

No. 1-11-2789

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. 05 CR 21070
)	
DIANA THAMES,)	Honorable
)	William O. Maki
)	Hyman I. Riebman,
Defendant-Appellant.)	Judges Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant's allegation that her trial counsel rendered ineffective assistance was rebutted by the record and did not have an arguable basis in law or fact, the circuit court's summary dismissal of her postconviction petition is affirmed.
- ¶ 2 Defendant Diana Thames appeals from an order of the circuit court summarily dismissing her *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant contends the court erred when it dismissed her petition because she presented an arguable claim that her trial counsel rendered ineffective assistance where counsel failed to have the murder

weapon and other evidence tested for fingerprints and DNA of the victim's exboyfriend, whom the defense theorized was the real murderer. We affirm.

¶ 3 Following a bench trial, defendant was convicted of the 2005 first degree murder of her longtime best friend, Cindy Wolosick, who was stabbed with a kitchen knife 26 times in her head, neck, chest and abdomen, and was found lying on her bed. The trial court sentenced defendant to a term of 35 years' imprisonment.

¶ 4 On direct appeal, defendant argued that the State failed to prove her guilty beyond a reasonable doubt, and that the trial court erred when it denied her pretrial motion for a continuance, when it partially denied her motion to suppress, and when it admitted Wolosick's out-of-court statements. This court rejected defendant's arguments and affirmed her conviction and sentence. *People v. Thames*, No. 1-08-1319 (2010) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Thames*, 238 Ill. 2d 671 (2010).

¶ 5 On May 24, 2011, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2010). Defendant raised several allegations that counsel, who represented her at trial and on appeal, rendered ineffective assistance, and claimed her due process rights were violated because the State failed to prove her guilty beyond a reasonable doubt. Defendant alleged, *inter alia*, that trial counsel should have had the murder weapon and other items at the crime scene tested for DNA and fingerprints beyond the testing conducted by the State. Defendant further alleged that counsel failed to thoroughly investigate Peter Alfieri, Wolosick's exboyfriend, as a prime suspect in the case. Alfieri was an investor in the real estate company owned by defendant and Wolosick, and defendant alleged that Alfieri had demanded money that was owed to him by the company, which was in financial difficulty.

¶ 6 The only two documents attached to defendant's petition are the results of a 1998 medical examination and a 1998 letter from a physician to her former employer, both addressing defendant's wrist strength and pain level due to carpal tunnel syndrome. Defendant also submitted a memorandum of law in support of her postconviction petition in which she expanded upon four of the allegations raised in her petition, all of which she has abandoned on appeal. There is no affidavit from defendant attesting to the veracity of the allegations in her petition.

¶ 7 The circuit court found that defendant failed to establish that counsel's performance in challenging or requesting additional testing of the State's DNA evidence fell below an objective standard of reasonableness. The court further found that the issue was already decided on direct appeal when this court found that defendant was proven guilty beyond a reasonable doubt, noting that the State's DNA expert testified that a fingernail found in the victim's bedroom contained a major DNA profile that matched defendant, which allowed the trial court to infer that the nail was torn from defendant's finger while she struggled with Wolosick. The circuit court concluded that defendant's allegations had no arguable basis in fact or law, and summarily dismissed her postconviction petition as frivolous and patently without merit.

¶ 8 On appeal, defendant contends the circuit court erred when it dismissed her petition because she presented an arguable claim that her trial counsel rendered ineffective assistance where counsel failed to have the murder weapon and other evidence tested for fingerprints and DNA of the victim's exboyfriend, Peter Alfieri, whom the defense theorized was the real murderer. Defendant argues that a match to Alfieri's fingerprints or DNA on the knife would have created reasonable doubt, and she would have been acquitted. Furthermore, defendant asserts that if Alfieri's prints and DNA were not found on the knife, it would not have harmed the defense because defendant's fingerprints and DNA were not found on the weapon either. Defendant acknowledges that counsel highlighted the lack of testing by the State to argue Alfieri

could have been the murderer, but claims counsel's action cannot be considered trial strategy because forensic testing could have corroborated the claim that Alfieri was the murderer.

¶ 9 The State argues that defendant's legal theory is completely contradicted by the trial record which shows that the murder weapon was processed for latent prints and DNA, with no fingerprints being found on the knife, and the only DNA found on the weapon belonged to the victim. The State further argues that all evidence that may have led to a suspect was tested for fingerprints, blood and DNA. In addition, the State argues that trial counsel made a strategic decision to use the purported lack of testing in her argument and cross-examination of the witnesses in an attempt to portray the police investigation as insufficient.

