

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 03—CF—1598
)	
CHARLES HILL,)	Honorable
)	Thomas E. Mueller,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

ORDER

Held: The summary dismissal of defendant's postconviction petition was proper; one of the two claims at issue was forfeited, as it could have been raised on direct appeal and defendant did not allege ineffective assistance of appellate counsel; although the other claim was not forfeited, as it was based on a police report that was not in the record, it did not state the gist of a constitutional violation, as defendant was not prejudiced by trial counsel's failure to impeach a witness with her admission that she had initially lied to the police about an immaterial aspect of the case.

At issue in this appeal is whether summary dismissal of defendant's, Charles Hill's, postconviction petition on forfeiture grounds was proper. Because one of the claims defendant raised in his petition relied on matters *dehors* the record, we conclude that summary dismissal on

forfeiture grounds was improper. Nevertheless, because defendant failed to present the gist of a constitutional violation with regard to the one claim that was not forfeited, we affirm the summary dismissal of defendant’s petition.

Evidence presented at trial revealed that defendant and some other men called a cab in the early morning of July 16, 2003. Shortly after picking the men up, the cab driver was shot and killed. Following a jury trial, defendant was convicted of first-degree murder (720 ILCS 5/9—1(a)(1) (West 2002)), and he was sentenced to 48 years’ imprisonment. Defendant appealed, and this court affirmed (see *People v. Hill*, No. 2—07—0076 (2008) (unpublished order under Supreme Court Rule 23)).

Soon thereafter, defendant, with the help of an attorney, petitioned for postconviction relief. In his petition, defendant argued that his trial counsel was ineffective for failing to (1) object to or move to strike the testimony of four State’s witnesses who were with or had contact with defendant on the night of the murder; (2) impeach a State’s witness with a statement she gave to the police concerning the content of a phone conversation she had with one of the men who was with defendant when the victim was shot; (3) impeach a State’s witness with a statement he gave to the police concerning where he placed the gun used to shoot the victim; (4) perfect the impeachment of various State’s witnesses by calling the police officer who took statements from the witnesses; and (5) secure the waiver of defendant’s right to testify. Nowhere in the petition did defendant argue that appellate counsel was ineffective for failing to raise any of these issues or that appellate counsel could not have raised any of the issues on direct appeal. Given that, the trial court summarily dismissed the petition, finding that “[d]efendant’s post-conviction petition is dismissed as patently without merit (based on forfeiture/waiver).” Defendant timely appeals from the summary dismissal of his petition.

The issue raised in this appeal is whether the summary dismissal of defendant’s petition was proper. Except in cases where the death penalty has been imposed, proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)) are divided into three distinct stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). This appeal concerns a dismissal at the first such stage. We review *de novo* the dismissal of a petition at the first stage. See *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009).

At the first stage, the trial court has 90 days to examine the petition independently and summarily dismiss it if it is frivolous or patently without merit. 725 ILCS 5/122—2.1(a)(2) (West 2008); *Gaultney*, 174 Ill. 2d at 418. Moreover, at the first stage, “the common law doctrines of *res judicata* and [forfeiture] operate to bar the raising of claims that were or could have been adjudicated on direct appeal.” *People v. Blair*, 215 Ill. 2d 427, 443 (2005). Forfeiture bars review of issues that could have been raised on direct appeal, but were not raised. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). However, the forfeiture rule is not without exceptions. For example, “[t]he doctrine[] of *** [forfeiture] will *** be relaxed *** where the [forfeiture] stems from the ineffective assistance of appellate counsel, or where the facts relating to the claim do not appear on the face of the original appellate record.” *Id.*

Here, defendant contends that two of his claims are not forfeited.¹ The substance of those two claims is as follows. Concerning the first claim, defendant alleged that “[he] was denied his

¹Although defendant concedes that all but two of his allegations are forfeited, the Act does not allow for partial summary dismissal of a petition, and, thus, defendant argues that the entire petition should be remanded for further proceedings under the Act. See *People v. Rivera*, 198 Ill. 2d 364, 371 (2001).

constitutional right to effective assistance of counsel as a result of counsel’s failure to impeach Shea Peters with her statement to the police in which she admitted lying and trying to protect Cecil Hubbard.” (Emphasis omitted.) More specifically, defendant asserted:

“20. Defense counsel was in possession of Aurora Police Department Investigator Mike Tierney’s written interview of Shea Peters on July 16, 2003. *** In that interview, ‘Peters admitted to lying to Investigators in her original interview about the above subjects calling her and asking her if she found a pair of missing eye glasses.’ *** Peters further admitted ‘that she was trying to protect [Hubbard] because she wanted him for her boyfriend.’ ***

21. Defense counsel did not cross-examine Peters or introduce any independent evidence regarding her admissions that she had lied to the police and was trying to protect Hubbard. *** By not so confronting Peters, counsel’s performance was deficient. Reasonable counsel would have pursued such cross-examination or adduced such evidence, especially in light of the fact that Peters’ credibility was at issue and the suggestion by the defense that Hubbard had committed the murder.

