2024 IL App (5th) 220766-U

NO. 5-22-0766

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 15-CF-1388
	)	
HAYZE L. SCHOONOVER,	)	Honorable
	)	Adam M. Dill,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Vaughan and Justice Boie concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the circuit court's summary dismissal of defendant's postconviction petition at the first stage of the proceedings and remand for further proceedings, where the petition stated the gist of a constitutional claim of ineffective assistance of defense counsel.

¶ 2 Following a jury trial in the Champaign County circuit court, defendant, Hayze L. Schoonover, was convicted of three counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and sentenced to consecutive imprisonment terms totaling 85 years. Defendant's convictions and sentences were ultimately affirmed on direct appeal. *People v. Schoonover*, 2021 IL 124832; *People v. Schoonover*, 2022 IL App (4th) 160882-UB.[1] Defendant

[1]We note that the trial proceedings took place under the jurisdiction of the Fourth District. After the Fourth District issued decisions on direct appeal, Champaign County was redistricted from the Fourth District to the Fifth District. Ill. S. Ct., M.R. 30858 (eff. Dec. 8, 2021).

then filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2022)), raising various claims of ineffective assistance of defense counsel and appellate counsel. The circuit court dismissed the petition at the first stage of the proceedings, finding that defendant's claims were either forfeited, barred by *res judicata*, or otherwise frivolous and patently without merit. Defendant appeals, arguing that the circuit court erred by summarily dismissing his postconviction petition. For the following reasons, we reverse and remand for further proceedings.

¶ 3 I. Background

¶ 4 On September 24, 2015, the State charged defendant by information with four counts of predatory criminal sexual assault of a child, following allegations that he had repeated sexual contact with his minor niece, M.L. The matter proceeded to a three-day jury trial, beginning on August 22, 2016.

¶ 5 At the outset of defendant's trial, the circuit court expressed its intention to invoke section 115-11 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-11 (West 2014)) to effectuate a temporary closure of the courtroom during M.L.'s testimony. The following exchange took place:

> "THE COURT: When [M.L.] testifies, I want the courtroom cleared except for family members.
>
> MR. LARSON [(ASSISTANT STATE'S ATTORNEY)]: Thank you, Your Honor.
>
> MR. ALLEGRETTI [(DEFENSE ATTORNEY)]: I'm sorry, Judge. [Defendant's] family members are here. Is that—are you barring them?
>
> THE COURT: Out."

¶ 6 The circuit court returned to the issue of closing the courtroom after addressing additional matters. The court stated:

"All right. Well pursuant to [section 115-11 of the Code], where the alleged victim of the offense is a minor under eighteen years of age, the court may exclude from the proceedings while the victim is testifying all persons who, in the opinion of the court, do not have a direct interest in the case except the media. So I'm going to order that the courtroom be cleared, with the exception of the media, when [M.L.] testifies. I will note [defense counsel's] objection."

The State indicated that M.L.'s grandmother was present and wanted to remain in the courtroom during M.L.'s testimony. The court responded that M.L.'s grandmother "would be someone who [was] allowed to remain."

¶ 7 After the parties presented opening statements and before M.L. testified, the following colloquy took place outside the presence of the jury:

"THE COURT: All right. At this point pursuant to [section 115-11], I'm going to clear the courtroom. Mr. Larson, you said the grandmother is going to be present.

MR. LARSON: Yes, Your Honor.

THE COURT: Who else?

MR. LARSON: Your Honor, her father and stepfather[,] we would also ask to be present.

THE COURT: Who is in the back of the courtroom? Who is the gentleman sitting there? And the rest of the people on this side. All right. As soon as we get done with her testimony, I will bring the rest of the people in the courtroom."

The court also allowed the media to remain in the courtroom during M.L.'s testimony.

¶ 8 After M.L. testified, the circuit court reopened the courtroom. The courtroom remained open for the remainder of defendant's trial. The State later recalled M.L., and M.L. testified in open court.

¶ 9 Following deliberations, the jury found defendant guilty of three counts of predatory criminal sexual assault of a child. The circuit court sentenced defendant to consecutive terms of imprisonment, totaling 85 years.

