

FOURTH DIVISION
December 12, 2013

No. 1-12-1636

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. 06 CR 10062-10066
)	No. 07 CR 24494
)	
ALONSO BRACEY,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s order dismissing the petition for postconviction relief as frivolous and patently without merit is reversed. Petitioner sufficiently pled that he would have accepted the State’s plea offer if defense counsel had transmitted the offer to him.

¶ 2 Following a jury trial, the trial court entered a judgment of conviction on four counts of

1-12-1636

predatory criminal sexual assault and four counts of aggravated criminal sexual abuse against defendant, Alonso Bracey. The court sentenced defendant to natural life imprisonment for the predatory criminal sexual assaults and concurrent terms of five years' imprisonment for the aggravated criminal sexual abuse counts. This court affirmed defendant's conviction and sentence on direct appeal. Defendant filed a *pro se* petition for postconviction relief alleging, *inter alia*, ineffective assistance of trial counsel based on counsel's alleged failure to transmit an offer of a plea bargain from the State, and ineffective assistance of appellate counsel in failing to raise the issues in defendant's postconviction petition on direct appeal. The trial court summarily dismissed the petition. Defendant appeals only from the dismissal of that portion of the petition alleging ineffective assistance of trial counsel for allegedly failing to transmit the State's plea offer to him and ineffective assistance of appellate counsel for failing to raise that issue on direct appeal. For the following reasons, we reverse the trial court's summary dismissal of the petition.

¶ 3

BACKGROUND

¶ 4 In September 2007 the parties appeared before the trial court on a date which had been scheduled for the beginning of defendant's trial. Defendant was present in court. The State and the defense informed the court the matter was not proceeding to trial on that date, after which defendant's trial attorney made the following statement:

“MR. LONDON [Defense counsel]: We have had some discussions about some plea negotiations. This is the first time we've done this since the case is going on. I presented an offer to my client just this morning. He had an opportunity to mull it over.

1-12-1636

I had further discussions.

¶ 5 Defense counsel then discussed discovery issues with the trial court and requested an additional 14 days to complete discovery and to return to court to set a new trial date. When the parties returned to court, there was no discussion of a plea. The case proceeded to trial in February 2008. On the first day of trial, after the trial court and attorneys had discussed preliminary matters and just before the court was about to bring in the jury for jury selection, the following discussion occurred:

“MS. SHEA [Assistant State’s Attorney]: Should I put on the record there was previously an offer made on this case?

THE COURT: Might want to do that.

MS. SHEA: There was previously an offer made on this case and the offer was rejected. I don’t believe that was ever put on the record.

MR. LONDON [Defense counsel]: There was never an offer made. There was never an offer. A preliminary discussion, never an offer made.

THE COURT: Go ahead and tell us what the offer was.

MS. SHEA: An offer of 18 years Illinois Department of Corrections on a predatory criminal sexual assault, 7 years aggravated criminal sexual abuse, concurrent.

MR. LONDON: Never made that offer. That offer was never made.

1-12-1636

MR. LONDON: If they made the offer we would have considered it perhaps. The offer was never made.

THE COURT: It's up to you, Mr. London.

MR. LONDON: That offer was never made.

THE COURT: Mr. London, let's [not] get into a big to do about it. Is the offer still there or not?

MS. SHEA: No, Judge.

THE COURT: All right. Fine.

MR. LONDON: Why even put it on the record, why put it on the record?

THE COURT: Sometimes the cases, Mr. London, when the man goes to trial and eventually is found guilty, he said I was never told that. I would have taken it.

MR. LONDON: That's what I'm saying now.

THE COURT: All right.

MR. LONDON: Judge, I'm telling you she never made that offer. If she would have made the offer, I would have taken it to my client and we would have discussed it. So why even put it on the record? It was never told, why put it on the record?

THE COURT: I can't speak for someone else, Mr. London. All I'm saying.

1-12-1636

MR. LONDON: She's being disingenuous at best and outright lying. She never made an offer 18 plus 7 concurrently, never.

