2025 IL App (4th) 240869-U

NO. 4-24-0869

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 7, 2025
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Marshall County |
| GARY C. BERCHTOLD, | ) | No. 19CF43 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | James A. Mack, |
| | ) | Judge Presiding. |

JUSTICE VANCIL delivered the judgment of the court.
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court granted counsel's motion to withdraw, finding no arguably meritorious issues could be raised regarding the dismissal of defendant's postconviction petition at the first stage of proceedings.

¶ 2 Defendant, Gary C. Berchtold, was convicted of first degree murder, dismembering a human body, and concealing a homicidal death. Following an unsuccessful appeal, he filed a *pro se* postconviction petition in the trial court, raising multiple constitutional issues related to his conviction and sentencing. The court denied his petition at the first stage of proceedings, finding it frivolous and patently without merit. Counsel was appointed to represent defendant on appeal and subsequently filed a motion for leave to withdraw, with an attached memorandum, stating an appeal would be without arguable merit.

¶ 3 We grant counsel's motion and affirm the dismissal of defendant's postconviction petition.

¶ 4 I. BACKGROUND

¶ 5 On September 6, 2019, defendant was indicted on two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2018)), one count of dismembering a human body (*id.* § 12-20.5), and one count of concealing a homicidal death (*id.* § 9-3.4(a)). The indictment alleged that on or about August 31, 2018, defendant shot and killed Tiffini Murphy, burned her body in a firepit on his property, and then moved her remains to a different location.

¶ 6 Prior to trial, the State filed two motions to continue, one due to the COVID-19 pandemic and one due to a delay in receiving DNA results for trial. The trial court granted the State's COVID-19 motion to continue, noting that the continuance was made pursuant to Illinois Supreme Court emergency orders authorizing such continuances and that, per the orders, defendant's speedy-trial calculation would be tolled during that time. Defendant later filed a motion to dismiss his charges, alleging that his right to a speedy trial was violated because the emergency orders were unconstitutional and, even assuming the orders were constitutional and the tolled time for the speedy-trial calculation was removed, he still did not have a trial within the 120-day statutory period. See 725 ILCS 5/103-5 (West 2020). The court denied defendant's motion. Because the court ruled in the State's favor on its COVID-19 motion to continue, the State did not argue its motion to continue regarding DNA results, and the court never ruled on this motion.

¶ 7 Also before trial, the State filed a motion seeking use immunity pursuant to section 106-2.5(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/106-2.5(b) (West 2020)) for one of its prospective witness, Krystopher Williams, who was present at defendant's home on the night of Murphy's death. The trial court reviewed past statements made by Williams and determined he had a reasonable belief that he could be prosecuted with regard to certain

aspects of the testimony he would present at trial. The court granted the State's motion over defense counsel's objection, giving Williams immunity as to any incriminating information directly or indirectly derived from his trial testimony.

¶ 8 Defendant's bench trial began on June 16, 2021. The State presented the following evidence through witness testimony and recorded police interviews with defendant. Tiffini Murphy and defendant had an arrangement in which defendant allowed Murphy to stay at his house in exchange for her cleaning the residence. On January 1, 2019, Murphy's father filed a missing person report for Murphy after not having heard from her since the previous August. When interviewed by police regarding Murphy's disappearance, defendant stated that he dropped her off at a gas station in Lacon, Illinois, on the night of August 31, 2018, and had not heard from her since. In his initial interviews with police, defendant repeatedly asserted that Murphy had connections with dangerous individuals, including bikers and gang members, and suggested that her disappearance might be related to her involvement with them.

¶ 9 Williams, a distant relative of defendant's, told police he was in Chillicothe, Illinois, on August 31, 2018, and had contacted defendant for a ride back to defendant's home, where he was staying at the time. Williams initially presented the same story as defendant, telling police that defendant and Murphy picked him up from Chillicothe in defendant's truck, and the two men then dropped Murphy off at a gas station in Lacon before continuing home. However, when Williams spoke to police a second time and was informed he was facing jail time for failing to register as a sex offender, he presented a different version of events. He told police that Murphy, who was highly intoxicated and behaving belligerently, was not dropped off in Lacon, as previously stated, but instead accompanied Williams and defendant back to defendant's home. On the way there, she vomited multiple times in defendant's truck and,

according to Williams, struck defendant while he was driving, knocking his glasses off and angering him. When the three arrived at defendant's house, defendant and Williams exited the vehicle, while Murphy remained in the passenger seat, going in and out of consciousness.

