

No. 1-13-0835

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 6270
	)	
ALLEN McCRAY,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Simon and Justice Pierce concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Court erred in summarily dismissing post-conviction petition claiming ineffective assistance of trial counsel, where it is arguable that counsel was ineffective for not investigating or presenting witness who would have supported the defense case at trial.

¶ 2 Following a jury trial, Allen (or Alan) McCray, the defendant, was convicted of first degree murder and sentenced to 42 years' imprisonment. We affirmed on direct appeal. *People v. McCray*, No. 1-09-0513 (2011)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his September 2012 *pro se* post-conviction petition,

contending that it stated the gist of a meritorious claim that trial counsel rendered ineffective assistance by not investigating or calling a witness who would have testified in support of the defendant's theory of the case.

¶ 3 Defendant was charged with first degree murder for allegedly fatally shooting Jerry Dean on or about October 8, 2003. At least twice before trial, trial counsel informed the court that he was meeting with defendant or obtained the court's permission to meet with defendant. At trial, the evidence showed that Dean's body, with a gunshot wound to the head, was found slumped over in the driver's seat of his van which was parked in a wooded vacant lot (the lot) at about 1 p.m. on October 8, with a witness having seen the van in the same location at about 7 a.m. Police found gunshot residue on Dean's right hand and a bullet in the passenger-seat headrest of the van. While useable fingerprints were found on the van, none matched defendant or Dean. Dean's autopsy revealed that he suffered a fatal gunshot to the head, fired from 18 or more inches away, and that he had a .221 blood alcohol concentration. A neighbor whose home overlooked the lot had a video camera facing the lot on the night of October 8, 2003, from shortly after midnight until about 6 a.m., and the neighbor provided the video to the police. The neighbor slept until about 6:30 a.m., and was not disturbed by any noise or commotion.

¶ 4 Nigel Lake testified that he had been a friend of defendant since childhood and was acquainted with Dean from the neighborhood. At around 1 a.m. on October 8 according to his direct testimony, or before midnight on October 7 according to his cross-examination, Lake was sitting in a car, parked in front of his home about a half-mile away from the lot, with two friends. Lake was starting to fall asleep from smoking marijuana when Dean "smashed" his van into the side of the car. Dean continued to drive the van, but he turned the van around and passed Lake before driving away. Lake believed Dean was intoxicated. Dean's van stopped near defendant's

home about a block away. Lake heard a commotion of yelling and a slamming gate before returning home. He sat on his front porch with his girlfriend and friends for "the rest of the night," and did not see the defendant or his car that night because defendant's car was not drivable at the time.

¶ 5 In February 2005, Lake was brought to a police station and interviewed, and Assistant State's Attorney (ASA) Lawrence O'Reilly prepared a written statement of the interview that Lake signed on each page. However, Lake testified that he signed the statement because he was "intimidated" by the police, in that he was questioned for over a day and was told by officers that he would not be permitted to leave until he gave a statement. Lake was given a prepared statement to sign and initialed changes that were already on the page. When Lake met ASA O'Reilly, officers stayed in the room so that Lake was never alone with ASA O'Reilly. At trial, after invoking his right to remain silent and being granted use immunity, Lake denied that he told the police or ASA O'Reilly the things in the statement.

¶ 6 The statement initially reflected that the incident began when Lake was in the car with Leroy and Courtney, and Dean's van struck that car between 11 p.m. and midnight. Lake corrected the statement (with the corrections initialed by Lake, ASA O'Reilly, and a detective) to indicate that the car was struck between 1 and 2 a.m.

¶ 7 In the statement, Lake also said that defendant came to his home several minutes after he went home. Defendant spoke with Lake on his porch, explaining that he was upset by Dean coming to his home late at night pounding drunkenly on the door while his children were sleeping. Defendant and Lake then went for a drive in defendant's car, with Lake driving, so that defendant would calm down. When they returned from the ride, Dean was in front of defendant's home, asleep behind the wheel of his van. Defendant had Lake drive him to his mother's home,

where defendant went briefly into the backyard before returning to the car. Defendant exited the car near his home, still angry at Dean for waking his children. Defendant told Lake to "pull up" if something happened and to follow Dean's van if it left, and Lake parked near the van. Lake saw defendant "crouching down" while approaching the van and opening the driver's door of the van with his sleeve. Dean seemed to still be sleeping. Lake heard a gunshot and saw a flash inside the van, then defendant got into the van and drove away. Lake followed defendant in defendant's car and saw him park the van in the lot, and he heard a gunshot in the area where the van was parked and saw defendant running back to his car. Defendant told Lake that he shot and killed Dean, and Lake replied that he would have nothing more to do with defendant. Lake was then dropped off at his home.

