No. 1-09-1772

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
APRIL 15, 2011

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. 04 CR 9052
	)	
NATE DAVIS,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
PRESIDING JUSTICE GARCIA and JUSTICE McBRIDE concurred in the judgment.

O R D E R

Held: Defendant's *pro se* postconviction petition alleged a claim with an arguable basis in law and fact that his trial counsel failed to raise the affirmative defense of involuntary intoxication. His petition was sufficient to survive summary dismissal under the Act. As a result, the circuit court's dismissal of the petition at the first-stage of postconviction proceedings was reversed, and the case remanded.

Defendant Nate (Nathaniel) Davis appeals from the summary

dismissal of his petition filed *pro se* under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)). On appeal, he contends that he stated a claim with an arguable basis in law and fact when he alleged trial counsel was constitutionally ineffective for failing to raise the affirmative defense of involuntary intoxication. We reverse and remand.

Defendant was charged with the aggravated kidnaping of one-year-old Aki Jonathan Williams and possession of a stolen motor vehicle. Prior to trial, and by agreement, a psychiatrist evaluated defendant, finding him legally sane at the time of his offense and fit to stand trial. The case proceeded to a bench trial. Trial evidence revealed that Aki Williams, the father of the one-year-old, left his car running while he stepped away to collect rent. Williams then saw defendant enter and abscond with the car, which contained both his child and cell phone. Defendant picked up friends Tewan Jackson and Jesse Hall on the street corner. According to their combined testimony, defendant was dirty, shoeless, bruised, and wearing a bloody, ripped top. His nose and lips were black, as though "he had been smoking something" and he appeared "really high off something." Defendant claimed the child was his and stated that he had a fight with the "baby mama," then "got jumped" on the South Side.

Williams called his cell phone, which was in the car, and attempted to negotiate the return of his child. Defendant would

answer, then repeat "money, money, money" and hang up. After about four such conversations, Williams offered to give defendant "anything" to "get his son back." Defendant said, "ten G's" then hung up. Eventually, defendant drove to his mother's home, exited the vehicle with the baby, and handed the car keys and telephone to his friends. Jackson and Hall subsequently learned that the baby in fact was not defendant's and reported the incident to police. The police went to the mother's home, recovered the baby, and arrested defendant.

Defendant's mother Nancy Evans testified on his behalf that he arrived home that day and handed her the baby. She then instructed her daughter to call the police. She testified that defendant appeared shoeless, with pants falling down, a ripped and bloody shirt, filthy socks, knots on his head, and bleeding wrists. Defendant was crying but not blinking. Evans admitted signing a written statement that defendant "was high on something stronger than alcohol."

Defendant was convicted of the above-stated offenses, then sentenced to 18 years' imprisonment. On direct appeal, he argued, in relevant part, that the trial court should have clarified whether defendant waived his right to testify when, in responding to the court, he stated: "Nawl. I'm not giving that up. I'm waiving the right to testify." Defendant further argued that the trial court erred by failing to order a competency

hearing following that equivocation. This court rejected defendant's claims and affirmed his convictions. *People v. Davis*, 1-05-3086 (2007) (unpublished order under Supreme Court Rule 23).

Defendant, *pro se*, subsequently filed this postconviction petition. Defendant alleged that trial counsel was ineffective for failing to investigate an insanity defense. In support, defendant asserted that medical records showed he suffered from a "substance-induced psychosis" at the time of his offense that made him "unable to appreciate the criminality of his conduct." Yet, counsel did not obtain these records, review the behavioral clinical exam, or seek a second opinion regarding the psychiatric opinion finding him sane at the time of the offense. Defendant asserted that a competent attorney would have done so and counsel's errors prejudiced him.

Defendant adduced the following evidence in support of his claim that he suffered an involuntarily-induced psychotic break. Defendant attached the affidavit of his mother stating that shortly before the offense, defendant, who previously "sounded fine," left a message on her voicemail that he had been killed. She then recounted defendant's strange appearance on the day in question, adding that defendant stated he "saw Jesus 'walk on water,' and that he had seen his deceased grandparents." His mother stated that counsel declined to listen to the recorded

message and ignored her entreaties to pursue an insanity defense.

Defendant attached his own affidavit in which he stated that immediately prior to the offense he was given marijuana by "some men in the music business" that was "laced with another substance." They beat him, he ran to a church, then was admitted to a hospital, but became scared and so ran away again. He stated that he jumped into Williams' vehicle, believing he was still being pursued. He did not notice the child in the car until he drove away.

