No. 2—09—1161
Order filed May 25, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 05—CF—1309
KANDIA S. WILLIAMS,	)	Honorable Blanche Hill Fawell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court's summary dismissal of defendant's postconviction petition at the first stage alleging ineffectiveness of trial and appellate counsel was proper; the court did not err in applying the *Strickland* standard at the first stage; as to trial counsel, defendant's claims were unsupported by affidavits or an explanation for their absence, contradicted by the record, or pertained to matters of trial strategy; as to appellate counsel, the claim depended on evidence outside the record. We affirmed the judgment of the trial court.

Defendant, Kandia S. Williams, appeals the dismissal of his petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122—1 *et seq.* (West 2008)), alleging ineffective assistance of counsel in relation to his convictions of armed robbery (720 ILCS 5/18—2(a)(1) (West

2004)) and aggravated unlawful restraint (720 ILCS 5/10—3.1(a) (West 2004)). Defendant contends that the trial court applied the wrong standard when it dismissed his petition, arguing that it prematurely applied the standard from *Strickland v. Washington*, 466 U.S. 668 (1984), instead of applying the standard from *People v. Hodges*, 234 Ill. 2d 1 (2009), and that the trial court wrongly found that the petition was frivolous and patently without merit. We affirm.

I. BACKGROUND

In March 2006, defendant was found guilty of armed robbery and aggravated unlawful restraint in connection with the robbery of a gas station. Also charged were Dana Gunn and Nairobi Stephenson. Gunn pleaded guilty and agreed to testify against defendant and Stephenson. Another individual, Michael Branch, was initially taken into custody but was not charged.

At trial, Tejes Chokski, the gas station clerk, testified that, on the night of the robbery, two men entered the station. One was shorter and the other was taller and was wearing a basketball jersey. Chokski identified defendant in court as the taller man. He also had identified defendant in a lineup. There was evidence at trial that the shorter man was Stephenson and that Gunn waited in a vehicle outside. Chokski testified that defendant initially went to the lottery machine but later pushed him into the back room, where the shorter man held him at gunpoint. Chokski said that defendant returned to the customer area, and Chokski heard him tell a customer that the business was closed. According to Chokski, defendant returned to the back room with Chokski's black school bag. Defendant then left and unsuccessfully tried to open the cash register. Chokski testified that defendant returned, said to the other man that they should leave, and then wrapped Chokski's hands and covered his mouth with duct tape. The men then fled. Chokski said that the station did not sell

duct tape. He also said that, at some point during the robbery, defendant wore latex gloves that he removed as he ran from the store.

Chokski left the back room after the men fled and encountered two customers, Rachel Troy and Kirk Kline. Chokski told them that he had been robbed, and Troy and Kline, who saw the men leave the station, left to pursue them. During the pursuit, one of the robbers fired shots at Troy and Kline, and Stephenson was accidentally shot. Troy and Kline provided information about the robbers' vehicle to the police, and Troy described one of the men as very tall, wearing a "do rag," jersey, and jeans.

Evidence at trial showed that, after the robbery, Gunn, Stephenson, and defendant went to Branch's apartment. There was evidence that defendant had been there earlier in the day and had shown Branch an ecstasy pill. There was also evidence that Branch was tall. Gunn testified that everyone changed clothes or was trying to change clothes, and Stephenson left to go to the hospital. Shortly after, the police arrived and found Chokski's black bag in the apartment. A lottery ticket from the gas station was found in defendant's pocket. At trial, an officer identified a photo of the jersey that defendant was wearing at the time.

Defendant was arrested and placed in a five-person lineup in which all five people wore orange jumpsuits. Defendant held card number three. Troy identified defendant in that lineup, but later failed to identify him in a second lineup. She also identified defendant at trial. Kline, who did not testify at trial, was unable to identify defendant in the lineup, but gave police a description of him that was consistent with other witnesses. Another person, James Pocius, identified the robber as either number three (defendant) or number five. Pocius did not testify.

