

No. 1-11-3357

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. 07 CR 14025
)	
MICHAEL BLAKES,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* postconviction petition where the affidavits attached met the "arguable" *Strickland* test for first stage petitions.
- ¶ 2 Defendant Michael Blakes appeals from 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 the circuit court erred in dismissing his petition because his claims had arguable bases in law and fact. Specifically, defendant claims that he was denied effective assistance of counsel when, although he provided counsel with the names of two witnesses who would support his defense, counsel failed to investigate or subpoena those witnesses. He further claims that he was denied effective assistance of counsel when counsel failed to obtain a witness's medical records in order to impeach her at trial. We reverse and remand.

No. 1-11-3357

¶ 3 The evidence at defendant's bench trial established, through the testimony of the victim T.L. and her friend Donisha Logan, that defendant struck the victim in the face several times, then dragged her into defendant's family home. The victim testified that once inside, defendant hit her in the face several more times, and ultimately penetrated her orally, vaginally, and anally with his penis. The victim and Logan denied being involved in a physical altercation with a group of women earlier that evening.

¶ 4 Mercedes Cetewayo testified that at the time of the incident she was defendant's brother's girlfriend and lived in the family home. At trial, Cetewayo did not recall the day of the incident, making a statement to the police, or testifying before the grand jury. She explained that she suffered from seizures and blackouts and took medication for this issue. Cetewayo did not recall telling a detective that she heard a girl crying and asking to be let go, later saw the girl crying on the basement staircase, and ultimately told police about this girl. After Cetewayo testified, the defense moved to strike her testimony pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). The court denied this motion and Cetewayo's prior written statement and grand jury testimony were ultimately entered into evidence pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2008)).

¶ 5 Defendant then testified that the sexual contact with the victim was consensual and that the victim was injured earlier that evening when she and Logan were in a physical confrontation with a group of women. Defendant was subsequently found guilty of four counts of aggravated criminal sexual assault and sentenced to four consecutive terms of six years and three months in prison.

¶ 6 On appeal, defendant contended that he was entitled to 18 additional days of presentence custody credit. This court agreed, corrected his mittimus, and affirmed the judgment of the circuit court in all other aspects. See *People v. Blakes*, No. 1-10-0067 (2011) (unpublished order under Supreme Court Rule 23).

No. 1-11-3357

¶ 7 In August 2011, defendant filed the instant *pro se* postconviction petition alleging that he was denied the effective assistance of trial and appellate counsel. Defendant alleged, *inter alia*, that trial counsel failed to contact or subpoena Myron Taylor and Calvin Thomas, who were with defendant on the night of the offense, even though defendant gave counsel the men's addresses and telephone numbers prior to trial. Defendant further alleged that Taylor and Thomas would have testified that the victim and Logan were in a physical fight with a group of women which was broken up by the police, and that Thomas would also have testified that the victim went inside defendant's home willingly. Defendant finally alleged that counsel failed to investigate witness Mercedes Cetewayo's use of a psychotropic drug called Keppra, which can cause amnesia and loss of coordination, and to move to suppress her statement. The affidavits of defendant, Taylor, Cetewayo, Amie Blakes, and Claudette Baker were attached to the petition in support. Defendant explained that Thomas's affidavit was not attached because Thomas had moved and defendant could not locate his current address.

¶ 8 In a statement pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)), defendant averred that trial counsel failed to contact and subpoena Taylor and Thomas even though defendant gave counsel their contact information and stated that they were willing to testify. Defendant further averred that he found counsel's statement that counsel was unable to contact Taylor and Thomas "hard to believe." In her affidavit, Cetewayo averred that she took Keppra, that the drug changes the way she thinks and understands things, and that she had recently learned that she had been "overdosing" herself by taking the medication every three hours, when it should be administered every six hours. In his affidavit, Taylor averred that he was willing to testify that he saw the victim and Logan in a fight with a group of women on the day of the offense. Amie Blakes averred that she reminded trial counsel to contact Taylor and Thomas, and gave counsel the men's addresses and phone numbers. Claudette Baker averred that she saw Amie give trial counsel Thomas and Taylor's addresses.