MS. SHEA: Judge.

THE COURT: All right. She says it was made, it's academic at this point, the offer is not there any more if it ever was there.

MS. SHEA: Prior to the '07 case, in November, that offer was made repeatedly to counsel.

MR. LONDON: It was not.

* * *

THE COURT: Perhaps you can still talk to the State about a resolution if you want to do that.

MR. LONDON: You know, since she said that was the offer made, it was never made, I would like to have the opportunity to discuss it with the State's Attorney [*sic*] and see.

THE COURT: You have 10 minutes to do it.

MR. LONDON: And perhaps discuss it with my client.

THE COURT: Fine, not saying they're making an offer or not.

You can talk to them and see if they could, you can talk to your client.

Take him back, talk to the lawyers and see if there is any reason to talk and we'll go from there."

¶ 6 The parties went off the record and when the matter went back on the record, defense

1-12-1636

counsel informed the trial court: “No need to even discuss it. Let’s proceed.” The matter proceeded to trial after which the jury found defendant guilty of four counts of predatory criminal sexual assault and four counts of aggravated criminal sexual abuse based on various incidents between defendant and juvenile males who played on basketball teams defendant coached. The court sentenced defendant to a mandatory natural-life prison term for the predatory criminal sexual assault counts and to concurrent 5-year prison terms on the aggravated criminal sexual abuse counts.

¶ 7 In January 2012 defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant’s *pro se* petition alleged several violations of defendant’s constitutional rights. Defendant pursues only two of those alleged deprivations in this appeal: (1) trial counsel rendered ineffective assistance of counsel in failing to inform defendant of an offer by the State to enter a plea bargain, and (2) appellate counsel rendered ineffective assistance of counsel in failing to raise that issue on direct appeal.

Defendant’s *pro se* petition alleged defendant’s trial attorney failed to inform defendant of the State’s offer of 18 and 7 years’ imprisonment. Defendant alleged trial counsel was aware of the State’s offer in September 2007 and lied to the court about presenting the offer to his client when the parties appeared in court on the date which had been scheduled for trial to begin, when defense counsel requested a continuance to complete discovery. Defendant alleged counsel’s conversations with him were “disingenuous, and without full disclosure.” Defendant argued “[t]his left [defendant] suffering from ineffective assistant [*sic*] of counsel, that very well played a major role on the outcome of this trial and on there actually being a trial or not.”

1-12-1636

¶ 8 Defendant filed a document titled “Affidavit in Support” with his petition. The “affidavit” is not notarized, but is verified pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)). The “affidavit” states that defendant’s “trial attorney did not inform me of any 18 years or 7 years plea agreement.” The “affidavit” also states “I am completely innocent of all these charges, yet I was not given a fair trial, nor an effective defense attorney.”

¶ 9 On April 5, 2012, the trial court entered a written order finding the issues raised in the petition to be frivolous and patently without merit. The court dismissed defendant’s petition for postconviction relief. Our supreme court issued a supervisory order directing this court to allow defendant’s notice of appeal filed on May 8, 2012, to stand as a validly filed notice of appeal.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 Defendant argues the trial court erred in summarily dismissing his postconviction petition because the petition states an arguable claim that (1) defendant’s trial counsel’s performance fell below and objective standard of reasonableness because counsel failed to inform defendant the State made an offer of a plea bargain and (2) defendant was prejudiced by counsel’s deficient performance because defendant would have accepted had he known of the offer. Alternatively, defendant argues the trial court erred in summarily dismissing the petition because the petition sets forth an arguable claim that appellate counsel was ineffective in failing to raise trial counsel’s ineffective assistance on direct appeal. “At the first stage of postconviction proceedings, a petition will only be dismissed if it is frivolous or patently without merit.” *People*

1-12-1636

v. Trujillo, 2012 IL App (1st) 103212, ¶ 7. The allegations in the petition are taken as true at the first stage. *People v. Tate*, 2012 IL 112214, ¶ 9. “Where the record rebuts the allegations in a petition, summary dismissal is proper.” *Trujillo*, 2012 IL App (1st) 103212, ¶ 12. “The summary dismissal of a postconviction petition is reviewed *de novo*.” *Trujillo*, 2012 IL App (1st) 103212, ¶ 7. “[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*.” *People v. Hale*, 2013 IL 113140, ¶ 15. Thus, to survive the first stage of postconviction proceedings, a petition claiming ineffective assistance of counsel must show “that it is arguable that counsel’s performance fell below an objective standard of reasonableness and that it is arguable that the defendant was prejudiced by counsel’s performance.” *Trujillo*, 2012 IL App (1st) 103212, ¶ 8.

¶ 13 “[A]n attorney’s failure to disclose a plea offer to the defendant may give rise to a constitutional claim, regardless of whether the defendant subsequently received a fair trial.” *Trujillo*, 2012 IL App (1st) 103212, ¶ 9. In this case, the alleged offer was for a sentence of less prison time than defendant faced and which he actually received. 720 ILCS 5/12-14.1(b)(1.2) (West 2008) (“A person convicted of predatory criminal sexual assault of a child committed against 2 or more persons regardless of whether the offenses occurred as the result of the same act or of several related or unrelated acts shall be sentenced to a term of natural life imprisonment.”). In such a case, “[i]f counsel *** failed to inform defendant of the guilty plea offer, it is arguable that his assistance was deficient.” *Id.* ¶¶ 9, 10 (“defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”) (quoting *Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct.

1-12-1636

1399, 1408 (2012)). See also *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376, 1385 (2012) (“In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”). Moreover, if a reasonable probability exists defendant would have accepted the offer had it been presented to him, arguably he has been prejudiced by counsel’s alleged deficiency. *Trujillo*, 2012 IL App (1st) 103212, ¶¶ 9, 10; *Frye*, ___ U.S. at ___, 132 S. Ct. at 1409 (“To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.”).

¶ 14 Since our supreme court’s decision in *Hale*, it will not suffice for a defendant to demonstrate a reasonable probability he or she would have accepted the State’s offer to demonstrate prejudice. *Hale*, 2013 IL 113140, ¶ 20 (holding that the United States Supreme Court decisions in *Frye* and *Cooper* “must now be relied upon in deciding if prejudice has been shown where a plea offer has lapsed or been rejected because of counsel’s deficient performance.”). Under *Frye* and *Cooper*, to show prejudice, a defendant “must also demonstrate a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under

state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. [Citations.]” (Internal quotation marks omitted.) *Id.* ¶ 19.

¶ 15 Nonetheless, “to establish the prejudice prong of *Strickland*, a defendant must show that he would have accepted the State’s plea offer had counsel’s performance not been deficient. Absent defendant’s demonstration of this factor, prejudice cannot be proven and there is no need to address the additional factors set forth in *Frye* and *Cooper*.” *Hale*, 2013 IL 113140, ¶ 21. Thus, the *Hale* court’s analysis ended with its determination “of whether defendant would have accepted the State’s 15-year plea offer if not for the alleged erroneous advice of defense counsel.” *Hale*, 2013 IL 113140, ¶ 22. In this case, the State argues defendant’s petition fails to show defendant would have accepted the State’s plea offer had counsel informed him of it because defendant failed to allege in his petition or state in his affidavit that he would have accepted the offer, and the record rebuts any suggestion defendant was ever willing to plead guilty.

¶ 16 1. Sufficiency of the Petition

¶ 17 First, we must address the State’s argument the petition should be dismissed for failing to satisfy the pleading requirements of sections 122-1 and 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-1, 2 (West 2010)). Section 122-1 requires the petition to be verified by affidavit (725 ILCS 5/122-1(b) (West 2010)) and section 122-2 requires the allegations in the petition to be supported by affidavit or other evidence (725 ILCS 5/122-2 (West 2010)). The

1-12-1636

State argues that defendant's unsworn verification pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)) is not a substitute for the affidavits required by sections 122-1 and 122-2. The State concedes this court has held that the lack of notarization on a verification affidavit is not an appropriate ground for first-stage dismissal under section 122-1. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 34 ("Even where a section 122-1 affidavit is a technical nullity for lack of notarization, this simply does not affect the petitioner's claims or right to relief. Simply stated, since an unnotarized verification affidavit cannot render a petition frivolous or patently without merit, it cannot be condoned as a proper basis for first stage dismissal of a postconviction petition.").

