out those petitions which are obviously without merit and the threshold for a petition's survival of the first stage of review is low. *People v. Tate*, 2012 IL 112214, ¶ 9. It is not until the second stage of proceedings that a court will determine whether the petition and any accompanying documents establish a substantial showing of a constitutional violation. *Id.* ¶ 10. At the first stage, we only consider whether defendant's claim is based on a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. As the record shows that defendant received a medication refill in November 1999 and is silent regarding the quantity of the medication included in the refill and whether or at what time defendant took the medication, defendant's assertion that he was taking the drugs at issue shortly before committing the crimes in May 2000 is neither fanciful nor delusional.

¶ 21 The State further maintains that defendant is barred from raising his actual innocence claim by principles of collateral estoppel and the law of the case doctrine because the trial court rejected defendant's claim that he did not appreciate the criminality of his conduct due to his alleged insanity when the court found that he had not established the defense of insanity and this court affirmed that finding on appeal. However, defendant's actual innocence claim is distinct

from his insanity defense because his actual innocence claim is based on the allegation that he did not appreciate the criminality of his conduct at the time of the killings because he was in a drugged condition due to the unexpected side effects of Zoloft and Risperdal, whereas his insanity defense was based on the assertion that he did not appreciate the criminality of his conduct due to his mental illness. Therefore, the trial court was not presented with any evidence of defendant's allegedly drugged condition and neither the trial court nor this court ruled on whether defendant failed to appreciate the criminality of his conduct due to such a condition. As such, we conclude that defendant's actual innocence claim has an arguable basis in fact and law and that the circuit court erred in dismissing defendant's petition at the first stage of proceedings.

¶ 22 CONCLUSION

¶ 23 Accordingly, we reverse the dismissal of defendant's postconviction petition and remand the matter to the circuit court of Cook County for second-stage proceedings under the Act.

¶ 24 Reversed and remanded.