¶ 10 At the time, a recreational vehicle (RV) that Williams had purchased to dismantle for scrap metal was parked on defendant's property. Defendant asked Williams if he wanted an old recliner that had been left inside. Williams stated he did not, and defendant removed the recliner from the RV and placed it between the house and a burn pit on the property. Defendant then told Williams to go inside and not come back out, no matter what he heard. Williams noticed that defendant had a revolver on him. Williams went into the house and, a short while later, heard six gunshots. Defendant then came into the house and asked Williams if he had a lighter or matches. Later, while lying in bed, Williams saw the glow of a fire through his bedroom window. Defendant kept a large fire burning in the firepit for four days. When Williams asked where Murphy was, defendant told him she was "gone."

¶ 11 Williams told police that after the fire died out, defendant disposed of the burn pile at another location in two separate trips. Williams accompanied defendant on the second one. Based on Williams's information, police obtained a search warrant for a farm in Edelstein, Illinois, where they found burned pieces of human bones, pieces of metal and plastic, and two fired cartridge cases. Williams told police that a week or two after Murphy disappeared, he had a conversation with defendant in which defendant told him he had tied Murphy to the recliner, shot her six times in the chest, and burned her body. Defendant told Williams to tell the police that they dropped Murphy off in Lacon.

¶ 12 Police interviewed defendant again, confronting him with the additional information they obtained regarding Murphy's disappearance. Defendant then admitted he did

not drop Murphy off in Lacon but brought both her and Williams back to his home. He stated that Williams and Murphy were arguing in the truck, and when they got to the house, they got into a physical fight involving defendant's gun. He could not give details about who had the gun or how it was obtained. He stated that all three of them had their hands on the gun during the struggle. Defendant told police that in the midst of him trying to break up the fight between Murphy and Williams, Murphy was accidentally shot. Defendant burned her body in a panic, and although he burned the recliner at the same time, he denied ever tying her to it.

¶ 13 Experts testified at trial that the bones found in the burn pile did not contain sufficient DNA to identify them as belonging to Murphy. Additionally, due to the state of the bones and how little was recovered, it was impossible to determine the cause of death of the person to whom the bones belonged. Defendant did not present evidence or testify in his defense.

¶ 14 The trial court found defendant guilty of first degree murder for personally discharging a firearm that caused the death of another person, dismembering a human body, and concealing a homicidal death. The court sentenced him to 45 years for the first degree murder count, with a firearm enhancement of 25 years; 20 years for the dismemberment count, to run consecutively with the murder sentence; and 5 years for the concealment count, to be served concurrently with the dismemberment sentence but consecutive to the murder sentence.

¶ 15 Defendant appealed, arguing the trial court erred in its handling of the State's pretrial motion for use immunity of Williams. *People v. Berchtold*, 2023 IL App (3d) 210464-U, ¶ 13. Specifically, defendant argued the court should not have listened to interviews between Williams and police in order to determine if Williams had a fifth amendment privilege. *Id.* He argued that the information contained in the interviews—which were not admitted at trial—improperly influenced the court's later decision. *Id.* ¶ 16. The Third District affirmed defendant's

conviction, finding defendant's argument was rebutted by the record where the court explicitly stated it had not considered any information learned in Williams's interviews when it made its decision at trial. *Id.*

¶ 16 On March 20, 2024, defendant filed a *pro se* postconviction petition. In his petition, he raised the following six arguments: (1) his *de facto* life sentence violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because his "intellectual impairments" created "diminished culpability"; (2) he was actually innocent where he was not present at his home when Murphy was killed and his confession was the result of police coercion, (3) trial counsel was ineffective for failing to call two separate witnesses who would testify that there was not a fire at defendant's residence on the night Murphy was killed; (4) his due process rights were violated where elements of the crime were not proven beyond a reasonable doubt and the State knowingly used perjured testimony from Williams; (5) he was denied his right to a speedy trial; and (6) "appellate counsel was ineffective for failure to brief and argue all matters of record related to trial counsel's errors." Defendant's petition concluded with a request that the trial court "grant [him] further sufficient time and leave to amend this petition to add additional claims and supporting affidavits and factual material as his investigation continues."