¶ 8 Lake testified before the grand jury in February 2005. He admitted at trial to telling the grand jury that, earlier in February 2005, he viewed a video at a police station depicting a man running from the lot after a van parked there. He denied testifying that he recognized defendant as that man from his limp, and he denied giving grand jury testimony consistent with his statement. At trial, Lake admitted that defendant has difficulty walking but denied that he was the man in the video.

¶ 9 ASA Lawrence O'Reilly testified that, when he interviewed Lake at the police station in February 2005, he asked Lake questions and Lake answered them. The changes to the statement occurred when ASA O'Reilly read the draft statement to Lake, Lake indicated it needed corrections, ASA O'Reilly added each correction to the draft, and Lake, ASA O'Reilly, and a detective initialed each change. Before Lake signed his statement, ASA O'Reilly was alone with him and asked him if he was well-treated; Lake said that he was and described what he had eaten while at the station. The statement as described above was spread of record. On cross-

examination, ASA O'Reilly testified that the officers briefed him on the case before he met Lake, including that Lake had been in a car with the shooter, but did not mention any video. ASA O'Reilly did not read Lake the *Miranda* rights because he considered him a witness rather than a suspect, and he denied being told by the police that Lake was a participant in the shooting.

¶ 10 ASA Catherine Gregorovic testified that she interviewed Lake just before she presented him to the grand jury, including showing him a video. While officers were present, ASA Gregorovic was alone with Lake for a time and he made no complaints when asked about his treatment. She examined Lake before the grand jury, where he testified generally consistently with the statement and opined that the walk of the man on the video resembled defendant's "distinctive walk." However, Lake testified to hearing a muffled "thoop thoop" sound near the van when his statement described only one shot.

¶ 11 Antwan (or Antoine) Anderson testified that he knew defendant and Dean from the neighborhood. Anderson was home on the morning of October 8, 2003, when defendant came to his home and spoke with him on his front porch, but nobody else was present. Defendant said that he had "f\*\*ked up" and shot Dean because Dean had tried unsuccessfully to force his way into defendant's home earlier that morning. Defendant told Anderson that he then left home with Lake but returned to find Dean "passed out" in his van in front of defendant's home. Defendant told Anderson he went to get his gun, returned home, "creeped up on the van," opened the door, and shot Dean. Defendant drove the van and later disposed of the gun with a man from the neighborhood called Little Al. In February 2005, Anderson went to a police station and viewed a video, depicting a van driving into the woods and a man running out of the woods. Anderson did not recognize the van nor the fleeing man's face or clothing but believed the man was defendant based on his gait, as defendant had a gunshot wound affecting his walk. In 2005, defendant was

the only person Anderson knew with such a gait, but he had since encountered other people with a similar walk.

¶ 12 On cross-examination, Anderson testified that he signed a written statement in February 2005 after spending three days in police custody. During that time, Anderson brought officers back to his home where he had two guns though he did not have a firearm owner's identification card. The officers recovered the guns and then returned with Anderson to the station where he was questioned regarding the instant case and ultimately gave his statement. While Anderson identified the man in the video as defendant from his gait, he had never seen defendant run. When defendant admitted shooting Dean, he never mentioned involvement by Lake. Anderson did not mention defendant's admission for two years "because it wasn't my business."

¶ 13 Sergeant Scott Rotkvich testified that he was investigating the Dean shooting in February 2005 when he went to Anderson's home. Anderson agreed to go to the police station, and told Sergeant Rotkvich something that caused him to recover two guns in the home. When Anderson was interviewed at the station over the course of about 12 hours, he was relaxed and cooperative. Anderson viewed the video about two hours after arriving at the station and identified the running man as defendant based on his features, clothing, and distinctive gait. However, Sergeant Rotkvich's report did not describe how Anderson identified the running man but merely stated that he did so.

¶ 14 Sergeant Rotkvich also brought Lake to the police station in February 2005; he asked Lake if he would go to the police station for an interview, and Lake agreed. As Lake was being interviewed over the course of about 15 hours, he was provided food and drink and allowed to use the telephone and washroom. Sergeant Rotkvich denied that he or anyone in his presence threatened Lake during the interview that he would not go home unless he signed a statement or

that his children would be taken. Lake was cooperative and answered the questions he was asked, and Sergeant Rotkvich denied suggesting to Lake an account of the events on the night in question. Lake viewed the video about two hours after arriving at the station and identified the running man as defendant based on his features, clothing, and distinctive gait. Sergeant Rotkvich described the video as depicting a van driving onto the lot followed by "a loud noise" and then a man running from the lot. He could not identify the running man in the video, whose gait was unusual but not unique, despite an attempt by the Federal Bureau of Investigation to enhance the video. Sergeant Rotkvich did not ask or direct defendant to run so that his gait could be compared, nor did anyone else to his knowledge.