¶ 10 On September 28, 2016, defense counsel filed a posttrial motion for new trial. Defense counsel did not raise an issue relating to the partial closure of the courtroom at trial. The circuit court denied the posttrial motion.

¶ 11 Defendant filed a direct appeal, arguing that (1) the circuit court violated his right to a public trial by barring his family members from the courtroom during the minor victim's trial testimony, (2) defense counsel provided ineffective assistance, (3) and the court abused its discretion during sentencing. *People v. Schoonover*, 2019 IL App (4th) 160882, ¶ 1. The Fourth District concluded that defendant forfeited review of the issue regarding the denial of his right to a public trial and the court's violation of section 115-11 of the Code but considered whether the circuit court's closure of the courtroom constituted second-prong plain error. *Id*. ¶¶ 19-21. In considering this issue, the Fourth District noted that defendant's appellate counsel attempted to supplement the appellate record with an affidavit of defense counsel by attaching the affidavit to the appellate brief, but the Fourth District declined to consider the affidavit because it was not part of the record on appeal. *Id*. ¶ 25. Despite this, the Fourth District agreed with defendant that the record showed a clear or obvious error occurred when the circuit court, pursuant to section 115-11, *sua sponte* ordered persons excluded from the courtroom during M.L.'s testimony without first

inquiring and then determining whether they had a direct interest in the case. *Id*. ¶ 26. The Fourth District reasoned as follows:

> "Although the court acted properly in holding that the media was exempt from its order and limiting its closure to only the time period during which M.L. testified, the record otherwise reflects that it erred by failing to determine whether individuals it excluded from the courtroom had 'a direct interest in the case.' Significantly, defense counsel expressly brought the presence of defendant's 'family members' to the court's attention. However, without making any inquiry into those individuals or their interest in the case, the court directed them '[o]ut' of the courtroom. The court made no explicit finding that these individuals lacked a direct interest in the case, nor can we assume an implicit finding where there was no inquiry made into the nature of their relation to defendant. At the very least, once defendant's family members were brought to the court's attention, it should have inquired as to who those individuals were and their interest in the case. [Citation.] The court's failure to make any inquiry indicates that it did not make an informed decision as to whether the family members brought to its attention had a direct interest in the proceedings prior to excluding them. Such action amounted to a blanket exclusion of anyone other than members of M.L.'s family and the media and constituted a violation of statutory requirements." *Id*. ¶ 29.

Accordingly, the Fourth District reversed and remanded for a new trial on that basis without addressing the remaining issues defendant raised on appeal. *Id*. ¶¶ 45, 56.

¶ 12 Our supreme court granted the State's petition for leave to appeal. *Schoonover,* 2021 IL 124832, ¶ 3. On review, our supreme court, "[f]inding no objection to the removal of spectators from the courtroom on the record nor finding the issue raised in a posttrial motion, as well as

recognizing defendant's acknowledgment that he failed to preserve his claim," concluded that defendant forfeited review of his claim that the circuit court erred by closing the courtroom during M.L.'s testimony. *Id.* ¶ 23.

¶ 13 Our supreme court next considered whether defendant's forfeiture could be excused under the plain error doctrine. *Id.* ¶ 25. In considering whether a clear or obvious error occurred, our supreme court noted that section 115-11 of the Code allowed the circuit court to exclude from the proceedings while the victim was testifying, all persons, who, in the opinion of the circuit court, did not have a direct interest in the case, except the media. *Id.* ¶¶ 30-32. Our supreme court noted that in *People v. Falaster*, 173 Ill. 2d 220, 226-28 (1996), it affirmed the appellate court on a similar issue where "(1) the trial court did not close the trial (instead it ordered the removal of spectators during the testimony of the 14-year-old victim), (2) the persons excluded were not immediate family members of the defendant and thus did not have a direct interest in the outcome of the case, and (3) the court did not impose any restrictions on the media, who were allowed continued access to the proceedings." *Id.* ¶ 34.