Defendant further cited medical records showing that the day after his arrest, he was transferred to the Cermak hospital psychiatric unit based on his "bizarre" and "manic" behavior. Medical notes show defendant was immediately placed in full leather restraints after exhibiting "psychotic symptoms," "pressured speech," and "agitation." He reportedly had a "disorganized thought process" and stated that he heard "voices of good people and bad people" and that he "had been in restraints for 10 days." Defendant twice defecated and urinated on himself, at one point smearing urine and feces over his body and spat at the door. He shouted: "Oh Lord! Help me Lord! I feel the Lord!" Defendant was placed in leather restraints for three days and administered psychotropic medications. The records further show that four days after his admission to the hospital, he was tested for drugs with results revealing the

presence of cannabinoids. By days four and five in treatment, medical notes reveal defendant, although "possibly delusional," was calm and compliant. The records suggest he was eventually released from restraints. According to a psychiatrist's notes, by day seven, defendant declined further psychiatric treatment. These notes reveal that although defendant admitted abusing marijuana for five years, he denied a history of "paranoid delusions." On day 10, the psychiatrist noted that defendant had been observed without medication for several days and was exhibiting appropriate behavior. The psychiatrist diagnosed defendant with "substance intoxication" and "induced psychosis" and noted the symptoms had been "resolved." Defendant was discharged from the hospital.

In addition to the above-stated documents, defendant attached the behavioral clinical exam of the psychiatrist who interviewed him for trial and the letters declaring him both legally sane at the time of his offense and competent to stand trial. Therein, the psychiatrist also diagnosed him with a substance-induced psychotic disorder.

The circuit court rejected defendant's postconviction petition. The court found that he was essentially "re-hashing" claims raised on direct appeal challenging his competency. The court held that defendant's claim was barred by *res judicata* and added that trial counsel in fact "did have him examined for

fitness" for trial and sanity at the time of the offense. The court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed.

We review the first-stage summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

The Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *Hodges*, 234 Ill. 2d at 9. A *pro se* postconviction petition may be summarily dismissed as frivolous and patently without merit if it has no arguable basis in law or fact, *i.e.* if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-13, 16.

Defendant contends his petition is sufficient to survive summary dismissal under the Act. The State initially responds that defendant waived his claim of ineffective assistance of trial counsel by failing to raise it on direct appeal.

We disagree with the State. The common law record on direct appeal does not contain the psychiatrist's behavioral clinical exam, which was completed prior to trial, the psychiatrist's findings of fitness and sanity, or the Cermak hospital records,

all of which form the evidentiary basis for defendant's ineffective assistance of counsel claim. In addition, the report of proceedings makes scant reference to the behavioral clinical exam. Absent the evidence now before this court, counsel on direct appeal would have been unable to efficaciously raise the present claim. Under these circumstances, waiver is relaxed, and defendant permitted to assert ineffective assistance of trial counsel under the Act. See *People v. Harris*, 206 Ill. 2d 293, 303 (2002); *People v. Jones*, 364 Ill. App. 3d 1, 4-5 (2005).

Defendant contends that he alleged a claim with an arguable basis in law and fact that trial counsel was constitutionally ineffective for failing to raise the affirmative defense of involuntary intoxication.

To assess this claim, we turn to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, a defendant must show both that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17, quoting *Strickland*, 466 U.S. at 687-88.

To assess defendant's claim, we also turn to section 6-3 of the Criminal Code of 1961 (Code), which defines the affirmative defense of involuntary intoxication. This defense may be raised when conduct is produced by an intoxicated or drugged condition.

720 ILCS 5/6-3 (West 2008); *People v. Hari*, 218 Ill. 2d 275, 291 (2006). Section 6-3 of the Code provides:

> "A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3 (West 2008).

The language "involuntarily produced" contemplates, although is not limited to, intoxication induced by some external influence such as trick, artifice or force. *Hari*, 218 Ill. 2d at 294-95. The defendant need only present some evidence supporting this defense. 720 ILCS 5/3-2(a) (West 2008); *Hari*, 218 Ill. 2d at 295. If raised, then the State has the burden of proving the defendant guilty beyond a reasonable doubt of that issue, together with the elements of the offense. 720 ILCS 5/3-2(b) (West 2008); *Hari*, 218 Ill. 2d at 295.

Given the law set forth above, in this case, the petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage of postconviction proceedings under the Act if (1) it is arguable that counsel's failure to raise the affirmative defense of involuntary intoxication fell below an

objective standard of reasonableness and (2) it is arguable that defendant was prejudiced as a result. See *Hodges*, 234 Ill. 2d at 17.

Here, defendant alleged sufficient facts to survive summary dismissal. Defendant alleged that trial counsel was ineffective for failing to investigate and obtain evidence that would have supported his defense theory that he was involuntarily intoxicated. Defendant alleged that he was given marijuana laced with another drug and beaten by "men in the music business." Defendant alleged that he fled for fear of his life, and it was in this delusional state that he jumped into Williams' vehicle, believing he was still being pursued by the men. He alleged he did not at first see the child in the car. Defendant also alleged that his mother was witness to his changed state during this period, yet counsel refused to acknowledge her concerns regarding defendant's mental state.

