

No. 1-11-0194

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. 01 CR 25171
)	
DARRIUS ROBERSON,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in dismissing defendant's postconviction petition where the petition asserted an arguable claim based in law and fact that defendant's constitutional right to a fair and impartial jury was violated by a juror who slept through significant portions of the trial. We reverse and remand.
- ¶ 2 Defendant Darrius Roberson appeals 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 2010). On appeal, defendant contends that the trial court erred in summarily dismissing his petition during the first stage of the proceeding because his petition presented an arguable claim of denial of his

due process and sixth amendment rights to a fair and impartial jury. We reverse and remand for further proceedings.

¶ 3 After a jury found defendant guilty of first degree murder and found the fact existed that during the commission of the offense, defendant personally discharged a firearm which proximately caused the death of Thomas DeLuca on September 15, 2001, defendant was sentenced to 45 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and ordered that his mittimus be corrected. *People v. Roberson*, No. 1-07-2434 (2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 On December 3, 2010, defendant filed the instant *pro se* petition alleging, in relevant part, that his right to a fair and impartial jury was violated where a juror slept during his trial. Defendant attached 16 affidavits to his petition from various individuals, with identical language declaring that during his jury trial, one male juror was sleeping during the case presentation. The affidavits averred that "[a]fter 10 minutes or more of sleeping during trial; [sic] this juror would occasionally awake as if he was paying attention." The affidavits further declared that the affiants observed the juror "all throughout the attorneys [sic] presentation and closing arguments sleeping; occasionally awakening 10 minutes throughout the entire proceedings." They were all notarized in August 2010. The trial court summarily dismissed the petition as frivolous and patently without merit. This appeal followed.

¶ 5 On appeal, defendant contends that the circuit court erred in summarily dismissing his postconviction petition at the first stage of the proceeding when his petition raised an arguable claim that his due process and sixth amendment rights to a fair and impartial jury were violated when a juror slept through significant portions of the trial. Defendant attached 16 affidavits to substantiate this claim.

¶ 6 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of postconviction proceedings, a petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A petition is considered frivolous or without merit only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. We review *de novo* the trial court's dismissal of a postconviction petition at the first stage. *People v. Williams*, 186 Ill. 2d 55, 59-60 (1999); *People v. Coleman*, 183 Ill. 2d 366, 378 (1998).

¶ 7 We first address the State's argument that defendant waived the issue by failing to object at trial and in a posttrial motion. "The common law doctrine of waiver bars a claim that could have been presented previously." *People v. Phipps*, 238 Ill.2d 54, 62 (2010). The State asserts that the law is clear: "a defendant has a duty to tell the judge about a sleeping juror and bring this issue to the attention of the trial court or the issue will be considered waived," citing *People v. Silagy*, 101 Ill. 2d 147, 171 (1984); *People v. Harris*, 123 Ill. 2d 113 (1988); *People v. Nix*, 150 Ill. App. 3d 48 (1986); and *People v. Grenko*, 356 Ill. App. 3d 532 (2005). The State fails to include the complete statement of the court's holding in *Silagy* in which our supreme court held "a defendant who *sees* a juror sleeping has a duty to call it to the attention of the court at that time." (Emphasis added.) *Silagy*, 101 Ill. 2d at 171; see also *Grenko*, 356 Ill. App. 3d at 535 (citing *Silagy*). Indeed, most of the cases that the State cites involve circumstances in which the court, the defendant, or defendant's counsel knew a juror was sleeping during the trial and failed to raise the issue with the court contemporaneously or in posttrial motions. *Grenko*, 356 Ill. App. 3d at 535; *Silagy*, 101 Ill.2d 147, 170; and *Harris*, 123 Ill. 2d at 160 (the trial court informed defense counsel that the court may have noticed a juror "nodding" once). In *Nix*, the facts of the

case did not specify whether defendant knew at the time of the trial that a juror was sleeping during trial, and the appellate court summarily rejected the defendant's allegation that one juror slept, stating that the defendant's failure to call the juror's behavior to the attention of the court waived the point. *Nix*, 150 Ill. App. 3d at 50. It appears, however, that the *Nix* reviewing court assumed the defendant was aware during the trial that the juror was sleeping. *Id.* Thus, the State's cited cases are inapposite.

¶ 8 Waiver is "the voluntary relinquishment of a known right." *Phipps*, 238 Ill. 2d at 62. This court will look to the particular facts and circumstances of defendant's case, and will liberally construe waiver principles in the defendant's favor. *Id.* We agree with defendant and find that defendant has not waived the present argument. There is no indication in the record that the parties or the trial court observed a juror sleeping. Because defendant does not now claim that he knew at the time of the trial or during posttrial motions that a juror was sleeping, we cannot say that he waived the issue.

¶ 9 We now turn to defendant's substantive claim. Defendants have the constitutional rights to be tried by a fair and impartial jury and to due process. U.S. Const. amends. VI and XIV. A juror who is inattentive for a substantial portion of a trial has been found to be unqualified to serve on the jury, and violates due process. *People v. Jones*, 369 Ill. App. 3d 452, 455-56 (2006). Here, defendant's claim has an arguable basis in law that his right to a fair and impartial jury was denied because, if taken as true, defendant's 16 affidavits assert that a juror slept throughout a significant portion of the presentation of evidence and closing arguments, only awakening occasionally as though he were paying attention. There is nothing in the record to affirmatively rebut this assertion. Accordingly, it is arguable as a matter of law that the sleeping juror was unqualified to serve on the jury.

¶ 10 To support its argument that defendant's claim has no arguable basis in fact, the State appears to attack the credibility of the 16 affidavits that defendant attached to his petition, arguing that it is "fantastic and delusional" that a juror slept through a significant portion of defendant's trial without being noticed by the parties or the trial judge. The State also cites the identical language in the affidavits and the fact that the affidavits were all signed within weeks as evidence of the affidavits' incredulity. These credibility arguments fail because credibility is to be resolved at the evidentiary hearing, and not during the first stage of postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 381(1998). All well-pleaded facts must be taken as true at this point in the proceeding. *Id.* Here, defendant's petition and attached affidavits plead an arguable basis in fact that a male juror slept through significant portions of defendant's trial. Thus, we hold that defendant sufficiently alleged an arguable claim of denial to his right to a fair and impartial jury to withstand summary dismissal.

¶ 11 For the foregoing reasons, we reverse the ruling of the circuit court of Cook County and remand for further proceedings not inconsistent with this opinion.

¶ 12 Reversed and remanded.