¶ 14 Our supreme court noted that, as in *Falaster*, the circuit court did not close the trial but exercised its discretion and ordered the temporary removal of spectators from the courtroom during M.L.'s testimony pursuant to section 115-11 of the Code. *Id.* ¶ 35. Our supreme court also noted that, like *Falaster*, the media was allowed to remain in the courtroom during M.L.'s testimony. *Id.* Our supreme court next noted:

> "Additionally, the record does not reflect that the persons excluded were immediate family members or otherwise interested parties. While defense counsel may have brought the presence of 'family members' to the attention of the trial court, the record is devoid of any clear indication that such family members were immediate family members or that any

family members were in fact excluded. Instead, the record is clear the court was amenable to requests of allowing additional family members to remain during M.L.'s testimony to include her grandmother and stepfather. Further, when the court inquired as to the unidentified remaining spectators, the record does not reflect that defense counsel—or the spectators—identified those persons as family members, much less immediate family members or otherwise interested parties, despite the court having read the statute and its limitations almost verbatim in open court. We will not postulate that those unidentified spectators were the family members that defense counsel previously referenced, nor will we presume the unidentified spectators had a direct interest in the case." *Id.* ¶ 36.

¶ 15 Accordingly, our supreme court reversed the Fourth District's decision, finding no clear or obvious error under section 115-11 of the Code or the sixth amendment (U.S. Const., amend. VI). *Id*. ¶¶ 41, 48. Our supreme court remanded the matter back to the appellate court to address all remaining issues. *Id*. ¶ 52. On remand, the Fourth District affirmed defendant's convictions and sentences. *Schoonover*, 2022 IL App (4th) 160882-UB.

¶ 16 On August 23, 2022, defendant filed a *pro se* petition for postconviction relief raising various claims. Relevant here, defendant claimed that defense counsel was ineffective for failing to inform the circuit court of the presence of his immediate family in the courtroom and the desire of his family to remain in the courtroom during M.L.'s testimony. In support, defendant alleged that defense counsel "made a general statement" to the court that his family was present, and that counsel did not object when the court ordered his family out of the courtroom. Defendant also alleged that defense counsel did not object when the court discussed the closure on two additional occasions before M.L. testified. Defendant alleged that defense counsel did not inform the circuit court that his father and stepmother were present at trial and wanted to remain in the courtroom

during M.L.'s testimony, despite defense counsel's awareness that defendant's father and stepmother were present. Defendant further alleged that defense counsel advised defendant, his father, and his stepmother that the law only allowed M.L.'s family to remain in the courtroom. Defendant also alleged that defense counsel advised defendant's father and stepmother that they would be barred from the rest of defendant's trial if they raised any objection to their removal during M.L.'s testimony. Defendant alleged that defense counsel's failure to inform the court of the presence of his father and stepmother led to defendant "being denied a public trial." Defendant alleged that denial of a public trial was structural error, and that prejudice was presumed. Defendant attached affidavits from defense counsel and his father in support of these allegations. In addition, defendant alleged that appellate counsel was ineffective for attempting to supplement the record with the affidavit from defense counsel and shifting blame to the circuit court, rather than raising the issue of defense counsel's ineffectiveness.

¶ 17 On November 3, 2022, following a hearing, the circuit court entered an order dismissing defendant's *pro se* postconviction petition at the first stage of the proceedings. The court noted that the issue regarding defendant's right to a public trial and the circuit court's application of section 115-11 of the Code "ha[d] been extensively appealed and litigated at both the Fourth District and the Supreme Court." The court noted that "[t]he Supreme Court found no clear or obvious error under section 115-11 and no violation of [defendant's] sixth amendment right to a public trial." Accordingly, the court concluded that all claims in the petition, other than the ineffective assistance of appellate counsel claim, were barred by *res judicata*. The court, relying on our supreme court's decision in *Schoonover*, 2021 IL 124832, also found that any claims of ineffective assistance of counsel based on the closure of the courtroom failed to state the gist of a constitutional claim and were frivolous or patently without merit. Thus, the court concluded that

defendant failed to state the gist of a constitutional claim and that defendant's claim was frivolous and patently without merit. For similar reasons, the court found that defendant's claim of ineffective assistance of appellate counsel failed. This appeal followed.