¶ 17 At the same time he filed his petition, defendant filed an accompanying "appendix," which included the following five documents: (1) an "affidavit of affirmation," signed by defendant, stating that everything contained in his petition was "true and accurate" to the best of his knowledge and that the matter was taken in good faith; (2) an "affidavit," again signed by defendant, stating that his petition had merit and was filed in good faith; (3) a motion for the appointment of counsel; (4) "Exhibit A," a copy of the supreme court's order in *In re*

*Illinois Courts Response to COVID-19 Emergency*, M.R. 30370 (eff. May 20, 2020), which modified prior orders related to COVID-19 and granted the chief judge of each circuit the authority to continue trials if necessary and to remove the continuances from speedy-trial calculations; and (5) "Exhibit B," a copy of the State's pretrial motion to continue defendant's trial in order to obtain DNA evidence.

¶ 18 The trial court dismissed defendant's petition on May 14, 2024, finding it to be frivolous and patently without merit. In its written order, the court first noted that "no attachments, exhibits, or substantive affidavits" were offered by defendant in support of the petition. It then undertook a brief substantive review of defendant's claims, finding them all to be "conclusory, speculative, or entirely rebutted by the record."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, appointed counsel moves to withdraw, asserting that defendant's appeal presents no arguably meritorious issues for review. We agree.

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)) provides a method by which criminal defendants may challenge the constitutionality of their convictions under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); 725 ILCS 5/122-1(a)(1) (West 2022). In cases not involving the death penalty, postconviction proceedings are broken down into three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, a trial court must independently review a petition within 90 days of its filing to determine if it is frivolous or patently without merit. *Id.* A petition is frivolous or patently without merit where its allegations, taken as true and liberally construed, have no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 11-12. "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. An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.* at 16. A fanciful factual allegation is one that is fantastic or delusional. *Id.* To survive summary dismissal at the first stage, petitions need only present a limited amount of detail and need not set forth a claim in its entirety or include citations to legal authority. *Edwards*, 197 Ill. 2d at 244.

¶ 23 Additionally, section 122-2 of the Act requires a postconviction petition to have "affidavits, records, or other evidence supporting its allegations" attached to it, or to explain the absence of such documents. 725 ILCS 5/122-2 (West 2022). This requirement is distinct from a separate requirement found in section 122-1(b) of the Act (*id.* § 122-1(b)), which states that a postconviction petition must be verified by affidavit. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The purpose of the verification requirement of section 122-1 is to confirm that the allegations of the petition are brought truthfully and in good faith. *Id.* at 67. The affidavit requirement of section 122-2, on the other hand, "shows that the verified allegations are capable of objective or independent corroboration." *Id.* "To equate the two is not only to confuse the purposes of subjective verification and independent corroboration but also to render the 'affidavits, records, or other evidence' requirement of section 122-2 meaningless surplusage." *Id.* The failure to comply with the requirement of section 122-2 is alone grounds for a first-stage dismissal. *People v. Delton*, 227 Ill. 2d 247, 255. We review the dismissal of a postconviction petition at the first stage *de novo*. *Id.*

¶ 24 We note at the outset that defendant has failed to support the majority of his claims with the necessary "affidavits, records, or other evidence," as required by section 122-2 of the Act. 725 ILCS 5/122-2 (West 2022). Although he filed two affidavits on the same day as his

petition, these affidavits merely state that the petition is true, accurate, and filed in good faith. They therefore fulfill the verification requirement of section 122-1, but they are neither the "affidavits, records, or other evidence" required by section 122-2 to support the allegations comprising defendant's claims, nor, alternatively, do they explain why such evidence is not attached. See *id.* Defendant's petition merely acknowledges that such evidence is missing and requests the trial court grant him additional time to add "supporting affidavits and factual material as his investigation continues." This is insufficient to comply with section 122-2. See *People v. Matthews*, 2022 IL App (4th) 210752, ¶ 64 (finding the defendant's affidavit stating that he was " 'currently in the process' " of obtaining a supporting document and would attach it at a later point in proceedings was not an explanation of the document's absence). The lack of compliance with section 122-2 is fatal to defendant's first, second, third, fourth, and sixth arguments. See *Delton*, 227 Ill. 2d at 255. Any contention to the contrary would be frivolous.