22. [Defendant] was prejudiced by the deficient performance. The jury would have been in a position to reject Peters’ testimony outright had evidence that she had lied to the police been adduced. If Peters was willing to lie to the police, then she would have been equally willing to lie on the witness stand. That Peters had lied to protect Hubbard would have fortified [defendant’s] suggestion at trial that Hubbard had committed the murder. The evidence would have shown consciousness of guilt *vis-a-vis* Hubbard. A jury finding that Hubbard—the person whose fingerprints were found in the cab—had fired the fatal shots

necessarily would have meant acquittal for [defendant]. In all events, counsel’s deficient performance deprived [defendant] of a fair and a reliable result.”

Concerning the second claim, defendant averred that “[he] was denied his constitutional right to effective assistance of counsel as a result of counsel’s failure to cross-examine Darnell Wade about the location of the gun in Peters’ home.” (Emphasis omitted.) More specifically, defendant contended:

“23. Shea Peters testified that she asked Darnell Wade to place the gun in the garage, and thereafter [she] observed him place it in a dumpster. *** Defense counsel was in possession of a police interview of Wade in which Wade stated that, while in Peters’ room, [Wade] wrapped the gun in a towel and placed it in a dresser because Peters ‘asked him to.’ *** Counsel did not cross-examine Wade on this point ***.

24. By not pursuing such cross-examination, counsel’s performance was deficient. Reasonable counsel would have shown the inconsistencies between Wade and Peters.

25. [Defendant] was prejudiced by the deficient performance. The jury would have been in a position to reject the testimony of Peters and/or Wade outright if it had evidence of the contradictions regarding the murder weapon. There is a reasonable probability that rejection of the testimony would have resulted in [defendant’s] acquittal. Counsel’s deficient performance deprived [defendant] of a fair and a reliable result.”

Attached to the petition were, among other things, Peters’ police report, Wade’s police report, and relevant portions of the trial transcripts. Peters indicated in her police report that she had a very brief phone conversation with Hubbard after he left her home. Specifically, Peters stated that “shortly after the cab left her home [Hubbard] had telephoned her and told her quickly not to tell the

cab people that she knows [defendant and the men with him] but only that they used her address.” Later in Peters’ police report, Peters “admitted to lying to Investigators in her original interview about the above subjects calling her and asking her if she found a pair of missing eye glasses.” Peters explained that “she was trying to protect [Hubbard] because she wanted him for her boyfriend.” In Wade’s police report, he indicated that “when he was in [Peters’] room, he sat down[, and] he wrapped the gun in a ‘face towel’ and placed it in the dresser because [Peters] asked him to.” At trial, Wade testified consistently with what he had told the police during their investigation. However, Wade added that several people, including Peters, were in the room when he put the gun in the dresser. At trial, Peters testified that she told Wade she did not want the gun in her house and that she followed Wade as he left her home and placed the gun in a dumpster behind her home.

With the substance of the two claims of ineffective assistance of counsel in mind, we examine whether defendant forfeited these claims. As to the first claim, we determine that defendant’s claim was not forfeited, because the fact that Peters originally lied to the police was not evident from the appellate record. Rather, that fact was presented only in the police report, which was not included in the record on appeal.

Regarding the second claim, we find that defendant forfeited review of his claim that counsel was ineffective for failing to cross-examine Wade about where he placed the gun. Wade’s testimony at trial on this point was consistent with what he told the police during their investigation. What contradicted Wade’s testimony and what he told investigators was what Peters testified to at trial. This conflict between Wade’s and Peters’ recollections of where the gun was placed while defendant and the men he was with were at Peters’ home was contained in the record on appeal, *i.e.*, in the

transcript of Wade’s and Peters’ testimony. Thus, because defendant never alleged that his appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to cross-examine Wade about where he placed the gun when he was at Peters’ home, this claim is forfeited.

That said, the State argues that both of these claims are forfeited, because the record is clear that the police reports were in trial counsel’s possession. We find the State’s position unfounded. Here, what matters in deciding whether defendant’s claims are forfeited is whether they are based on matters that were included in the record. See *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). If the materials needed to examine those issues are included in the record and the defendant does not allege appellate counsel’s ineffectiveness for failing to raise the issue, the postconviction claims are forfeited, because appellate counsel, by reviewing the record, could have raised the issues on direct appeal. See *Youngblood*, 389 Ill. App. 3d at 214-15 (claim that trial counsel was ineffective for failing to challenge the indictment was forfeited, because the facts necessary to consider that claim were included in the record, and the defendant failed to allege appellate counsel’s ineffectiveness for failing to raise trial counsel’s ineffectiveness on this point). In contrast, if the materials were not included in the record, the postconviction claims are not forfeited, because appellate counsel, even after reviewing the record, would have no reason to know of the claims based on those missing materials. See *People v. Barkes*, 399 Ill. App. 3d 980, 986, 988-90 (2010) (the defendant’s postconviction claim that his trial counsel was ineffective for refusing to let him testify at trial was not forfeited, because the facts necessary to resolve that claim were based on facts not included in the appellate record, *i.e.*, conversations the defendant had with his trial counsel).

