

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).

2012 IL App (4th) 110281-U

Filed 6/26/12

NO. 4-11-0281

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
ESMON V. JONES,)	No. 06CF1154
Defendant-Appellant.)	
)	Honorable
)	Katherine M. McCarthy,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court expressly dismissed defendant's *pro se* postconviction petition as a whole at the first stage of the proceedings, the court's failure to explain its reasoning for finding one of several issues was frivolous and patently without merit did not constitute an improper partial dismissal.
- ¶ 2 Defendant's ineffective-assistance-of-counsel claim based on counsel's failure to inform him that he could be impeached with his prior convictions lacked an arguable basis in law as to both prongs of the *Strickland* test and thus did not state the gist of a constitutional claim.
- ¶ 3 In December 2010, defendant, Esmon V. Jones, filed a *pro se* postconviction petition, which he later supplemented twice. In a March 2011 written order, the Macon County circuit court summarily dismissed defendant's petition as frivolous and patently without merit.
- ¶ 4 Defendant appeals, asserting (1) the trial court's dismissal was an improper partial summary dismissal because it failed to rule on one of defendant's claims and (2) the court erred

by dismissing defendant's petition because one of his ineffective-assistance-of-counsel claims stated the gist of a constitutional claim. We affirm.

¶ 5

I. BACKGROUND

¶ 6 In August 2006, the State charged defendant and a co-defendant, Jerome Davis, with six counts of first degree murder in the August 4, 2006, death of Calvin Fakes. Counts I through III alleged defendant personally discharged a firearm proximately causing Fakes' death and sought a 25-year sentencing enhancement based upon that fact. See 720 ILCS 5/9-1(a)(1), (a)(2) (West 2004); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004). Counts IV through VI alleged defendant and Davis discharged a firearm, thereby causing decedent's death. See 720 ILCS 5/9-1(a)(1), (a)(2) (West 2004).

¶ 7 Defendant's January 2008 trial was separate from Davis's trial. At trial, defendant testified on his own behalf. Before defendant took the stand, the trial court questioned defendant to make sure he understood he did not have to testify. When the court asked defendant if he had discussed whether or not to testify with his attorney, defendant indicated he had not, and the court recessed to allow defendant to talk to his counsel. After the recess, defendant indicated he was going to testify and he understood it was his personal decision whether to testify. At the conclusion of the trial, the jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a) (West 2004)) but found the State did not prove beyond a reasonable doubt defendant personally discharged a firearm during the commission of the offense (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)). In February 2008, the trial court sentenced defendant to a 35-year prison term. Defendant filed a motion to reconsider his sentence, which the court denied in May 2008.

¶ 8 After defendant's sentencing, the State tendered to defense counsel a copy of

Davis's 1999 conviction for reckless discharge of a firearm. In June 2008, defendant filed a motion to vacate the judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)), arguing the State committed reversible error under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), when it inadvertently failed to disclose Davis's 1999 felony conviction for reckless discharge of a firearm. After a July 2008 hearing, the court denied defendant's motion, finding lack of prejudice to defendant.

¶ 9 Defendant filed a direct appeal and asserted (1) the evidence presented did not permit the trial court to instruct the jury on accountability, (2) the court erred when it denied defendant's section 2-1401 motion that raised a *Brady* issue, and (3) the prosecutor committed reversible error during his rebuttal closing argument. We affirmed the trial court's judgment. *People v. Jones*, No. 4-08-0555 (Oct. 28, 2009) (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal, which the supreme court denied. *People v. Jones*, 236 Ill. 2d 564, 932 N.E.2d 1033 (2010).

¶ 10 In December 2010, defendant filed his *pro se* postconviction petition, asserting (1) the *Brady* violation related to Davis's felony conviction; (2) ineffective assistance of counsel based on counsel's failure to (a) challenge the State's assertion it did not know about Davis's felony until after trial, (b) inform defendant before he testified that he could be impeached with his prior convictions, (c) request the removal of a juror, (d) investigate the jury's potential exposure to the prosecutor's statements to the media, (e) object to the prosecutor's statements that were not based on trial testimony, (f) object to the State's questioning of Sharonda White, (g) call a list of favorable witnesses, and (h) challenge a jury instruction regarding responsibility for a third party's actions; (3) he was denied a fair trial by the prosecutor's remarks in closing argu-

ments; and (4) this court attributed to defendant "submissions" he did not make. Defendant attached numerous documents to his petition. In January 2011, defendant filed a motion to supplement his postconviction petition with several documents. The next month, defendant also filed a motion to supplement his petition. In the February 2011 supplement, defendant asserted ineffective assistance of trial and appellate counsel.

¶ 11 On March 24, 2011, the trial court entered its ruling summarily dismissing defendant's *pro se* petition as frivolous and patently without merit. On April 4, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 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). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 12 II. ANALYSIS

¶ 13 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)) 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 2010). 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 2010)) 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.

¶ 14 Moreover, our supreme court has explained 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.

¶ 15 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 2010). We review *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).

¶ 16 Last, to the extent defendant contends reversal is warranted because the trial court

improperly applied a heavier burden on defendant at the first stage of postconviction review, we note a trial court's utilization of the wrong standard is not a basis for reversing the summary dismissal. *People v. Dominguez*, 366 Ill. App. 3d 468, 473, 851 N.E.2d 894, 900 (2006); but *cf. People v. Newbolds*, 364 Ill. App. 3d 672, 679, 847 N.E.2d 614, 621 (2006) (finding the court's use of the improper standard at the first stage was a basis for reversing its dismissal of the postconviction petition). Since a reviewing court may affirm a dismissal on any proper ground, a procedurally proper summary dismissal based on an improper ground may still be affirmed. *Dominguez*, 366 Ill. App. 3d at 473, 851 N.E.2d at 900. Thus, this court applies the proper standard and will "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.

