No. 124992

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JUSTIN KNAPP Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-16-0162. There on appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois, No. 08 CF 562. Honorable Sharon L. Prather, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

THE SECOND DISTRICT APPELLATE COURT ERRED IN AFFIRMING THE CIRCUIT COURT'S DISMISSAL OF KNAPP'S FIRST-STAGE POST-CONVICTION PETITION WHERE IT APPLIED TOO STRINGENT OF A STANDARD AND MISUNDERSTOOD KNAPP'S CLAIM.

As an initial matter, the State does not address defendant's argument that the appellate court applied too stringent of a standard in affirming the dismissal of his post-conviction petition. Instead, the State merely argues that the appellate court reached the correct result (State's Brief at 17-18). The result simply *cannot* be correct on a first-stage post-conviction petition where the appellate court expected defendant, a non-attorney, to prove that but for counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *People v. Knapp*, 2019 IL App (2d) 160162, ¶ 38. The result simply *cannot* be correct where the appellate court expected defendant, a non-attorney, to overcome the second-stage presumption that trial counsel's actions were a result of trial strategy. *Knapp*, 2019 IL App (2d) 160162, ¶ 38. This overly stringent, second-stage reasoning used by the appellate court in affirming the first-stage dismissal of defendant's post-conviction petition is relevant in determining whether the result was correct—and it was not.

The State argues that the appellate court did not misunderstand defendant's argument because the court treated it as an argument that counsel prevented defendant from testifying due to the cases defendant cited below (State's Brief at 16-17). Whether defendant's argument is categorized as "counsel told me I

could not legally testify because my claims were not corroborated by evidence" or "counsel gave me erroneous advice which caused me not to testify" is irrelevant. Either way, defendant presented the gist of a constitutional claim that defense counsel was ineffective for providing bad advice. It is clear that the appellate court misunderstood defendant's argument because it found that the claim was positively rebutted by the record. An off-record conversation with defense counsel cannot be positively rebutted by the record. *Knapp*, 2019 IL App (2d) 160162, ¶¶ 39-41. The fact that defendant agreed on-record that he discussed his decision whether to testify with counsel in no way rebuts his claim that counsel was ineffective for giving bad advice off-record. Furthermore, the State cites the majority's finding that defendant "made no mention of any pressure from counsel" (State's Brief at 19). If counsel had told defendant that he could not testify because he had no corroborative evidence, defendant would not necessarily have viewed that as "pressure," just advice about the law. The specifics of defendant's conversation with defense counsel could be explored further at a third-stage evidentiary hearing.

The State reiterates the majority's finding that defendant made no contemporaneous assertion that he wished to testify (State's Brief at 18-20). The State misstates defendant's argument when it asserts that "defendant concedes that he failed to explicitly tell counsel that he desired to testify" (State's Brief at 20). What defendant said in his opening brief was that it could be inferred that defendant made a contemporaneous assertion to counsel prior to trial and again at the close of evidence, even if defendant did not have the legal knowledge to explicitly phrase it as such in his post-conviction petition (Def's Brief at 17). Defendant spoke with counsel pre-trial and at the conclusion of Avitia's testimony

about his proposed testimony (C505-06). In his affidavit, defendant said that defense counsel "told [defendant] that because there was no evidence to support [his] story, [he] could not testify" (C569). Defendant also stated, "During my trial, Mr. Sugden again told me that there had to be evidence supporting my version of events before he would let me testify. And since there still was nothing supporting me, I could not testify in my own defense" (C569). No *pro se* defendant is going to have the legal knowledge to say, "I made a contemporaneous assertion of my desire to testify," which is why the first-stage threshold for post-conviction petitions is so low.