¶ 18 The State concedes that the "substance of defendant's claim is found in his post-conviction petition." But, the State argues, because the only evidentiary support for defendant's claims--as required by section 122-2--is defendant's own affidavit, and defendant's affidavit is not notarized, the failure to attach an actual "affidavit" is dispositive in this case. Defendant argues the "Affidavit in Support" does provide evidentiary support for the claims in the petition, even if it is not a technical affidavit, in the form of evidence of the fact defendant's trial attorney failed to inform defendant of the State's plea offer, because it is "other evidence," which satisfies the requirements of section 122-2. See 725 ILCS 5/122-2 (West 2010) ("The petition shall have attached thereto affidavits, records, *or other evidence* supporting its allegations") (Emphasis added.).

¶ 19 "To be considered a valid affidavit, our supreme court has held that an affidavit must be notarized unless otherwise provided for by a specific supreme court rule or statutory

authorization.” *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 69. Our supreme court held that a sworn verification under section 122-1 can not serve as a substitute for the “affidavits, records, or other evidence” mandated by section 122-2. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). We find *Collins* does not mandate a finding in this case that defendant’s petition should be dismissed as lacking affidavits or other evidence under section 122-2. In *Collins*, the only attachment to the defendant’s petition was his sworn verification pursuant to section 122-1. *Collins*, 202 Ill. 2d at 62. The court recognized that “requiring the attachment of ‘affidavits, records, or other evidence’ will, in some cases, place an unreasonable burden upon post-conviction petitioners,” but held that did not mean that “the petitioners in such cases are relieved of bearing any burden whatsoever.” *Id.* at 68. The *Collins* court affirmed the dismissal of the defendant’s postconviction petition because the petition in that case offered *no* basis for finding any compliance with section 122-2. *Id.* at 68 (“the post-conviction petition that defendant filed in this case complies with neither the letter nor the substance of section 122-2, as it lacks not only an explanation for the absence of supporting evidence but also even a single allegation from which such an explanation could reasonably be inferred.”).

¶ 20 The purpose of section 122-2 is to show that the verified allegations in the petition are capable of objective or independent corroboration. *Collins*, 202 Ill. 2d at 67. By failing to demonstrate the possibility of independent corroboration at all, the “defendant [was] asking to be excused not only from section 122-2’s *evidentiary* requirements but also from section 122-2’s *pleading* requirements. Nothing in the Act authorizes such a comprehensive departure.”

(Emphases in original.) *Id.* at 68. However, if the petition and attachments satisfy the purpose of

1-12-1636

section 122-2 by showing that the verified allegations are capable of objective or independent corroboration, the petition should survive first-stage dismissal, even if that showing is not made by an affidavit or other evidence attached to the petition. See *Id.* at 67-68 (citing *People v. Williams*, 47 Ill. 2d 1, 4 (1970)). See also *People v. House*, 2013 IL App (2d) 120746, ¶ 19 (construing *Collins*). The *House* court found that “in *Collins*, the only attachment to the petition was a verification. Thus, there was no evidence at all under section 122-2. [Citation.] That is distinguishable from here, where defendant did provide support.” *House*, 2013 IL App (2d) 120746, ¶ 19. The *Collins* court distinguished, but did not overrule, its earlier decision in *Williams*, 47 Ill. 2d at 4, which “did not explicitly explain why affidavits, records, or other evidence were not attached, [but] did contain facts from which this court easily inferred that the only affidavit that petitioner could possibly have furnished, other than his own sworn statement, would have been that of his attorney.” (Internal quotation marks omitted.) *Collins*, 202 Ill. 2d at 68 (citing *Williams*, 47 Ill. 2d at 4).