¶ 18 II. Analysis

¶ 19 On appeal, defendant argues that the circuit court erred when it summarily dismissed his *pro se* postconviction petition at the first stage of the proceedings. The Post-Conviction Hearing Act sets forth a three-stage procedure through which a defendant may challenge his or her convictions based on allegations of a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of postconviction proceedings, the circuit court determines whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition is considered frivolous or patently without merit if the petition's allegations, taken as true, fail to state the gist of a meritorious constitutional claim. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The court may summarily dismiss a petition as frivolous or patently without merit if the petition has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16; 725 ILCS 5/122-2.1(a)(2) (West 2014). "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." *Hodges*, 234 Ill. 2d at 16. The petition may only contain a limited amount of detail but must allege sufficient facts to state an arguable constitutional claim. *Id.* at 9. This court reviews the circuit court's dismissal of a petition at the first stage of the proceedings *de novo*. *Id*.

¶ 20 The petition must be supported by "affidavits, records, or other evidence *** or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014); *Collins*, 202 Ill. 2d at 65. The

requirement set forth in section 122-2 serves to establish that the petition's allegations are capable of "objective or independent corroboration." *Collins*, 202 Ill. 2d at 67; *People v. Allen*, 2015 IL 113135, ¶ 34. The documents must "identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *People v. Delton*, 227 Ill. 2d 247, 254 (2008); *Allen*, 2015 IL 113135, ¶ 34.

¶ 21 Defendant asserts that his petition "states an arguable claim that he was denied his right to effective assistance because counsel failed to establish that his immediate family members, with a direct interest in the trial, were excluded from the courtroom during M.L.'s testimony pursuant to 725 ILCS 5/115-11." We agree.

¶ 22 A claim of ineffective assistance of counsel is evaluated under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that he or she suffered prejudice as a result of counsel's deficient performance. *Hodges*, 234 Ill. 2d at 17. At the first stage of postconviction proceedings, "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." *Id.*

¶ 23 Here, defendant's petition sets forth sufficient facts to state the gist of a constitutional violation of his right to effective assistance of counsel. The petition alleged that defense counsel "made a general statement" to the circuit court that his family was present, and that counsel did not object when the court ordered his family out of the courtroom. The petition further alleged that defense counsel advised defendant, his father, and his stepmother that the law only allowed M.L.'s family to remain in the courtroom. The petition also alleged that defense counsel advised

defendant's father and stepmother that they would be barred from the rest of defendant's trial if they raised any objection to their removal during M.L.'s testimony.

¶ 24 Defendant's petition additionally satisfied the corroboration requirements of section 122-2 of the Code. Defendant attached to the petition the affidavits of defense counsel and his father, which provided independent corroboration of the relevant allegations in defendant's petition. Specifically, defense counsel attested in his affidavit that defendant's father, Sam Schoonover, and defendant's stepmother, Karen Schoonover, were present at defendant's trial. Defendant's father attested that he was present at defendant's trial with defendant's stepmother, Karen Schoonover, from August 22, 2016, to August 24, 2016. Defendant's father attested that defense counsel advised him that he could not be present in the courtroom when M.L. testified. Defendant's father also attested that defense counsel advised him that the law only allowed M.L.'s family to be present during her testimony and that if he raised any objection, he would be barred from the rest of defendant's trial.

¶ 25 We reject the State's assertion that defendant's petition and supporting affidavits failed to show that his father and stepmother "were actually excluded from the courtroom by the circuit court." The record reveals that the circuit court ordered all persons, aside from M.L.'s family members and the media, out of the courtroom during M.L.'s testimony. The allegations in defendant's petition and the supporting affidavits, taken as true, indicate that defendant's father and stepmother were present at trial and were told that they would be excluded from the courtroom during M.L.'s testimony. Thus, we conclude that defendant's petition sets forth sufficient facts to state the gist of a constitutional violation of his right to effective assistance of counsel.