An investigating officer, Michael Ptak, testified that, when interviewed, defendant said that he had been at Branch's apartment and had passed out, and the next thing he knew, he was being taken into custody. Officer Brian Dooley testified about statements defendant later made to police. Dooley testified that defendant had been calling out from his cell that he wanted to speak to a detective. Dooley testified that he met with defendant and that defendant admitted committing the robbery, without providing many details. A fingerprint expert testified that two latent prints were found on the duct tape that matched defendant.

At the end of the State's case, defense counsel stated that she wanted to call one of the detectives to question him about two eyewitnesses who failed to identify defendant in the lineup. The State's objection on hearsay grounds was sustained. The defense then rested without calling any witnesses. In closing arguments, defense counsel focused on inconsistencies in the evidence and generally focused on a theory that defendant had fallen asleep at Branch's apartment after getting high on ecstasy, and that Branch was the actual robber. Counsel also argued that defendant must have handled the duct tape at Branch's apartment before the robbery. Counsel noted that it took multiple tests to uncover the prints; that there were prints on only one side of the tape, indicating that defendant merely handled it, but did not tear off pieces of it; and that defendant had been identified as wearing gloves during the robbery, so the prints must have been made earlier.

The jury found defendant guilty, and he was sentenced to 25 years' incarceration for the robbery with a concurrent 5-year term for aggravated unlawful restraint. Defendant's motion to reconsider was denied, and he appealed. We affirmed. *People v. Williams*, No. 2—06—0577 (2009) (unpublished order under Supreme Court Rule 23).

On September 22, 2009, defendant filed a *pro se* postconviction petition, alleging in part that his trial counsel was ineffective for failing to call an expert witness who would testify that the fingerprints on the tape were old. Defendant did not state who the expert was or provide an affidavit from the person. In his own affidavit, defendant stated that his attorney knew of a fingerprint expert who found that the fingerprints were old, but that his attorney said that a motion to call the expert as a witness would not be granted. Defendant again did not name the expert and did not explain why he could not obtain an affidavit from that person.

Defendant also alleged that his counsel was ineffective for failing to call Kline, Pocius, and Felix Perez, as witnesses. He alleged that Kline failed to identify him in a lineup. He alleged that Pocius witnessed the robbery, viewed the lineup, and said that the offender was either defendant or another man. In regard to Perez, defendant alleged that Perez saw Stephenson wearing clothing that was worn by one of the robbers. Defendant alleged that Perez's testimony would support his theory that, after the robbery, he was woken up by police at Branch's apartment and instructed to put on Stephenson's clothing. A police report attached to the petition shows that Perez said that Stephenson had possibly been wearing a ball cap, a white tri-color T-shirt, a dark jacket, and dark pants that were possibly jeans. Defendant attached no affidavits from Kline, Pocius, or Perez stating what their testimony would be. Defendant stated in his petition that he attempted to contact them, but was unsuccessful.

Finally, defendant alleged that his appellate counsel was ineffective for failing to argue defendant's assertion that he never spoke to Dooley. Defendant alleged that the record showed that he did not speak to Dooley, and he referenced logs from the jail reporting his cell activities at various times. Those logs do not reflect that defendant was constantly monitored and also indicate that

defendant was at one point observed to be yelling and was out of his jail cell for several periods of time.

On October 20, 2009, the trial court dismissed the petition at the first stage, finding that the requirements of showing ineffective assistance of counsel under *Strickland* were not met and that the petition was frivolous and patently without merit. Defendant timely appeals.

II. ANALYSIS

Although defendant's brief on appeal contains a lengthy facts section, in his argument section he argues only that, under *Hodges*, the trial court "prematurely" applied *Strickland*. That argument is made in regard to three claims from his postconviction petition: that his trial counsel was ineffective for (1) failing to call an unnamed fingerprint expert; (2) failing to investigate witnesses to the robbery who allegedly would have contradicted the lineup identification of defendant by other witnesses and would have shown that, at the lineup, defendant was wearing clothes that belonged to the actual robber; and (3) failing to take unspecified action in regard to evidence that defendant confessed to Dooley, when defendant alleges that Dooley never interviewed him. In his petition, defendant made this third claim under the rubric of ineffective assistance of appellate counsel for failing to raise the issue on appeal, but he does not mention appellate counsel in the argument section of his brief.