¶ 17

A. Partial Summary Dismissal

¶ 18

Initially, we address defendant's contention the trial court improperly granted a partial summary dismissal because it failed to specifically address one of defendant's numerous claims. The allegedly missed claim is defendant's assertion this court attributed statements to him that he did not make during his trial testimony. Defendant further contends that, due to the improper partial dismissal, his petition in its entirety should proceed to the second stage of the postconviction proceedings.

¶ 19

The primary case defendant cites in support of his contention is *People v. Rivera*, 198 Ill. 2d 364, 763 N.E.2d 306 (2001). In *Rivera*, 198 Ill. 2d at 366, 763 N.E.2d at 307-08, the trial court dismissed four of the defendant's postconviction claims as frivolous or patently without merit, but it found two of the claims did state the gist of a constitutional violation and advanced those two claims to the second stage of the postconviction proceedings. Our supreme

court held the plain language of the Postconviction Act did not allow for partial summary dismissals at the first stage of the proceedings. *Rivera*, 198 Ill. 2d at 370-72, 763 N.E.2d at 310-11.

¶ 20 Unlike *Rivera* and the other cases cited by defendant, the trial court expressly found defendant's postconviction petition was frivolous and patently without merit and summarily dismissed the petition in its *entirety*. In its written dismissal order, the court did reference defendant's alleged error by this court in its list of defendant's claims, noting defendant made "a vague reference to the fact that the Defendant did not submit to any submissions attributed to him by the Appellate Court." Due to the vagueness of defendant's argument, the court may have simply concluded further discussion was unwarranted in explaining why the issue was frivolous and patently without merit. The trial court's brevity on the issue is supported by the fact defendant's counsel on appeal does not even argue the issue states the gist of a constitutional claim.

¶ 21 Accordingly, we find the trial court's dismissal order properly dismissed defendant's petition in its entirety.

¶ 22 B. Ineffective Assistance of Counsel

¶ 23 On appeal, defendant only alleges his ineffective-assistance-of-trial-counsel claim based on counsel's failure to inform him his testimony could be impeached with his prior convictions states the gist of a constitutional claim.

¶ 24 We review defendant's ineffective-assistance-of-counsel claim under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that test, the defendant must show counsel's performance was (1) deficient and (2) that prejudice resulted from the

deficient performance. *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. Thus, "[a] postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754.

¶ 25 As to the first prong of the *Strickland* test, defendant's contention lacks an arguable legal basis. The decision whether to testify in one's own defense belongs to the defendant. *People v. Enis*, 194 Ill. 2d 361, 399, 743 N.E.2d 1, 23 (2000). However, that decision should be made with the advice of counsel. *People v. Smith*, 176 Ill. 2d 217, 235, 680 N.E.2d 291, 303 (1997). Counsel's advice on the issue of whether to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel. *People v. DeRossett*, 262 Ill. App. 3d 541, 546, 634 N.E.2d 1257, 1261 (1994). However, as defendant notes, courts have found ineffective assistance of counsel when counsel provides the defendant with *incorrect information* with respect to the consequences of taking the stand. See *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) (holding the defendant was deprived of a meaningful opportunity to decide whether to testify because counsel misinformed the defendant about the Government's use of prior convictions if the defendant testified); *United States v. Poe*, 352 F.2d 639, 640 (D.C. Cir. 1965) (holding the defendant was deprived of a fair trial where he waived his right to testify based on counsel's misinformation the Government could use inadmissible statements to impeach his testimony). The other case cited by defendant on appeal was the Eighth Circuit's decision in *Foster v. Delo*, 11 F.3d 1451 (8th Cir. 1993), which was vacated, and on rehearing *en banc*, the reviewing court found the defendant was not denied effective assistance of counsel

based on the defendant's failure to testify because the defendant had failed to establish the prejudice prong of *Strickland*. *Foster v. Delo*, 39 F.3d 873, 877 (8th Cir. 1994). In this case, defendant alleged counsel failed to provide information and not that counsel provided incorrect information.

¶ 26 On appeal, defendant fails to cite any cases showing counsel's failure to inform a defendant about impeachment with prior convictions constitutes deficient performance. While a defendant's waiver of the right to testify must be knowing and voluntary (*Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir. 1998)), all the defendant needs to know is the right's existence (*Smith*, 176 Ill. 2d at 236 n.1, 680 N.E.2d at 303 n.1). In this case, the record clearly shows defendant was aware of his right to testify as he exercised it after discussing the matter with his attorney.

¶ 27 Defendant's petition also lacks an arguable basis in law as to the second prong of *Strickland*. In his petition, defendant simply notes counsel's failure to inform and does not allege any prejudice from counsel's alleged deficiency. Defendant does not indicate he would have waived his right to testify in his own defense if he had known he could be impeached with his prior convictions. Moreover, defense counsel had defendant reveal his prior convictions on direct examination, "thereby removing the potential impeachment value of the evidence from the State." *People v. Williams*, 317 Ill. App. 3d 945, 950, 742 N.E.2d 774, 779 (2000).

¶ 28 Accordingly, we find the trial court properly found defendant's ineffective-assistance-of-counsel claim based on counsel's failure to inform defendant he could be impeached with prior convictions failed to state the gist of a constitutional claim.

¶ 29

III. CONCLUSION

¶ 30 For the reasons stated, we affirm the Macon County circuit court's judgment. As

part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed.