

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).

2014 IL App (4th) 130173-U

NO. 4-13-0173

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 10, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
RONALD W. THIELE,)	No. 10CF144
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Where defendant alleges trial counsel failed to inform him of his right to request a lesser-included-offense instruction of possession of a controlled substance and defendant was a heavy heroin user, defendant has met the low threshold of stating the gist of a constitutional claim of ineffective assistance of counsel.

¶ 2 In December 2012, defendant, Ronald W. Thiele, filed a *pro se* postconviction petition, raising numerous contentions of constitutional error. In February 2013, the Livingston County circuit court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals the dismissal, asserting it was improper because his ineffective-assistance-of-counsel claim that trial counsel failed to inform him of his right to request a lesser-included-offense instruction and the consequences of not tendering one stated the gist of a constitutional claim. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In June 2010, a grand jury indicted defendant with two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1), (d) (West 2010)) and one count of unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2010)). The unlawful-delivery counts alleged that, on May 24 and 27, 2010, defendant knowingly delivered heroin to a confidential source (later identified as Face Meints). The unlawful-possession-with-the-intent-to-deliver count asserted that, on May 29, 2010, defendant knowingly possessed with the intent to deliver 15 grams or more but less than 100 grams of a substance containing heroin.

¶ 5 The evidence presented at defendant's trial that is relevant to the issue on appeal is set forth below. Meints testified on behalf of the State and described the two controlled buys he made from defendant, whom he had known all of his life. During the first buy, Meints bought two bags of heroin for \$60. During the second buy, Meints observed defendant first sell Brad Haab eight or nine bags of heroin for \$200. Meints also bought \$200 worth of heroin. While Meints was in defendant's home for the second buy, he observed defendant inject himself with heroin. Meints admitted to using heroin at defendant's home on prior occasions.

¶ 6 On May 29, 2010, the police executed a search warrant for defendant's home. Deputy Brad DeMoss testified defendant and his girlfriend, Megan Johns, were both sleeping when they entered the home. DeMoss recovered syringes from multiple locations in the home. The police also found bags containing heroin in the pocket of defendant's jeans. In total, 149 small bags of heroin were recovered from defendant's pocket. Inspector Mike Willis testified defendant's wallet was also in the jeans and it contained \$148. Willis interviewed defendant, and defendant was adamant the heroin was all his. Defendant had gotten the heroin in Cicero, Illinois, the day before the search. He had paid \$1,000 for 13 packs of 14 individual Ziploc bags

of heroin. Defendant gave Willis the names of the people to whom defendant had been selling heroin. Defendant admitted being a heroin addict and stated he sold heroin to support his heroin habit. Willis admitted the police did not find any weapons, scales, ledgers, packaging materials, and items used in "cutting narcotics." However, Willis further testified they often did not find cutting items or scales with heroin because the sellers are purchasing heroin already packaged for sale. Defendant admitted to using eight or nine bags of heroin at a time. While 8 to 9 bags of heroin were a lot for one use, Willis had known users who claimed to use 15 to 16 bags at a time.

¶ 7 Michelle Dieke, a forensic scientist with the Illinois State Police, testified the State's exhibit No. 1 contained a tenth of a gram of a substance containing heroin. Aaron Roemer, also a forensic scientist with the Illinois State Police, testified the State's exhibit No. 2 was a plastic bag with nine smaller plastic bags containing an off-white powder. The powder from all nine bags weighed 1.2 grams and tested positive for heroin. The State's exhibit No. 3 was a larger plastic bag with other bags inside and contained a total of 149 small bags of white powder. Roemer weighed the powder contained in 120 of the small bags and found the powder weighed 15.4 grams. The powder in the other 29 bags weighed 7.5 grams. Roemer tested the powder in the 120 bags and found it tested positive for heroin. He did not test the other 29 bags. Most of the small bags were in groups of 14 tethered together with tape.

¶ 8 Defendant presented the testimony of his girlfriend Johns. Johns testified defendant used heroin about three times a day. She also noted Meints was defendant's friend and coworker. According to Johns, in the two months prior to defendant's arrest, Meints was at defendant's home at least five times a week and would use heroin every time he came to the house. Meints also kept clothing and a motorcycle at defendant's home. According to Johns, the heroin found during the search all belonged to defendant.

¶ 9 In closing argument, defense counsel argued the evidence did not show defendant intended to sell more than 15 grams of heroin because a large portion of it was for his personal use.

¶ 10 At the end of the trial, a jury found defendant guilty of all three charges. Defendant filed a motion for new trial and judgment of acquittal. On March 16, 2011, the trial court held a joint hearing on defendant's posttrial motion and sentencing. The court denied defendant's posttrial motion and sentenced him to concurrent prison terms of 10 years and 25 years on the unlawful-delivery-of-a-controlled-substance counts and 41 years for unlawful possession of a controlled substance with the intent to deliver. Defendant filed a motion to reconsider his sentences, which the court denied. Defendant appealed, and this court affirmed his convictions and sentences. *People v. Thiele*, 2012 IL App (4th) 110410-U.

