

**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).

NO. 4-09-0586

Filed 1/18/11

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTHONY J. HARRIS,	)	No. 07CF153
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Knecht and Justice Appleton concurred  
in the judgment.

**ORDER**

*Held:* (1) Any use of an improper standard by the trial court in analyzing a postconviction petition at the first stage of the postconviction proceedings would not itself warrant reversal of the petition's dismissal.

(2) Since the record did not completely contradict defendant's assertions supporting his ineffective-assistance-of-trial-counsel claim, defendant's *pro se* postconviction petition stated a gist of a constitutional claim, and thus the trial court's dismissal was erroneous.

(3) This court's reversal of the trial court's first-stage dismissal of defendant's postconviction petition rendered moot defendant's arguments regarding filing fees and court costs.

In April 2009, defendant, Anthony J. Harris, filed his *pro se* postconviction petition, arguing, *inter alia*, he was denied effective assistance of trial counsel. In July 2009, the Champaign County circuit court dismissed defendant's petition, finding the issues raised by defendant were patently without

merit. Defendant appeals the dismissal, asserting (1) the trial court used the wrong standard in deciding to dismiss defendant's petition, (2) his ineffective-assistance-of-counsel claims were sufficient to survive the first stage of the postconviction proceedings, and (3) the court erred by requiring defendant to pay court costs and filing fees after the dismissal of his petition. We reverse and remand.

#### I. BACKGROUND

In February 2007, a grand jury charged defendant with two counts of aggravated robbery (720 ILCS 5/18-5(a) (West 2006)). Those counts were based on separate robberies on the night of January 24, 2007, in Urbana, Illinois. In June 2007, the trial court held a jury trial on both charges. The evidence relevant to the issues on appeal is set forth in analyzing the issues. After hearing all of the evidence, a jury returned guilty verdicts on both charges.

At a July 25, 2007, hearing, the trial court denied the first of many posttrial motions and sentenced defendant to concurrent terms of 22 years' imprisonment. Defendant appealed, and on appeal, this court dismissed defendant's appeal for lack of jurisdiction. *People v. Harris*, No. 4-07-0690 (December 19, 2008) (unpublished order under Supreme Court Rule 23).

In April 2009, defendant filed his *pro se* postconviction petition, raising, *inter alia*, numerous claims of ineffective

assistance of trial counsel. On July 7, 2009, the trial court dismissed defendant's postconviction petition. In the order, the court stated the following:

"the issues raised in the postconviction petition are patently without merit and that [defendant] has failed to make a substantial showing that either his United State[s] or Illinois constitutional rights were violated in either the trial or appellate proceedings."

In addition to dismissing the petition, the court ordered defendant to pay filing fees. On July 14, 2009, the court filed an amended order, which required defendant to also pay actual court costs.

On August 5, 2009, defendant filed a notice of appeal. While the notice of appeal incorrectly lists the date of the order, it states the nature of the order appealed was a postconviction petition. A liberal construction of the notice of appeal indicates the order appealed was the court's July 14, 2009, amended order dismissing defendant's postconviction petition. Thus, we find the notice of appeal sufficiently complied with Supreme Court Rule 606 (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009)). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to

appeals in postconviction proceedings). Regardless, in accordance with Supreme Court Rules 303(b)(5), 606, and 651(d) (Ill. S. Ct. R. 303(b)(5) (eff. May 30, 2008); R. 606 (eff. Mar. 20, 2009); R. 651(d) (eff. Dec. 1, 1984)), defendant filed a late notice of appeal that listed the July 14, 2009, order and noted it was the denial of a postconviction petition. Accordingly, this court has jurisdiction under Supreme Court Rule 651(a) (Ill. S. Ct. R. 651(a) (eff. Dec. 1, 1984)).

## II. ANALYSIS

The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2008)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). When a case does not involve the death penalty, the adjudication of a postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must, independently and without considering any argument by the State, decide whether the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail.

*People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Legal argument or citation to legal authority is not required. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). However, section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2008)) requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." In analyzing the petition, courts are to take the allegations of the petition as true as well as liberally construe them. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

Moreover, our supreme court has recently held a court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one the record completely contradicts. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

Additionally, in considering a postconviction petition at the first stage of the proceedings, the court can examine the

following: "the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2008). This court reviews *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105-06 (2000).

If the trial court does not dismiss the petition at the first stage, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007-08. At the second stage of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

#### A. First-Stage Standard

Defendant first argues the trial court applied the incorrect standard when determining whether his petition should be dismissed at the first stage of the proceedings. Specifically, he notes the court stated the "substantial showing of a

constitutional violation" standard applicable to the second stage of the postconviction proceedings and thus omitted the "gist of a constitutional claim" standard that applies to the first stage.

In support of his argument, he cites the Fifth District case of *People v. Newbolds*, 364 Ill. App. 3d 672, 847 N.E.2d 614 (2006). There, the trial court appeared to have employed the "substantial showing of a constitutional violation, rather than the lighter burden of presenting a gist of a constitutional violation." (Internal quotation marks omitted.) *Newbolds*, 364 Ill. App. 3d at 679, 847 N.E.2d at 621. The *Newbolds* court found the court's use of the improper standard was a basis for reversing its dismissal of the postconviction petition. *Newbolds*, 364 Ill. App. 3d at 679, 847 N.E.2d at 621.

However, as noted by the State, the Second District has also addressed the issue and found a trial court's utilization of the wrong standard is not a basis for reversing the dismissal. See *People v. Dominguez*, 366 Ill. App. 3d 468, 473, 851 N.E.2d 894, 900 (2006). The *Dominguez* court explained that, since a reviewing court may affirm on any proper ground, a procedurally proper summary dismissal based on an improper ground may still be affirmed. Thus, the reviewing court should apply the proper standard and "affirm if, in accordance with that standard, the summary dismissal is justified." *Dominguez*, 366 Ill. App. 3d at 473, 851 N.E.2d at 900.

