

THIRD DIVISION
June 15, 2011

No. 1-09-3407

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).

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 19004
)	
DWAYNE McCOY,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

O R D E R

HELD: The trial court erred in summarily dismissing defendant's *pro se* postconviction petition when it had an arguable basis in law and fact.

Defendant Dwayne McCoy appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that the trial court erred in dismissing his petition because he

stated the gist of a constitutional claim of ineffective assistance of counsel based upon counsel's failure to impeach a witness with a prior inconsistent statement.¹ We reverse and remand.

After a bench trial, defendant was found guilty of first degree murder and sentenced to 65 years in prison. At trial, the State established, through the testimony of Anthony Philips and Thurman Wade, that defendant fatally shot the victim. Defendant presented the testimony of Cornell Owens, who testified that defendant was merely present when an unidentified man ran out of an alley and shot the victim. On rebuttal, however, Kaya Washington testified that when she looked out of her bedroom window, she saw "a body" fall out of a car and no one else was on the street. She then heard gunshots a few seconds later.

In finding defendant guilty of first degree murder, the trial court determined that Philips and Wade testified in a credible manner, and based in part on Washington's testimony, Owens was not a credible witness. Defendant was sentenced to 65 years in prison. This court affirmed defendant's conviction and

¹ Defendant also contended that this case should be reassigned upon remand because the judge assigned to the case prejudged the outcome of this proceeding. However, the parties agree that the judge's retirement has rendered this issue moot.

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sentence on appeal. See *People v. McCoy*, No. 1-06-3473 (2008) (unpublished order under Supreme Court Rule 23).

In August 2009, defendant filed the instant *pro se* postconviction petition alleging, *inter alia*, that he received ineffective assistance of counsel because counsel failed to impeach Washington with a prior inconsistent statement. Attached to the petition was a police report indicating Washington told officers that she got out of bed when she heard gunshots. When she looked outside, she saw a car in the street and then watched the car drive away.

In dismissing the petition as frivolous and patently without merit, the trial judge stated that he had not believed Owens's testimony and had relied upon the testimony of Wade and Philips to find defendant guilty. The court characterized Washington as a circumstantial witness. The court then stated that defense counsel's decision not to impeach Washington with the police report, "which may or may not have been inconsistent with other police reports," did not constitute ineffective assistance because counsel subjected her testimony to meaningful adversarial testing, *i.e.*, extensive cross-examination.

The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2008). At the first stage of a postconviction

proceeding, a defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). "Unless positively rebutted by the record, all well-pled facts [in the petition] are taken as true" at the first stage of a proceeding under the Act. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84 (2001).

A petition is summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Coleman*, 183 Ill. 2d at 397, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A postconviction petition alleging ineffective

assistance of counsel may not be dismissed at the first stage of the proceedings "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." *Hodges*, 234 Ill. 2d at 17.

Here, defendant contends that the trial court erred when it dismissed his petition because his claim that counsel's failure to impeach Washington constituted ineffective assistance had an arguable basis in law and fact. Specifically, defendant argues that because the police report indicated that Washington did not go to the window until after she heard gunshots, she could not have seen who was on the street before the shooting.

The State responds that because the same judge presided over defendant's bench trial and the instant postconviction proceeding, the trial court was in a unique position to determine whether defendant was actually prejudiced by counsel's failure to impeach Washington with the police report. The State highlights the court's determinations that Washington's testimony was subjected to meaningful adversarial testing through extensive cross-examination and that the potential impeachment would not have affected the outcome of the trial because the court relied on the credible testimony of Philips and Wade in finding defendant guilty.

However, the question of whether defendant was actually prejudiced by his counsel's failure to impeach Washington is premature. The only question before this court in the instant appeal is whether defendant's *pro se* postconviction petition has an arguable basis in fact and law. See *Hodges*, 234 Ill. 2d at 11-12. If it does, then this cause must be remanded for further proceedings under the Act.

Generally, the decision whether to cross-examine or impeach a witness is a matter of trial strategy that will not support a claim of ineffective assistance of counsel. *People v. Williams*, 329 Ill. App. 3d 846, 854 (2002). However, this court has found that the failure to impeach a witness when significant impeaching evidence is available is not trial strategy, and consequently, could support a claim of ineffective assistance. *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994); see also *People v. Vera*, 277 Ill. App. 3d 130, 140 (1995).

Here, defendant argues that counsel's failure to impeach Washington with her prior inconsistent statement constituted ineffective assistance when, based in part upon her testimony, the trial court determined Owens was not a credible witness. Defendant's allegations cannot be characterized as fantastic or delusional when the police report indicates that Washington told officers she did not go to the window until after she heard gunshots whereas her trial testimony indicates that she was at

the window, saw "a body" fall out of a car onto an otherwise deserted street, and heard gunshots a few seconds later. See *Hodges*, 234 Ill. 2d at 17. Similarly, defendant's legal theory that counsel was ineffective when he failed to use this prior inconsistent statement to impeach Washington is not indisputably meritless because it is not contradicted by the record. See *Hodges*, 234 Ill. 2d at 16. At trial, defendant presented testimony indicating that although he was present on the street when the victim was shot, someone else was the shooter. However, the trial court found this testimony incredible based in part upon Washington's testimony. Because the impeachment of the State's rebuttal witness would have removed one basis upon which the court rested this negative credibility determination, it is at least arguable that counsel's failure to impeach Washington fell below an objective standard of reasonableness and prejudiced defendant. See *Hodges*, 234 Ill. 2d at 17. As defendant's *pro se* petition for postconviction relief did not lack an arguable basis in either law or fact, the trial court erred when it summarily dismissed the petition as frivolous and patently without merit. See *Hodges*, 234 Ill. 2d at 16-17.

Accordingly, we reverse the dismissal and remand this case for second stage proceedings without expressing an opinion as to whether defendant will ultimately prevail on his ineffective assistance claim. See *Hodges*, 234 Ill. 2d at 22.

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The judgment of the circuit court of Cook County is reversed.

Reversed and remanded.