Furthermore, defendant urges this Court to find that *People v. Brown*, 54 Ill. 2d 21 (1973), and its progeny do not apply where, as here, a defendant says his attorney told him the law would preclude him from testifying. Having received that advice, it is illogical to require that a defendant reassert his right to testify. The federal Seventh Circuit Court of Appeals has expressed disfavor with this principle. In a recent opinion, Circuit Judge Flaum cogently wrote,

> Indeed, we are troubled by the obligation that Illinois caselaw appears to impose upon a defendant to contemporaneously assert a right to testify in circumstances where defense counsel has just silenced the defendant. Perhaps the Illinois Supreme Court will find occasion to take another look at its approach when it considers *Knapp* later this term.

Hartsfield v. Dorethy, 949 F.3d 307, 315, n.5 (7th Cir. 2020). After defense counsel incorrectly advised defendant that he was not legally permitted to testify because there was not corroborating evidence to support his version of events, defendant should not be required to prove he reasserted his right to testify.

Contrary to the State's argument that counsel "simply gave his professional opinion *** that testifying was a 'bad idea,'" defendant received advice from counsel that was patently false and that caused him to involuntarily relinquish his right

to testify (State's Brief at 20). It is not the law in Illinois that a defendant cannot testify on his own behalf unless there is corroborating evidence available to support his claims. Thus, the slippery slope fallacy from *People v. Coleman*, 2011 IL App (1st) 091005, that the State cites to is not applicable here (State's Brief at 20). Defendant has an arguable claim of ineffective assistance of counsel, not because counsel told him testifying would be a "bad idea," but because counsel's ineffective advice caused defendant to relinquish his fundamental right to testify. Along this same vein, the State concludes that counsel's performance was not deficient because counsel's advice not to testify was correct based on the evidence (State's Brief at 23). The choice whether or not to testify is one of the only decisions that was solely defendant's to make. *People v. Medina*, 221 Ill. 2d 394, 403-04 (2006); *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). Because the choice to testify is a defendant's, a defendant may take the stand even if his attorney believes he is making a strategical error, just as defendants are allowed self-representation even though it increases the likelihood of an unfavorable outcome. See generally *McCoy*, 138 S. Ct. at 1508 (discussing the autonomy involved in decisions reserved solely for the defendant).

Finally, the State argues that there is no reasonable probability that the proposed testimony would change the outcome of the trial (State's Brief at 24-27). The State, like the majority, argues as if defendant's post-conviction petition has reached the second stage and is obligated to make out a substantial deprivation of his constitutional rights. See *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The State cites to *People v. Smith*, 341 Ill. App. 3d 530 1st Dist. 2003), where a *Strickland* claim was denied " where defendant failed to show that counsel's decision

to not call witness would have changed the outcome of the trial" (State's Brief at 25). There is no "showing" that the outcome of the trial would have been different required at the first stage. Defendant is only required to allege an *arguable* claim that he was prejudiced by counsel's performance. *People v. Cathey*, 2012 IL 111746, ¶ 23 (citing *People v. Hodges*, 234 Ill. 2d 1, 17 (2009)). Knapp's proposed testimony would "arguably have attacked the credibility of both Avitia and Pedroza." *Knapp*, 2019 IL App (2d) 160162, ¶ 88 (McLaren, J., dissenting). Also, he would have been able to explain why he had the gas cans, which the State argued was "the most powerful evidence that the defendant knew he had committed a criminal offense" (R679). Defendant would have testified that his clothes were taken and inventoried by the police, not burned by defendant in order to destroy evidence (C509). Defendant was arguably prejudiced by counsel's deficient performance.

The State then claims that the evidence defendant attached in support of his petition undermines his argument (State's Brief at 26-27). If there are any inconsistencies in defendant's post-conviction petition, it is because he is not an attorney. He stated the gist of a constitutional claim of ineffective assistance of counsel, and he respectfully requests that this Honorable Court vacate the circuit court's summary dismissal of his post-conviction petition and reverse the appellate court's decision and remand the cause for second-stage post-conviction proceedings.

CONCLUSION

For the foregoing reasons, Justin Knapp, petitioner-appellant, respectfully requests that this Honorable Court vacate the circuit court's summary dismissal of his post-conviction petition and reverse the appellate court's decision and remand the cause for second-stage post-conviction proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 6 pages.

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 24, 2020, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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