Defendant further alleged that counsel failed to review the behavioral clinical exam or obtain hospital records, which showed that he suffered from a "substance-induced psychosis" at the time of his offense. He alleged, for example, that he was admitted to the Cermak hospital psychiatric ward shortly after his arrest, placed in full leather restraints for a number of days, and treated with psychotropic medications while he exhibited psychotic behaviors. After some days of treatment, defendant

stabilized, and his psychotic behaviors dissipated. The treating psychiatrist diagnosed defendant with drug-induced psychosis. The trial psychiatrist diagnosed him with the same.

Defendant supported these allegations with records from the trial psychiatrist, the Cermak hospital records, and signed affidavits by him and his mother. Defendant thus satisfied the corroboration requirements of section 122-2 of the Act.

The factual allegations that defendant was in an involuntarily-produced drugged condition under section 6-3 of the Code cannot be described as fantastic or delusional. Given the absence of the medical records on direct appeal, defendant's allegation that counsel failed to review the records also is not fantastic or delusional. As a result, we cannot say that defendant's allegations lack an arguable basis in fact under the Act.

We, likewise, cannot say defendant's legal theory that counsel was ineffective for failing to raise the affirmative defense of involuntary intoxication was indisputably meritless. The State counters that defendant "made no mention of an insanity defense based on involuntary intoxication" and thus failed to assert a legal claim. In addressing the State's argument, we must note that both parties fail to acknowledge the difference between an insanity defense and a defense of involuntary intoxication. The two defenses are controlled by two separate

statutes and have distinct elements. See 720 ILCS 5/6-2, 6-3 (West 2008). Because the drug use and evidence of short-lived psychosis at issue in this case could not possibly satisfy the "mental disease or mental defect" requirement for an insanity defense, we have chosen to focus our analysis solely on the defense of involuntary intoxication. See *People v. Free*, 94 Ill. 2d 378, 406-07 (1983). While defendant's postconviction petition focuses heavily on counsel's failure to raise "an insanity defense," reading it liberally, as we must (*Hodges*, 234 Ill. 2d at 21), we find it also alleges that counsel was ineffective for failing to raise the affirmative defense of involuntary intoxication. Indeed, defendant specifically states that he suffered from a "substance-induced psychosis" at the time of his offense that made him "unable to appreciate the criminality of his conduct."

We again note that under section 6-3 of the Code defining involuntary intoxication, the language "involuntarily produced" contemplates, although is not limited to, intoxication induced by some external influence such as trick, artifice or force. *Hari*, 218 Ill. 2d at 294-95. In *People v. Brumfield*, 72 Ill. App. 3d 107 (1979), this court held that it was error for the trial judge to preclude evidence showing defendant smoked marijuana that, unbeknownst to him, contained angel dust. This court concluded that evidence of involuntary intoxication or a drugged condition

could have provided a defense to the crime of rape.

In this case, defendant asserted that his crime was produced by an involuntary drugged condition, imposed by an external influence of trick or artifice, thus rendering him unable to appreciate the criminality of his conduct. The State argues that this assertion is contradicted by the record because test results in the medical records show defendant tested positive only for cannabinoids and no other substance, making it unlikely that the marijuana was laced, as defendant claims. We disagree. Defendant was tested for the presence of drugs some three days after he was admitted to the hospital and some four days after the offense. Within that period, he was given various psychotropic medications. Moreover, the Cermak medical records also demonstrate that defendant admitted smoking marijuana in the past but denied a history of paranoid delusions. This suggests the drugs he consumed were indeed laced with another substance. Given the totality of the evidence, we do not find defendant's claim is refuted by the record.

Where the trial record revealed defendant was in a drugged and abnormal condition around the time of his offense, we conclude that it is at least arguable that trial counsel's failure to obtain the medical records and pursue the affirmative defense of involuntary intoxication fell below the objective standard of reasonableness. It also is at least arguable that an

involuntary intoxication defense premised on unwitting ingestion of laced illegal drugs enjoyed a probability of success, and defendant thus was prejudiced by counsel's failure to raise the defense. While we question *Brumfield*'s conclusion that ingestion of an illegal drug may support an involuntary intoxication defense, this does not affect our ultimate decision. We review defendant's petition to determine solely whether there is an arguable basis in law for the claim; we need not determine the ultimate validity or success of the legal claim. Although borderline, we permit this case to proceed under the Act.

In light of the foregoing, we conclude that defendant set forth a claim of arguable merit in both law and fact that counsel was ineffective under *Strickland*. Therefore, we reverse the circuit court's summary dismissal of defendant's petition for postconviction relief and remand the petition to the circuit court for further proceedings under the Act. See *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

Reversed and remanded.