A. The *Hodges* and *Strickland* Standards

"Except in cases where the death penalty has been imposed, the Act establishes a three-stage process for adjudicating a postconviction petition." *People v. Carballido*, No. 2—09—0340, slip op. at 18 (Ill. App. Mar. 17, 2011) (citing *People v. Jones*, 213 Ill. 2d 498, 503 (2004)). "At the first stage, the trial court must review the petition within 90 days of its filing to determine whether it is

either frivolous or patently without merit." *Id.* (citing 725 ILCS 5/122—2.1(a)(2) (West 2008)). "If the trial court determines that the petition is either frivolous or patently without merit, it must dismiss the petition in a written order." *Id.* Although only a limited amount of detail need be presented in a *pro se* petition, the petition must clearly set forth how the petitioner's constitutional rights were violated. *Hodges*, 234 Ill. 2d at 9; see 725 ILCS 5/122—2 (West 2008).

A *pro se* postconviction petition is frivolous or patently without merit when it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. "A petition has no basis in law when it is based on an 'indisputably meritless legal theory,' meaning that the legal theory is 'completely contradicted by the record.' " *Carballido*, slip op. at 18 (quoting *Hodges*, 234 Ill. 2d at 16). "A petition has no basis in fact when it is based on 'fanciful factual allegation[s],' meaning that the factual allegations are 'fantastic or delusional.' " *Id.* (quoting *Hodges,* 234 Ill. 2d at 17). "If the court does not dismiss the petition as frivolous or patently without merit, then the petition advances to the second stage." *Id.* at 18-19. "We review *de novo* a trial court's first-stage dismissal." *Id.* at 19. "At the dismissal stage of a postconviction proceeding, all well-pleaded facts not positively rebutted by the original trial record are taken as true." *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)).

"A defendant has a sixth amendment right to effective assistance of counsel." *Carballido*, slip op. at 16 (citing *People v. Taylor*, 237 Ill. 2d 356, 374 (2010)). We review claims of ineffective assistance according to the two-prong test set forth in *Strickland*, 466 U.S. at 687-88 (adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984)), which requires the defendant to show that: "(1) as determined by prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by

counsel's deficient performance" *Carballido*, slip op. at 16-17. This standard was specifically applied in *Hodges*, which stated that, "[a]t the first stage of postconviction proceedings under the Act, 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." *Hodges*, 234 Ill. 2d at 17.

Defendant's only clear argument on appeal is that the trial court "prematurely applied" *Strickland* instead of applying *Hodges*. Thus, he appears to argue that any guidance from *Strickland* is inappropriate at the first stage of postconviction proceedings. But *Hodges* does not preclude any application of *Strickland*. Instead, *Hodges* merely clarifies that a petition is frivolous or patently without merit when it has no arguable basis in law or fact. More specifically, in *Hodges*, our supreme court used *Strickland* as guidance to determine whether the petition in that case had an arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 17. Thus, in determining whether defendant's petition was frivolous, the trial court properly looked to the *Strickland* standard to determine whether it was arguable that the performance of defense counsel fell below an objective standard of reasonableness or caused prejudice.

The State suggests that defendant has failed to sufficiently argue any further contentions in his brief and that our analysis can stop here. Other than listing three instances of alleged ineffective assistance in a few sentences, defendant does not develop his argument or explain how his counsel's actions fell below an objective standard of reasonableness or how he suffered prejudice. However, because defendant has provided some argument, we will address the three claims.

1. Failure to Call a Fingerprint Expert

Defendant contends that his trial counsel was ineffective for failing to call a fingerprint expert to testify that the prints found on the tape were old. However, defendant did not provide an affidavit from an expert to show that one was available or to show what his or her testimony would be. Defendant never provided information about the identity of the fingerprint expert. A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010). In the absence of such an affidavit, a court cannot determine whether the proposed witness could have provided testimony favorable to the defendant, and further review of the claim is unnecessary. *Id.* The requirement of supporting attachments is likewise codified in section 122—2 of the Act, providing that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122—2 (West 2008).