¶ 11 On December 19, 2012, defendant filed his 33-page postconviction petition with exhibits, raising numerous claims of error. On February 15, 2013, the trial court dismissed the petition at the first stage of the proceedings. On February 26, 2013, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (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. Feb. 6, 2013).

¶ 12 II. ANALYSIS

¶ 13 In this appeal, defendant challenges the trial court's dismissal of his *pro se* postconviction petition at the first stage of the proceedings. 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).

¶ 14 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)) 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 2012). 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 2012)) 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.

¶ 15 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.

¶ 16 On appeal, defendant asserts he established the gist of a constitutional claim based on ineffective assistance of counsel relating to the right to tender a lesser-included-offense instruction. That is the only issue in his postconviction petition that he raises on appeal and, thus, that is the only issue we will address.

¶ 17 We review ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. "At the first stage of proceedings under the [Postconviction] Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed 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." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 18 Here, defendant specifically argues trial counsel failed to advise him that he had the right to request a lesser-included-offense instruction and the consequences of not filing one. He supports that assertion with his own affidavit. We note that, with an ineffective-assistance-of-counsel claim, a defendant is not expected to obtain an affidavit from his trial counsel stating the attorney was ineffective. *People v. Kellerman*, 342 Ill. App. 3d 1019, 1026, 804 N.E.2d 1067, 1073 (2003). As to counsel's performance, defendant points out he, not trial counsel, had the right to decide whether to submit an instruction on the lesser-included offense of possession of a controlled substance. See *People v. Brocksmith*, 162 Ill. 2d 224, 229, 642 N.E.2d 1230, 1232 (1994). The State does not offer any argument regarding counsel's performance. We note our supreme court has stated that for a defendant to make an intelligent and informed decision regarding a lesser-included offense, "the defendant obviously requires the advice of counsel to aid the defendant in evaluating the evidence and to apprise the defendant of any potential conflicts with the defense strategy pursued to that point in the trial." *People v. Medina*, 221 Ill. 2d 394, 406, 851 N.E.2d 1220, 1226 (2006). Since defendant has stated in his affidavit that his trial counsel failed to even inform him of his right to submit a lesser-included-offense instruction, we find he has shown it is arguable his counsel's performance fell below an objective standard of reasonableness.

¶ 19 Regarding prejudice, defendant must show it is arguable that had counsel informed defendant of his right to submit a lesser-included-offense instruction, defendant would have elected to submit one and the proceeding's result would have been different. In his petition, defendant points out the evidence showed he was a "severe" heroin user and his live-in girlfriend was also a heroin user. Defendant used eight or nine bags at a time and used at least three times a day. Thus, defendant argues a jury could have found the entire amount or a substantial portion

of the heroin recovered from his house was for personal use. In response, the State only addresses defendant's "substantial portion" argument and asserts defendant failed to cite any authority the State was required to prove he intended to sell the entire 15 or more grams of heroin. However, the State fails to even mention defendant's additional assertion *all* of the heroin could have been found to be for personal use. Defendant explained how he and his girlfriend could have used about 16 grams of heroin in four days based on the evidence of their habits. Given those facts, it is not delusional or baseless a jury could have found defendant guilty of just the lesser-included offense of simple possession. Accordingly, it is arguable defendant was prejudiced by counsel's alleged failure to inform him of his right to submit a lesser-included offense, and thus he has met the low threshold of a gist of a constitutional claim as to this issue. Since we have found defendant presents an arguable showing he was prejudiced based on the entire amount of heroin, we do not address defendant's argument as to whether he could have also requested the lesser-included offense of possession with the intent to deliver a lesser amount and the related argument by the State that it was not required to prove defendant intended to actually deliver 15 grams or more of the heroin that he possessed. Thus, our decision in no way addresses the merits of those arguments.

¶ 20 In light of our finding, the entire postconviction petition must be remanded for further proceedings because "summary partial dismissals are not permitted at the first stage of a postconviction proceeding." *Hodges*, 234 Ill. 2d at 22 n.8, 912 N.E.2d at 1215 n.8. However, our finding is in no way an opinion on the actual merits of the issue or on whether defendant will ultimately prevail on his ineffective-assistance claim. See *Hodges*, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

¶ 21

III. CONCLUSION

¶ 22 For the reasons stated, we reverse the Livingston County circuit court's dismissal of defendant's petition at the first stage of the postconviction proceedings and remand the cause for further proceedings.

¶ 23 Reversed and remanded.