¶ 10 We review the circuit court's summary dismissal of defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *Coleman*, 183 Ill. 2d at 378-79. Our supreme court has held that a petition may be summarily dismissed as 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 petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 11 As a threshold matter, we note that section 122-1(b) of the Act provides that a postconviction proceeding is commenced when a prisoner files a petition that is "verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). The purpose of the affidavit is to verify that the allegations in the defendant's petition are being brought truthfully and in good faith. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Where a postconviction petition does not comply with the

pleading requirements of the Act, summary dismissal of the petition by the circuit court is proper. *People v. Delton*, 227 Ill. 2d 247, 258 (2008); *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011).

¶ 12 Here, the record reveals that defendant did not provide an affidavit verifying the truthfulness of the allegations in her petition as required by section 122-1(b) of the Act. Defendant's failure to meet the pleading requirements of the Act was "fatal" to her postconviction petition and alone justified the circuit court's summary dismissal of her petition. *Delton*, 227 Ill. 2d at 255; *Collins*, 202 Ill. 2d at 66.

¶ 13 Notwithstanding the pleading deficiency, we find that the circuit court properly dismissed defendant's postconviction petition where her allegation that trial counsel rendered ineffective assistance has no arguable basis in law or fact. Claims of ineffective assistance of counsel are evaluated using the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, she suffered prejudice that deprived her of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Graham*, 206 Ill. 2d at 476. If defendant cannot prove she suffered prejudice, this court need not determine whether counsel's performance was deficient. *Id.* "In considering whether counsel's performance was deficient, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ' " *People v. Patterson*, 217 Ill. 2d 407, 441 (2005), quoting *Strickland*, 466 U.S. at 689. In general, conduct related to trial

strategy will not support a claim of ineffective assistance unless counsel failed to pursue any meaningful adversarial testing. *Patterson*, 217 Ill. 2d at 441.

¶ 14 Decisions regarding which witnesses to call and what evidence to present at trial on defendant's behalf are considered matters of trial strategy, and as such, are generally immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). Moreover, where the court examines the court file and trial transcripts and finds that the allegations in the postconviction petition are contradicted by the trial record, the court may summarily dismiss the petition. *People v. Deloney*, 341 Ill. App. 3d 621, 626 (2003), citing 725 ILCS 5/122-2.1(c) (West 1998), and *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 15 Here, we find that defendant cannot show that counsel's conduct was unreasonable, or that she was prejudiced by counsel's actions. The record shows that trial counsel's primary theory of defense in this case was that the crime scene was not properly processed and the forensic testing was not thoroughly completed, and therefore, the evidence failed to prove defendant guilty beyond a reasonable doubt. Counsel's decision to emphasize the lack of forensic testing in an attempt to portray the police investigation as insufficient was a matter of trial strategy. By arguing that it was possible that someone else, namely Peter Alfieri, could have committed the murder, and that no testing was done to exclude him as a suspect, counsel attempted to create reasonable doubt that would allow the trial court, sitting as the trier of fact, to find defendant not guilty. Defendant contends that if Alfieri's fingerprints or DNA were found on the knife or other evidence at the crime scene, she would have been acquitted. However, defendant's assertion that Alfieri's fingerprints and DNA would have been exculpatory evidence is purely speculative. The record shows that there was no evidence at trial that placed Alfieri at the crime scene. In announcing its findings, the trial court stated that Alfieri took an unnecessary beating during the trial. The court further found that any inference that Alfieri was present on the night of the

murder, when he had an alibi, was unfair and nonsensical. Consequently, it seems unlikely that his fingerprints or DNA would have been found on the murder weapon or other evidence.

¶ 16 We reject defendant's assertion that if Alfieri's fingerprints and DNA were not found at the crime scene, it would not have harmed her defense. If counsel had compelled Alfieri to submit to the forensic testing, and his fingerprints and DNA were not found on the knife or any other evidence, and there was no other evidence that he was at the crime scene, counsel could not have argued that it was possible that he was the killer. Counsel's theory of defense would have been destroyed and her argument that reasonable doubt existed would have been even less persuasive. Instead, by focusing on the lack of forensic testing, counsel was able to argue that the police targeted defendant and overlooked other possible suspects.

¶ 17 Finally, we find that the trial record contradicts defendant's allegation that Alfieri's fingerprints could have been found on the murder weapon. Palatine police detective Robert Bice testified that no fingerprints at all were found on the knife. Counsel was aware of this finding. Therefore, counsel had no grounds to assert that there was a possibility that forensic testing could have shown Alfieri's fingerprints on the murder weapon.

¶ 18 Based on the above, we find that counsel's trial strategy of challenging the lack of forensic testing was not unreasonable. Furthermore, we cannot say that there is a reasonable probability that the result of defendant's trial would have been different if counsel had compelled testing for Alfieri's fingerprints and DNA, and thus, defendant was not prejudiced by counsel's actions. Accordingly, defendant's claim that trial counsel rendered ineffective assistance by failing to pursue additional forensic testing has no arguable basis in law or fact.

¶ 19 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* postconviction petition.

¶ 20 Affirmed.

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