"The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10 (citing *People v. Delton*, 227 Ill. 2d 247, 254 (2008)). " 'Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' " *Id.* (quoting *Delton*, 227 Ill. 2d at 254-55). Here, without an affidavit from a fingerprint expert, who defendant did not even name in his petition, and without an explanation for the absence of such an affidavit, further review of the claim is unnecessary.

2. Failure to Call Witnesses in Regard to the Lineup

Defendant argues that he presented an arguable factual and legal basis for his claim that he had been misidentified in the lineup and that Kline, Pocius, and Perez would have contradicted those

identifications and indicated that the misidentifications occurred because defendant was wearing Stephenson's clothes in the lineup. However, defendant's claims are contradicted by the record, and his counsel's decision not to call Kline and Pocius was a matter of trial strategy.

Although the trial court initially takes the allegations in a postconviction petition as true at the first stage, in evaluating the petition " 'the trial court may consider the petition's allegations in light of the trial record and may dismiss the petition if the record contradicts those allegations.' " *People v. Burns*, 405 Ill. App. 3d 40, 42 (2010) (quoting *People v. Robinson*, 375 Ill. App. 3d 320, 329 (2007)). "[A] legal argument that is completely contradicted by the record is an example of an indisputably meritless argument." *Id.* (citing *Hodges*, 234 Ill. 2d at 16). Also, "[t]rial counsel's decision whether to present a particular witness is within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel." *People v. Gonzalez*, No. 2—09—0088, slip op. at 17 (Ill. App. Feb. 24, 2011) (citing *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999)). "Errors in strategy do not constitute ineffective assistance of counsel." *Id.* (citing *People v. Krankel*, 131 Ill. App. 3d 887, 892 (1985)).

Here, defendant argues that he was misidentified because, in the lineup, he was wearing clothes that belonged to another person. But, contrary to defendant's allegations, the record shows that he was wearing an orange jumpsuit in the lineup. In addition, witnesses described defendant as wearing a jersey, "do rag," and jeans during the robbery, while Perez reported that Stephenson was attired in a ball cap, a T-shirt, a jacket, and possibly jeans. Thus, defendant's contentions are contradicted by the record and have no arguable basis in law or fact.

Further, as to Pocius and Kline, defendant has failed to allege any facts to show that the decision not to call them was anything other than sound trial strategy or that, or in any event, he was

prejudiced by the failure. Although Pocius and Kline did not identify defendant in the lineup, Kline accurately described him to the police and Pocius did not rule out defendant as one of the suspects. Thus, their testimony would have added little to defendant's case, while potentially damaging it, making a decision not to call them being trial strategy. Further, prejudice is shown under *Strickland* when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Here, defendant failed to establish that a reasonable probability existed that the result of the proceeding would have been different had defense counsel called Kline and Pocius to testify. Thus, defendant has not shown an arguable basis in either law or fact for his claim that his counsel was ineffective for failing to call them as witnesses.

3. Failure to Challenge Statements Made to Dooley

In his brief, defendant argues that his trial counsel should have taken some unspecified action to challenge his confession to Dooley. In his petition, however, defendant framed this in terms of ineffective assistance of appellate counsel.

"A claim of ineffective assistance of appellate counsel is governed by the same rules that apply to claims of ineffective assistance of trial counsel." *People v. Moore*, 402 Ill. App. 3d 143, 146 (2010). "The defendant must show that appellate counsel's failure to raise a particular issue on direct appeal was objectively unreasonable and that the defendant was prejudiced by that failure. In order to show prejudice, the defendant must show that the underlying issue had merit." *Id.* at 146-47. Issues that depend on evidence outside of the record generally may not be raised on direct appeal. See *id.* at 146.

Here, defendant's claim depends on his assertion that he never spoke to Dooley, proof of which was not in the record on direct appeal. Thus, his appellate counsel could not raise the issue. To the extent that defendant claims that the record proves that he did not speak with Dooley, he is in error. Defendant points to jail records to assert that he never left his cell, but those records do not show that he was consistently monitored and do show that defendant was out of his cell on several occasions. Accordingly, defendant's argument has no arguable basis in law or fact.

III. CONCLUSION

The trial court did not err when it applied *Strickland* or when it determined that the petition was frivolous and patently without merit. Accordingly, we affirm the judgment of the circuit court of Du Page County.

Affirmed.