¶ 21 In *Wilborn*, 2011 IL App (1st) 092802, ¶ 68, this court rejected the State’s argument that the trial court properly dismissed a postconviction petition as lacking supporting documentation under section 122-2 because an affidavit attached to the postconviction petition was not valid because it was not notarized. *Id.* The *Wilborn* court affirmed the trial court’s summary dismissal of the defendant’s postconviction petition as frivolous and patently without merit. *Wilborn*, 2011 IL App (1st) 092802, ¶ 99. But the court refused to follow the Second District’s holding in *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011), which “found that because the defendant’s section 122-1 affidavit was not notarized, it was not valid and he was not entitled to relief.”

1-12-1636

Wilborn, 2011 IL App (1st) ¶ 71. This court also declined to follow the holding in *Carr* in *Henderson*, 2011 IL App (1st) 090923, ¶ 35. This court noted that the *Carr* court “declined to distinguish affidavits filed pursuant to section 122-1 from the section 122-2 affidavit *** because *** the notarization requirement for affidavits applies to the entire Act.” *Wilborn*, 2011 IL App (1st) 092802, ¶ 71.

¶ 22 Based on the foregoing authorities, we hold that defendant’s petition and “Affidavit in Support” are sufficient to satisfy the pleading requirements of sections 122-1 and 122-2 at the first stage. The lack of notarization on the verification affidavit is not an appropriate grounds for dismissal at this stage of proceedings. *Henderson*, 2011 IL App (1st) 090923, ¶ 34. This court has held that “not every defect in a petition warrants summary dismissal.” *Henderson*, 2011 IL App (1st) 090923, ¶ 29. “[T]he Act allows summary dismissal only where a defect renders a petition frivolous or patently without merit. By their traditional meaning, we do not find those terms would encompass the mere lack of notarization of a verification affidavit.” *Id.* ¶ 34. That rationale applies with equal force to defendant’s supporting affidavit in this case. Also equally applicable in this case is the *Henderson* court’s concern that “the purposes of the Act and section 122-2.1 would be hindered by preventing petitions which are neither frivolous nor patently without merit from proceeding to the second stage due to the technicality at issue.” *Henderson*, 2011 IL App (1st) 090923, ¶ 35. “A petition is considered frivolous or without merit only if it has no *arguable* basis either in law or in fact. [Citation.] Petitions based on meritless legal theory or fanciful factual allegations will be dismissed.” (Emphasis added.) *Trujillo*, 2012 IL App (1st) 103212, ¶ 7. For reasons more fully explained below, we find that defendant’s

1-12-1636

“Affidavit in Support” is sufficient to raise an arguable factual basis for his claim and is not fanciful.

¶ 23 Although the *Henderson* court distinguished a section 122-1 affidavit from the section 122-2 affidavit on the basis that “unlike a section 122-2 affidavit, a section 122-1 verification affidavit does not show that the defendant’s allegations can be corroborated and is not considered when determining whether a defendant has a factual basis for his claims” (*Henderson*, 2011 IL App (1st) 090923, ¶ 34), our supreme court has found that a petition can survive first stage dismissal under section 122-2 without a supporting affidavit (*Williams*, 47 Ill. 2d at 4). At the first stage, we must construe the *pleadings* as a whole to determine whether defendant has complied with section 122-2. *Collins*, 202 Ill. 2d at 68. “At the second stage, the State will have the opportunity to object to the lack of notarization.” *Henderson*, 2011 IL App (1st) 090923, ¶ 36 (referring to verification affidavit). At this stage, defendant’s “Affidavit in Support” is sufficient to provide support for defendant’s claims in his petition and survive summary dismissal. See *House*, 2013 IL App (2d) 120746, ¶ 18 (finding adequate support under section 122-2 where the defendant “submitted other documents” including unnotorized statements certified under section 1-109 of the Code of Civil Procedure).