¶ 15 Eric Coles testified that, before 1 a.m. on October 8, 2003, he went to defendant's home to sell a television to defendant's girlfriend on behalf of another man. Coles met Dean and, while riding in Dean's van, noticed that Dean had been drinking alcohol but he could not tell if he was drunk. Dean agreed to buy the television and it was left in his van. Coles then saw Dean's van parked near defendant's home, with Dean sleeping inside. Coles spoke briefly with Dean before leaving, with Dean still in his van, about 15 minutes after first meeting Dean. On cross-examination, Coles testified that he saw defendant right after leaving the van, which was before midnight, but he never saw defendant near Dean. Coles denied being "high" that night but could not recall if he had been drinking alcohol. He admitted to two prior theft convictions and to being in custody for contempt of court at the time of trial.

¶ 16 Defendant testified that he knew Anderson for about 10 years and was a friend of Lake for over 20 years but only acquainted with Dean. Between about 12:30 and 1 a.m. on October 8, 2003, defendant was standing in front of his home with six or seven people while his girlfriend and children were inside. Dean came to the home and began "kicking and banging on the door

really loud." When defendant asked why he was doing so, Dean replied that he needed to use the washroom. Defendant would not allow Dean inside "because he was too intoxicated and loud." Dean "used the bathroom on the side of the house" and then left. Defendant denied at trial that these actions upset him and denied any physical confrontation with Dean. Defendant returned to the front of the house, going inside at about 1 or 1:30 a.m. He left home about 15 minutes later to buy marijuana and cigars, riding with a friend (not Lake) in the friend's car. Only one of defendant's two cars was in working order that day. Defendant and his friend smoked their marijuana and returned to defendant's home at about 2 a.m., and defendant went to bed. He did not see Dean or his van that night after the initial incident, and he heard of Dean's death a few days later. He denied shooting Dean or riding in a car with Lake that night. Upon viewing the video at trial, defendant recognized the lot and Dean's van but did not recognize the fleeing man or believe that he had a limp. Defendant's right leg has nerve impairment from a 1997 gunshot wound, but he is able to run and play sports such as basketball although "I don't play that hard." He denied that the gait of the man in the video resembled his own; the man runs "like he's running in place or something, my legs kick back when I run." Defendant was 5'9" tall and about 230 pounds as of 2003 and at the 2008 trial. He had convictions for aggravated battery and possession of a controlled substance in 2001 and possession of a stolen motor vehicle in 2002.

¶ 17 After arguments, instruction, and a few hours of deliberation, the jury informed the court that it was unable to reach a verdict as "we are 3 and 9." The court instructed the jury to continue deliberating, but after another hour of deliberating, sequestered the jury for the evening. The next day, after several more hours of deliberation, the jury found McCray guilty of first degree murder but also found that the prosecution failed to prove that McCray personally discharged a firearm that caused Dean's death. The court sentenced defendant to 42 years' imprisonment.

¶ 18 On direct appeal, defendant contended that the evidence was insufficient to convict him and that prosecutorial comments deprived him of a fair trial. Regarding the first claim, we noted credibility issues with the inculpatory evidence – Lake's grand jury testimony, defendant's confession to Anderson, and the video of "a blurry image of a man with a limp running from the" lot (*McCray*, No. 1-09-0513, ¶ 19) – but also noted that credibility is a matter for the finder of fact and found that "[w]e cannot say that every rational trier of fact would reject as incredible both Anderson's testimony and the transcript of Lake's out-of-court testimony." *McCray*, No. 1-09-0513, ¶ 22. Regarding prosecutorial comments, we found no plain error (the post-trial motion raised no such challenge) in the State's correct statement that reasonable doubt is not defined in the jury instructions but must be interpreted by the jury, nor in arguing that "Anderson and Lake abided by a code that forbade snitching" when there was evidence for such an assertion and it did not mislead the jury or render the trial unfair. *McCray*, No. 1-09-0513, ¶¶ 25-27.

¶ 19 In his post-conviction petition, filed on September 24, 2012, defendant alleged in relevant part that trial counsel rendered ineffective assistance by failing to interview witnesses who would have corroborated Lake and defendant's trial testimony that defendant never came to Lake's home on the night in question. Attached to the petition were various affidavits, including one by Elisa Lanier. Lanier averred that she and "a couple of my friends" were on Lake's porch on the night in question and defendant did not come to Lake's home between 11:30 p.m. and 3 a.m. She also averred that she would testify for the defense and that she told defendant so "but was never contacted." Defendant's own affidavit was attached to the petition, but he did not aver in his petition that he told trial counsel about the witnesses including Lanier. However, he alleged that "counsel failed to interview or counsel [defendant] sufficiently," that "the only time [defendant] spoke with counsel was at court," and that trial counsel "never came to see [defendant] to review

the evidence presented," and defendant averred generally that the allegations of the petition were true.