We agree with the Second District. Our *de novo* review utilizing the proper standard addresses the trial court's use of an improper one if it did so. Thus, the use of an improper standard in analyzing a postconviction petition at the first stage does not itself serve as a basis for reversal, and we need not address whether the trial court used the wrong standard.

B. Propriety of the Dismissal

Defendant argues his postconviction petition did state the gist of a constitutional claim and thus should have moved to the second stage of the proceedings. Particularly, defendant points to his ineffective-assistance-of-trial-counsel claim based on counsel's failure to file a motion to quash his arrest and suppress evidence. The State asserts defendant's claim is completely contradicted by the record and is frivolous and patently without merit.

Initially, we address defendant's argument the State is estopped from arguing the claim is insufficient to pass to the second stage. Defendant fails to cite any authority demonstrating the standard for determining whether a *pro se* ineffective-assistance-of-counsel claim is sufficient to warrant an inquiry by the trial court is the same as the one for determining whether a postconviction petition survives the first stage of the proceedings. Accordingly, we find defendant has forfeited this argument. See *People v. Ward*, 215 Ill. 2d 317, 332, 830 N.E.2d

556, 564 (2005) (noting a point raised in a brief but not supported by citation to relevant authority is forfeited).

Contrary to defendant's assertion, his argument primarily consists of conclusory statements and contains little factual details. The argument is also difficult to understand. It appears the main thrust of defendant's argument is the police violated his fourth-amendment right in arresting him and thus his trial counsel was ineffective for failing to file a motion to quash arrest and suppress the evidence.

This court analyzes ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), which requires the defendant to prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999). To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the

defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceedings' result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

To sustain a claim of ineffectiveness based on trial counsel's failure to file a motion to quash and suppress, the defendant must establish the trial court would have granted the motion, thereby assuring a different result at trial. *People v. Harris*, 389 Ill. App. 3d 107, 134, 904 N.E.2d 1077, 1099 (2009).

As to the fourth-amendment violation, defendant's contentions in his petition suggest the police made a warrantless entry into a home or dwelling at the time of his arrest. The petition does note the police officers were not witnessing a crime at the time of his arrest. He also states no exigent circumstances existed and the officer had no basis for effectuating the arrest.

The State asserts defendant lacks standing to raise the fourth-amendment violation because the dwelling was not defendant's home and he lacked an expectation of privacy. Generally, standing is an affirmative defense. See *People v. Kelly*, 397 Ill. App. 3d 232, 265, 921 N.E.2d 333, 362 (2009). At the first stage of the postconviction proceedings, the trial court examines the petition "without any input from either side." See *Gaultney*, 174 Ill. 2d at 418, 675 N.E.2d at 106. Thus, we agree with

defendant the standing argument is more appropriate for the second stage of the proceedings where the State would have the opportunity to present it. See *Hodges*, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

Our supreme court has explained when a warrantless entry to arrest a felony suspect is permissible as follows:

"[A] warrantless, nonconsensual entry into a private dwelling to effectuate a felony arrest will not violate the fourth amendment prohibition against unreasonable searches and seizures if the arresting officers have probable cause to arrest and the officers' entry onto private property is reasonable in light of the attendant circumstances. At a minimum, entry onto private property to effectuate a warrantless arrest will be reasonable if (1) probable cause to arrest exists prior to the entry onto private property, and (2) the attendant circumstances include an element of exigency that justifies the decision to proceed without waiting to obtain a warrant." (Emphasis omitted.)

*People v. Wear*, 229 Ill. 2d 545, 574-75, 893 N.E.2d 631, 648 (2008).

After examining the record, we do not find it completely contradicts defendant's assertion no exigent circumstances existed. The two robberies occurred around 5:51 p.m. and 10:30 p.m. on January 24, 2007. Sergeant Joel Sanders testified the police developed defendant was the alleged robber and knew he lived in Mahomet. The police were also able to get a license plate number and a description of a vehicle associated with him. At 2 a.m. on January 25, 2007, Sergeant Sanders located the vehicle at a home on Illinois Street, a place known for criminal activity. Sergeant Sanders observed the vehicle at the home from 2 to 7 a.m. Police officer Harley Rutledge testified he arrived at the Illinois Street residence around 8:20 a.m. Officer Hediger was then conducting surveillance of the home. At that time, there was no movement at the scene. Officer Rutledge and several other officers decided to knock on the doors of the home and make contact with whoever was inside. Officer Rutledge knocked on the front door, which eventually flew open. After seeing and identifying defendant, he entered the home without consent and arrested defendant.

Under the aforementioned facts, the police had sufficient time to obtain a warrant to enter the Illinois Street home where the police arrested defendant. Thus, the record does not completely contradict defendant's claim exigent circumstances did not exist at the time the police made the warrantless entry to

arrest him. Accordingly, defendant's petition is not frivolous or patently without merit. We note our finding is in no way an opinion on the actual merits of the issue of whether exigent circumstances existed or on whether defendant will ultimately prevail on his ineffective-assistance claim. See *Hodges*, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

#### C. Court Costs and Filing Fees

Defendant last argues the trial court erred by requiring him to pay court costs and fees after the dismissal of his postconviction petition. Since we have reversed the trial court's order dismissing defendant's postconviction petition, this issue is now moot, and we decline to address it.

#### III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment and remand the cause to the Champaign County circuit court for further proceedings.

Reversed and remanded.