¶ 24 2. Sufficiency of the Allegations

¶ 25 Turning to the substance of the petition, the State’s argument that defendant failed to state an arguable claim is based on the fact defendant’s pleadings never expressly state he would have accepted the State’s offer and on an alleged lack of objective support in the record for the proposition that defendant would have pled guilty. Defendant points to the statement in the

1-12-1636

petition that counsel's deficient performance "played a major role *** on there actually being a trial or not" as an indication that had counsel informed defendant of the State's offer, defendant would have pled guilty. The State argues that statement in the petition does not expressly say that defendant would have accepted the State's offer nor reflects that defendant would have pled guilty. The State argues that defendant's appellate counsel's interpretation of that line is refuted by the record, which shows that defendant, throughout trial and after--including in this appeal--vociferously maintained his innocence.

¶ 26 The State relies on *Hale* in support of its argument that the record refutes defendant's suggestion he was ever willing to plead guilty. The State argues defendant's position on appeal is refuted by the fact defendant elicited testimony from multiple witnesses to suggest it was entirely out of character for defendant to have committed the charged offenses. "A defendant in a criminal case may offer proof of his good character to establish that his character traits are inconsistent with the commission of the crime charged." *City of Champaign v. Sides*, 349 Ill. App. 3d 293, 305 (2004). "In sex crimes, the traits involved, and as to which the accused may introduce evidence of his good character of reputation, are chastity, morality, and decency." *People v. Partee*, 17 Ill. App. 3d 166, 179 (1974). "Evidence of good reputation standing uncontroverted is entitled to some consideration and weight." *People v. Pax*, 399 Ill. 605, 610 (1948). The State also argues that the record refutes defendant's contention on appeal because at trial, defendant claimed the victims lied about the abuse to seek revenge against defendant for their playing time on defendant's basketball teams, and because defendant took the stand to profess his own innocence.

¶ 27 In *Hale*, “the only evidence defendant offered regarding why he chose not to plead guilty was his own self-serving testimony.” *Hale*, 2013 IL 113140, ¶ 24. The court found “no additional evidence substantiating [the] defendant’s claim of prejudice.” *Id.* ¶ 25. On the contrary, the *Hale* court found that “testimony from both defendant and [his attorney], combined with the evidence of defendant’s persistent belief in the possibility of acquittal at trial, compels us to conclude that defendant’s rejection of the proffered plea was not based upon counsel’s alleged erroneous advice but, as the State suggests, upon other considerations.” *Hale*, 2013 IL 113140, ¶ 29. In addition to the fact the defendant in *Hale* “clearly and expressly, on many occasions, professed his innocence and indicated a desire for trial” (*Hale*, 2013 IL 113140, ¶ 26), the court also found from the record that the “defendant in the case at bar arguably believed, prior to his trial, that he had both a witness to testify to his innocence and one victim who might refuse to testify” (*Id.* ¶ 27). The *Hale* court also found that the testimony established that the “defendant was willing to risk a 30-year sentence and go to trial, rather than plead guilty in exchange for a 15-year sentence.” *Id.* ¶ 28. The court concluded that “rather than providing any independent, objective confirmation that defendant’s rejection of the proffered plea was based upon counsel’s erroneous advice [citation] defendant’s sole, self-serving claim that he otherwise would have been “inclined” to accept the State’s plea offer is unsupported, denied by counsel and refuted by the record.” (Internal quotation marks omitted.) *Hale*, 2013 IL 113140, ¶ 30.

¶ 28 The State points to no similar facts of record in this case to those which the *Hale* court found established that the defendant in that case rejected the State’s proffered plea based upon other considerations rather than counsel’s erroneous advice. The *Hale* court did not rely solely