However, even though we determine that one of the claims that defendant advanced in his petition was not forfeited, we nevertheless affirm the summary dismissal of defendant’s petition,

because the claim concerning trial counsel’s ineffectiveness for failing to impeach Peters with the fact that she originally lied to the police does not present the gist of a constitutional violation. See *Youngblood*, 389 Ill. App. 3d at 213 (observing that reviewing court may affirm summary dismissal of postconviction petition on any valid basis that appears from the record).

As noted above, in examining the merits of defendant’s petition at the first stage of postconviction proceedings, we are concerned with whether the petition stated the gist of a constitutional violation. To present the “gist” of a constitutional violation, a claim must be more than a bare allegation of a deprivation of a constitutional right (*People v. Prier*, 245 Ill. App. 3d 1037, 1040 (1993)), but may be less than a completely pleaded or fully stated claim (*People v. Edwards*, 197 Ill. 2d 239, 245 (2001)). Thus, to set forth the gist of a constitutional claim, the petition need present only a limited amount of detail and need not set forth the claim in its entirety. *Id.* at 244.

In resolving whether the petition is frivolous or patently without merit, we accept as true all well-pleaded allegations, unless the record positively rebuts those allegations. *People v. Little*, 335 Ill. App. 3d 1046, 1050 (2003). A claim is “frivolous or patently without merit” if it “has no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A claim has no basis in fact if it is based on a “fanciful factual allegation.” *Id.* “Fanciful factual allegations include those which are fantastic or delusional.” *Id.* at 17. A postconviction claim has no basis in law when it is based on an “indisputably meritless legal theory.” *Id.* at 16.

The claim that was not forfeited concerns whether defendant’s trial counsel was ineffective for failing to impeach Peters with the statement she gave to the police, wherein she admitted that she initially lied about her phone conversation with Hubbard. A defendant who alleges that his counsel

was ineffective must establish that (1) his attorney’s performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *People v. Wendt*, 283 Ill. App. 3d 947, 951 (1996). However, if a defendant fails to allege that he was prejudiced, the second prong of the test, a court need not consider whether the attorney’s performance fell below an objective standard of reasonableness.

In resolving whether trial counsel was ineffective for failing to impeach Peters with the statement she gave the police, we find instructive *People v. Flores*, 231 Ill. App. 3d 813 (1992). In *Flores*, the defendant was convicted of unlawful possession of cannabis. *Id.* at 815. At trial, the arresting officer testified that the defendant posted bond after he was transported to the sheriff’s office and formally arrested. *Id.* at 826. The officer’s police report indicated that the defendant posted bond at the scene. *Id.* Another officer testified at trial that there was no record of the defendant being “ ‘booked.’ ” *Id.* On appeal, the defendant argued that his trial counsel was ineffective for failing to impeach the arresting officer with his report. *Id.* The appellate court disagreed, noting that “[t]he subject matter of the impeachment [*i.e.*, when the defendant posted bond,] concerns an immaterial aspect of the case.” *Id.* Thus, trial counsel was not ineffective for failing to impeach the arresting officer on this point. *Id.* at 826-27.

Here, as in *Flores*, the fact that Peters lied about the content of her phone conversation with Hubbard is immaterial. Peters initially told the police that Hubbard called her to ask whether a pair of eyeglasses had been left at her home. If this were true, Hubbard in no way implicated himself in the murder. Later, Peters admitted that Hubbard called her after the cab left her home and told her to deny knowing defendant or any of the men who were with him on the night the cab driver was

shot. Peters admitted that she lied because she wanted to protect Hubbard, who had implicated himself as being involved in some way with the crime. However, Peters’ testimony was tangential to the core issue of whether defendant shot the cab driver or was in any way involved. That is, even if trial counsel had impeached Peters with the police report, the outcome of the trial would not have been different.

Because we determine that defendant forfeited all but one of his allegations and that the remaining allegation failed to present the gist of a constitutional violation, we need not address what effect, if any, defendant’s “affidavit verified by certification,” which was executed pursuant to section 1—109 of the Code of Civil Procedure (735 ILCS 5/1—109 (West 2008)) and was not notarized, had on the validity of defendant’s petition.

For these reasons, the judgment of the circuit court of Kane County is affirmed.

Affirmed.