¶ 25 We acknowledge that defendant filed two "Exhibits" at the same time as his petition: the previously mentioned supreme court order regarding COVID-19 continuances and the State's motion to continue defendant's trial in order to obtain DNA results. Both exhibits pertain to defendant's fifth argument that he was denied the right to a speedy trial. However, even if we were to assume that these documents fulfilled the requirements of section 122-2, we find defendant's fifth argument nevertheless fails to state the gist of a constitutional claim. Defendant argues, first, that the supreme court's order was unconstitutional where it "abrogate[d] trial rights to some but not all, depending on their zip code." This appears to be based on the fact that the order allowed each circuit's chief judge to decide individually, based on a number of factors, when that circuit would return to hearing court matters. As a result, each circuit was on a separate schedule, with some defendants' statutory speedy-trial calculations being tolled while

others were not. However, in *People v. Mayfield*, 2023 IL 128092, ¶ 31, our supreme court determined that the administrative orders entered by the court in response to COVID-19 were constitutional and, critically, superseded the statute setting out the 120-day speedy-trial time period, which defendant claims was violated. See 725 ILCS 5/103-5(a) (West 2022). Because our supreme court has already determined that the court order supersedes the statute, defendant's argument that the order is unconstitutional, lacks an arguable basis in law. Put another way, the order cannot be unconstitutional for affecting the application of a statute that it supersedes.

¶ 26 Additionally, defendant argues that he was denied the right to a speedy trial where the trial court granted the State's motion to continue in order to obtain DNA results because the State "did not demonstrate due diligence to get the results in time for use at trial." However, the record clearly shows that the court never granted the State's motion for a continuance related to obtaining the DNA results. That motion was never argued nor ruled upon by the court. Therefore, defendant's argument that the motion was erroneously granted and violated his right to a speedy trial is without merit.

¶ 27 As a final matter, we note that an exception to the evidentiary requirements of section 122-2 exists where a defendant alleges ineffective assistance of counsel and "the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *People v. Hall*, 217 Ill. 2d 324, 333 (2005). In such a situation, the failure to attach supporting evidentiary material, or explain its absence, may be excused. *Id.* However, we do not find this exception applicable in the present case. In his petition, defendant alleged ineffective assistance of both trial and appellate counsel. Yet, his allegations were not based on private consultations between himself and his attorney which could only have yielded the attorney's affidavit as evidence. See *id.* He argued trial counsel was ineffective for failing to call two

witnesses, an individual named Brittany Smith and "an expert in the field of google image," both of whom would testify to the lack of a fire on his property on the night of Murphy's death. Evidentiary support of this argument may have been found in affidavits from Smith or the unnamed "expert" or the Google images of his property to which the expert would presumably testify, yet defendant did not attach this information to his petition.

¶ 28 Similarly, it is not clear that defendant's claim of ineffective assistance of appellate counsel is based on only private conversations between defendant and counsel, as it is not clear what exactly defendant's claim is based on at all. In raising this claim, defendant offers only a single, conclusory sentence: "Appellate counsel was ineffective for failure to brief and argue all matters of record related to trial counsel's errors." In addition to failing to allege specific factual contentions, this argument does not allow us to conclude that the only supporting evidence defendant could have offered was the affidavit of his appellate counsel. If nothing else, the same affidavits from the witnesses his trial counsel allegedly failed to call would support his assertion that appellate counsel was ineffective for not raising trial counsel's ineffectiveness.

¶ 29 Defendant's failure to attach supporting documents to his petition in accordance with section 122-2 of the Act, or to explain the absence of these documents, was fatal to his petition and justified the trial court's summary dismissal. *Delton*, 227 Ill. 2d at 255. Further, the only claim arguably supported by additional documentation, his speedy-trial claim, lacked an arguable basis in law. As a result, no nonfrivolous issues may be raised on appeal.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 32 Affirmed.