1-12-1636

on the defendant's claim and defense of innocence. *Id.* ¶ 27 ("a claim of innocence by a defendant and the presentation of a defense to the charges does little, by itself, to answer the question of why he refused the plea offer in the first place") (Internal quotation marks omitted.) (quoting *People v. Curry*, 178 Ill. 2d 509, 532 (1997)). In *Hale*, the defendant proffered a witness to testify that someone else committed the crime, and the record contained evidence that defendant's "friend" attempted to bribe and scare one of the victims to obtain the victim's recantation. Given the defendant's potential evidence in *Hale*, the *Hale* court distinguished *Curry*, in which the defendant had a case that was described as "not particularly strong" and "weak." Further, despite the erroneousness of the belief that the maximum sentence he could receive was 30 years' imprisonment, the testimony from defendant and his attorney clearly established that the defendant "was willing to risk a 30-year sentence *** rather than plead guilty in exchange for a 15-year sentence." *Hale*, 2013 IL 113140, ¶ 28. Thus, in light of the evidence of the defendant's belief in acquittal (not just his claim of innocence), and the defendant's willingness to reject a plea for half of the maximum the defendant thought he could receive, the *Hale* court concluded that the record belied the defendant's contention that the *reason* he rejected the State's offer was counsel's deficient advice.

¶ 29 In this case, unlike in *Hale*, the State points to no objective evidence proffered by defendant to secure his acquittal independent of defendant's subjective claim of innocence. Defendant's reputation evidence is not of the same quality--and we believe would not have the same impact on the decision of whether or not to accept a plea bargain--as the *Hale* defendant's attempt to implicate someone else as the perpetrator or to obtain the victim's recantation of his

1-12-1636

prior identification of the defendant. “Good character and reputation evidence, where such is in issue, is, of course, entirely proper and permissible to be considered as a part of the defendant’s case, along with all the other evidence in the case, though it is not a defense, as such, to a crime; it may, in a particular case, be sufficient to raise a reasonable doubt as to guilt; its sufficiency and weight, like that of all other evidence, however, is a question of fact for determination by the trier of the facts; if guilt is clearly established, good character or reputation avails nothing.” *People v. Guzzardo*, 4 Ill. App. 2d 355, 371-72 (1955). There is also no affirmative evidence that defendant in this case was willing to risk a longer sentence because the State’s offer was not “good enough.” See *Hale*, 2013 IL 113140, ¶ 11 (at hearing in trial court on the defendant’s allegation of ineffective assistance, the “[d]efendant stated that in light of the plea offer, he asked counsel to make a counteroffer of 12 years.”). In this case, the State points to no more than the “claim of innocence by a defendant and the presentation of a defense to the charges” (*Hale*, 2013 IL 113140, ¶ 27) which the *Hale* court found insufficient, alone, “to answer the question of why [the defendant] refused the plea offer in the first place” (*Hale*, 2013 IL 113140, ¶ 27).

¶ 30 “The State’s strict construction of defendant’s petition is inconsistent with the requirement that a *pro se* petition be given a liberal construction. Where defendants are acting *pro se*, courts should review their petitions ‘with a lenient eye, allowing borderline cases to proceed.’ [Citation.]” *People v. Hodges*, 234 Ill. 2d 1, 21 (2009). All that is required at this stage is “a reasonable probability” that, but for counsel’s unprofessional errors, defendant would have accepted the plea offer. *Hale*, 2013 IL 113140, ¶ 18. The prejudice analysis must assess whether the defendant has shown that counsel’s deficient advice led the defendant to reject the

1-12-1636

plea offer. *Hale*, 2013 IL 113140, ¶ 23. Prejudice is not established where, as the court found in *Hale*, there is no independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's deficient performance *and not on other considerations*.

¶ 31 In this case, we cannot say that other considerations led defendant to reject the State's proffered plea. No other considerations could have led defendant to reject the plea because, due to counsel's deficient performance, defendant was not aware of the plea, and no "other considerations" could have come to bear. Absent "other considerations," defendant's "affidavit" provides sufficient "independent, objective confirmation" that defendant's not accepting the State's offer was due to counsel's deficient performance. As to prejudice from counsel's deficient performance, when determining whether the allegations state a constitutional claim, the allegations in the petition are to be liberally construed in favor of the defendant. *People v. Bethel*, 2012 IL App (5th) 100330, ¶ 10. This court views the threshold for survival at the first stage as "low" (*Tate*, 2012 IL 112214, ¶ 9) and only requires the defendant to present a limited amount of detail (*People v. McDonald*, 373 Ill. App. 3d 876, 879 (2007)). We should not ignore the normal inferences arising from a *pro se* petition. See *People v. Stepheny*, 46 Ill. 2d 153, 157 (1970) ("We believe the facts alleged and the normal inferences therefrom are sufficient to require an evidentiary hearing.").