¶ 20 The court summarily dismissed the petition on December 21, 2012. Regarding Lanier's affidavit, the court found that it cast some doubt on Lake's grand jury testimony but only on "a minor detail of this account," that is, when and where Lake and defendant met, rather than Lake witnessing the shooting or relaying defendant's confession. The court also found that "there was already significant reason to doubt" Lake's pretrial testimony, including his recantation at trial and invocation of his right to remain silent, so that additional impeachment from Lanier would not have persuaded the jury. This appeal followed.

¶ 21 On appeal, defendant contends that the summary dismissal of his petition was erroneous because he stated an arguably meritorious claim that trial counsel rendered ineffective assistance by not investigating or calling Lanier, who would have corroborated defendant's trial testimony that he never came to Lake's home on the night in question.

¶ 22 A post-conviction petition may be summarily dismissed at the first stage if it fails to present the gist of a meritorious constitutional claim: a petition is frivolous or patently without merit if it has no arguable basis in law or fact. *People v. Tate*, 2012 IL 112214, ¶ 9. In considering a petition at this stage, all well-pled facts must be taken as true unless positively rebutted by the record. *People v. Brown*, 236 Ill. 2d 175, 189 (2010). A petition has no arguable basis in law or fact when based on an indisputably meritless legal theory or a fanciful factual allegation. *Brown*, 236 Ill. 2d at 185. A claim completely contradicted by the record is an example of an indisputably meritless legal theory, while fanciful factual allegations include those that are fantastic or delusional. *Id.* Our review of a summary dismissal is *de novo*. *Brown*, 236 Ill. 2d at 185.

¶ 23 To state a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient – objectively unreasonable – and that the defendant was prejudiced by the deficient performance. *Tate*, 2012 IL 112214, ¶ 18. Generally, a post-conviction petition alleging ineffective assistance at the first stage may not be summarily dismissed if counsel's performance arguably fell below an objective standard of reasonableness and the defendant was arguably prejudiced. *Id.*, ¶ 19.

¶ 24 Here, we find that defendant has raised an arguable claim of effective assistance of counsel because trial counsel failed to investigate or call Lanier as a witness. It is also arguable that Lanier's account could have changed the outcome of trial had trial counsel discovered Lanier and presented her testimony. We noted on direct appeal that there were issues with the State's evidence, and they are highlighted by the jury's note indicating an initial impasse in deliberations and its unusual verdict: the jury found McCray guilty of Dean's murder due to a gunshot wound to the head, but also found that the prosecution failed to prove that McCray personally discharged a firearm in the course of the murder. *McCray*, No. 1-09-0513, ¶¶ 13, 20, 21.

¶ 25 We disagree with the circuit court's conclusion that Lanier's affidavit merely casts doubt on when and where Lake interacted with defendant on the night of Dean's death. The averment in Lanier's affidavit that defendant did not come to Lake's home between 11:30 p.m. and 3 a.m., encompasses the timeline of events that night. Moreover, Lanier's affidavit corroborates Lake's trial testimony that he never saw or interacted with defendant on the night of Dean's murder because he stayed on his porch that night, and impeaches Lake's pretrial statements that defendant met him at his home, that the two men drove around, and that the defendant murdered Dean. At the first stage of post-conviction proceedings, we must accept the allegations in McCray's petition and in the affidavits as true because they are not positively rebutted by the

record. *Tate*, 2012 IL 112214, ¶ 9. If a finder of fact believed Lanier's account, it would establish that Lake and defendant did not meet on the night of Dean's death and Lake's subsequent witnessing of Dean's murder in his pretrial statements did not occur. While Lanier's affidavit does not impeach Anderson's testimony that McCray confessed to him, it is neither fanciful nor delusional that Lanier's corroboration of Lake's trial testimony could tilt the weight of the evidence against conviction by impeaching Lake's pretrial inculpatory statement which corroborates Anderson's testimony.

¶ 26 We find that McCray's claim that trial counsel was ineffective for not conducting an investigation or calling Lanier as a witness arguably establishes counsel's deficient performance and arguably establishes that McCray was prejudiced by counsel's performance. Therefore, we hold that the circuit court erred when it summarily dismissed McCray's petition as frivolous and patently without merit.

¶ 27 Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further post-conviction proceedings.

¶ 28 Vacated and remanded.