¶ 26 In addition, there was an arguable legal basis for defendant's ineffective assistance claim. The petition additionally alleged that defense counsel's failure to inform the circuit court of the

presence of his father and stepmother led to defendant "being denied a public trial." The petition alleged that denial of a public trial was structural error, and that prejudice was presumed. We reject the State's assertion that this claim was either forfeited or barred by *res judicata*. It is well settled that a postconviction claim is forfeited "only if it could have been raised on direct appeal but was not." *People v. Moore*, 2022 IL App (1st) 192290, ¶ 34 (citing *People v. Tate*, 2012 IL 112214, ¶ 8). Here, as our supreme court noted, "the record does not reflect that the persons excluded were immediate family members or otherwise interested parties." *Schoonover*, 2021 IL 124832, ¶ 36. Accordingly, defendant could not have raised this claim of ineffective assistance of defense counsel on direct appeal, as the claim was based on information not contained within the trial record.

¶ 27 For similar reasons, defendant's claim of ineffective assistance was not barred by *res judicata*. The doctrine of *res judicata* bars only those claims that were "actually decided" on direct appeal. *Moore*, 2022 IL App (1st) 192290, ¶ 35 (quoting *People v. Harris*, 206 Ill. 2d 1, 42 (2002)). Here, defendant's claim was never "actually decided" because the record was insufficient to demonstrate that the persons excluded from the courtroom were defendant's immediate family members or otherwise interested parties. See *Schoonover*, 2021 IL 124832, ¶ 36. As defendant correctly notes, neither the Fourth District nor our supreme court considered the affidavits of defense counsel and defendant's father when deciding the case. Thus, we conclude that the issue was not one that could have been considered on direct appeal, making postconviction proceedings the proper course of action for defendant to raise this claim.

¶ 28 We also find it arguable that defense counsel's performance was deficient, where counsel failed to specifically inform the circuit court that defendant's father and stepmother were present and counsel failed to raise a specific objection to their exclusion during M.L.'s testimony. We note

that defense counsel's failures precluded the Fourth District and our supreme court from considering this specific issue on appeal. Section 115-11 of the Code provides:

> "In a prosecution for [certain sex offenses, including predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2014))], where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." 725 ILCS 5/115-11 (West 2014).

¶ 29 In applying these principles to the facts of the present case, our supreme court concluded that the circuit court did not close the courtroom but, instead, removed certain persons from the courtroom as permitted by section 115-11 of the Code. Our supreme court also noted that the circuit court allowed the media to remain in the courtroom during M.L.'s testimony. Regarding persons with a direct interest in the case, our supreme court concluded that no clear or obvious error occurred based, in part, on its determination that "the record does not reflect that the persons excluded were immediate family members or otherwise interested parties." *Schoonover*, 2021 IL 124832, ¶ 36. Our supreme court added that "[w]hile defense counsel may have brought the presence of 'family members' to the attention of the trial court, the record is devoid of any clear indication that such family members were immediate family members or that any family members were in fact excluded." *Id*. Our supreme court went on to note that "when the [trial] court inquired as to the unidentified remaining spectators, the record does not reflect that defense counsel—or the spectators—identified those persons as family members, much less immediate family members or otherwise interested parties, despite the court having read the statute and its limitations almost verbatim in open court." *Id*. Our supreme court declined to both "postulate that those unidentified

spectators were the family members that defense counsel previously referenced" and "presume the unidentified spectators had a direct interest in the case." *Id*.

¶ 30 In our view, it is arguable that our supreme court would have reached a different conclusion had defense counsel made an adequate record on which defendant's claim could have been reviewed on direct appeal. As a result, we conclude that defense counsel's failure to inform the circuit court of the presence of defendant's immediate family members and counsel's failure to specifically object to their removal arguably constituted deficient performance that resulted in prejudice to defendant.

¶ 31 Therefore, we conclude that defendant's petition set forth sufficient facts and supporting affidavits to state the gist of a claim of ineffective assistance of counsel. Accordingly, we cannot say that defendant's petition lacked an arguable basis in fact or law.

¶ 32 III. Conclusion

¶ 33 For the foregoing reasons, we reverse the order of the circuit court of Champaign County and remand the matter for further proceedings.

¶ 34 Reversed and remanded.