¶ 32 Although the petition in this case does not expressly state defendant would have accepted the State's offer, defendant's statement that his trial counsel's failure to communicate the offer to him "played a major role on the outcome of this trial and on there actually being a trial or not" is an indication that defendant would have accepted the offer sufficient to withstand dismissal at the

1-12-1636

first stage of postconviction proceedings. If defendant was never willing to plead guilty, as the State contends, then the failure to communicate an offer that would have been of no moment to defendant would not have played any--least of all a major--roll in the proceedings. Further, we construe the statement that counsel's error played a major role in "there actually being a trial," under the liberal construction required of us at this stage, to mean that had counsel not erred, there would not have been a trial. In other words, but for counsel's deficient performance, defendant would have accepted the State's offer.

¶ 33 The petition and supporting affidavit sufficiently allege that defendant would have pled had he known of the offer to survive the first stage of proceedings. In this case, at this stage of proceedings, the only fact we find to have caused defendant not to accept the State's offer is the fact that defendant did not know about the offer. We have no reason to believe that there is not a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it had defendant been informed of and accepted the State's offer.

¶ 34 Nor does the record positively rebut defendant's claim. Although defendant was present in court when trial counsel stated there had been plea discussions with the State and that counsel had presented an offer to defendant, the record does not contain the substance of counsel's alleged conversation with defendant. While the record might establish that the State made some offer early in the case, the record does not establish that the offer to which defendant's trial counsel referred was for 18 and 7 years' concurrent imprisonment. Therefore, the record raises a question of fact as to whether the State offered 18 and 7 years because there is evidence to

1-12-1636

support the State's claim it did make an offer, but defendant's trial counsel specifically stated that the State never made "that" offer; and, regardless, defendant's allegations raise a question as to whether trial counsel communicated the 18 and 7 years offer--if it was made--to defendant that is not refuted by the record. At this stage of proceedings, however, we *must* accept as true defendant's allegations that the State made that offer and counsel did not inform him of the offer. *Tate*, 2012 IL 112214, ¶ 9.

¶ 35 Defendant has demonstrated an arguable claim that trial counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by trial counsel's deficient performance. We need not address defendant's claim that appellate counsel was ineffective in failing to raise a claim on direct appeal that trial counsel rendered ineffective assistance. In light of our holding, this matter must be remanded for further proceedings, and "[u]nder the Act, summary *partial* dismissals are not permitted at the first stage of a postconviction proceeding." (Emphasis added.) *Hodges*, 234 Ill. 2d at 22 fn. 8. However, we do note that defendant argued that his claim that trial counsel rendered ineffective assistance was not forfeited by the failure to raise it on direct appeal because the allegations that his trial counsel did not inform him of the State's offer and that counsel's failure to disclose the offer "played a major role on the outcome of this trial and on there actually being a trial or not" were not part of the record on direct appeal and establish key elements of his claim. *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) ("Here, defendant's postconviction allegations of ineffectiveness of counsel are based on information outside the record, specifically things his counsel told him or failed to tell him. Therefore, defendant could not have raised these allegations on direct appeal, and thus

1-12-1636

he has not forfeited them.”). Thus, the “errors complained of are, by the defendant’s admission, not apparent from the record. Appellate counsel could not be considered incompetent for failing to argue matters not apparent from the record.” *People v. Hawk*, 93 Ill. App. 3d 175, 178 (1981).

¶ 36

CONCLUSION

¶ 37 For all of the foregoing reasons, this court reverses the summary dismissal of appellant, Alonso Bracey's, postconviction petition and remand the cause for a second stage proceeding.

¶ 38 Reversed and remanded.