No. 1-11-3357

¶ 9 The circuit court summarily dismissed the petition as frivolous and patently without merit. It is from this judgment that defendant appeals.

¶ 10 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In *People v. Tate*, 2012 IL 112214, our supreme court stated that first-stage review permits the circuit court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *Tate*, 2012 IL 112214, ¶ 9, quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12; see also *Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 11 On appeal, defendant first contends that the circuit court erred by summarily dismissing his *pro se* petition because he was denied effective assistance of counsel when trial counsel failed to investigate and present Thomas and Taylor at trial because their testimony would have supported defendant's version of events, *i.e.*, the victim's injuries were caused by a fight with a group of women and she entered defendant's home willingly.

No. 1-11-3357

¶ 12 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him.

Hodges, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "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.

¶ 13 Although defendant alleges that Thomas would testify that the victim was in a physical fight with a group of women and entered defendant's home willingly, Thomas's affidavit is not attached to defendant's petition, and this court cannot speculate as to what the content of Thomas's testimony might be. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 71 (absent a valid affidavit, a reviewing court cannot determine whether the proposed witness could have provided information or testimony favorable to the defendant).

¶ 14 Turning to the affidavits which are attached to the petition, *i.e.*, those of Amie and Taylor, as well as the allegations contained in defendant's *pro se* petition, we conclude that these affidavits arguably meet the *Strickland* test. Defendant indicated that he told trial counsel that Taylor was willing to testify and provided counsel with Taylor's contact information. Amie averred that she reminded counsel to contact Taylor and again provided his contact information. Taylor averred that he was willing to testify that the victim and Logan were in a fight with a group of women on the day of the offense. At trial, it was undisputed that the victim and defendant had engaged in sexual contact. Although defendant testified that this contact was consensual, the State's case against defendant rested, in part, upon the victim's and Logan's testimony that defendant struck the victim in the face and dragged her into his home. Although the victim and Logan denied being in a fight earlier that evening, defendant testified that the victim was injured in that fight. In other words, he was not responsible for the bruises to her

No. 1-11-3357

face. Because the victim's testimony that she was injured by defendant rather than in a fight could have caused the trial court to discount defendant's assertion that he did not strike the victim in the face and that the sexual encounter was consensual, it is at least arguable that defendant was prejudiced by counsel's failure to investigate and present the testimony of Taylor in support of defendant's version of events and that counsel's performance, or lack thereof, fell below an arguable standard of reasonableness. *Tate*, 2012 IL 112214, ¶¶ 23-24. Accordingly, the affidavits in support of defendant's petition are sufficient to advance this cause to the second stage of postconviction proceedings.

¶ 15 Although the State argues that defendant's claim must fail because defendant admitted that trial counsel told him that he was unable to contact Taylor, defendant stated that he found counsel's statement "hard to believe." Defendant also argues that trial counsel's billing statements, submitted to the court in support of motions requesting court-appointed attorney fees, do not reflect attempts to contact Taylor and support his claim that counsel did not, in fact, investigate and contact Taylor. Defendant's legal theory that counsel was ineffective for failing to investigate Taylor and present his testimony to corroborate defendant's version of events is not indisputably meritless when it is not completely contradicted by the record. See *Hodges*, 234 Ill. 2d at 16.

¶ 16 Ultimately, the testimony of Taylor could have provided an alternative explanation for the victim's injuries and contradicted the victim's and Logan's testimony that they were not involved in a physical altercation. We therefore reverse the dismissal of defendant's *pro se* postconviction petition, and remand this case for second stage proceedings under the Act without expressing an opinion as to whether defendant will ultimately make a substantial showing of a constitutional violation, as that is an issue to be determined at the second stage of proceedings. *Tate*, 2012 IL 112214, ¶¶ 25-26.

No. 1-11-3357

¶ 17 Based upon our finding above that the affidavits attached to defendant's *pro se* postconviction petition meet the arguable *Strickland* standard, this court need not reach defendant's claim that he was denied effective assistance of counsel because counsel failed to obtain Cetewayo's medical records. See *Rivera*, 198 Ill. 2d at 374 (the Act does not permit partial dismissals at the first stage).

¶ 18 For the reasons stated above, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings under the Act.

¶ 19 Reversed and remanded.