THIRD DIVISION
March 31, 2015

No. 1-13-0064

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 23271
	)	
ROBERT WASHINGTON,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not err in summarily dismissing post-conviction petition; additional evidence of victim's or defendant's mindset at time of incident unlikely to overcome overwhelming evidence regarding their actions. Mittimus corrected to properly reflect presentencing detention credit.

¶ 2 Following a 2008 jury trial, defendant Robert Washington was convicted of first degree murder, by personally discharging a firearm proximately causing death, and sentenced to 50 years' imprisonment. We affirmed on direct appeal. *People v. Washington*, No. 1-09-1817 (2011) (unpublished order under Supreme Court Rule 23). We also affirmed the denial of defendant's 2012 *pro se habeas* petition. *People v. Washington*, No. 1-12-0585 (2012)(unpublished order

under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his *pro se* post-conviction petition, contending that he stated an arguably meritorious claim of ineffective assistance of counsel for not calling a witness who would have supported his argument for second degree murder. He also contends that his mittimus should be corrected to properly reflect his presentencing detention credit.

¶ 3 Defendant was charged with the first degree murder of Ricky Carpenter ("victim") on or about September 17, 2006, by personally discharging a firearm proximately causing death.

¶ 4 In proceedings on the parties' motions *in limine*, defendant sought to introduce evidence of the victim's allegedly aggressive and violent character ("*Lynch* evidence"). In support of this, he filed in relevant part an investigator's report to defense counsel of a June 2007 interview of Mignon Boswell ("the Boswell Report"). Boswell said that, about a week before the shooting, the victim was "violent with Kewon Sykes at the apartment she and [victim] shared" in that he "came at Kewon with a frying pan and when it broke, he got a kitchen knife," but nobody was hurt. Boswell explained that "one of Kewon's daughters [came] through a window to get a jacket he left at the party." Boswell also said that the victim had once locked her in a room and beat her for three days while they lived in Atlanta, that "he was definitely violent with women," that she saw a letter indicating that the victim had AIDS, and that the victim repeatedly told her "that he was ready to die" rather than die slowly from his disease. The Boswell Report was not notarized and was signed by the investigator but not Boswell. The Sykes incident was addressed in accompanying affidavits but the balance of the Boswell Report was not.

¶ 5 After hearing testimony regarding the Sykes incident, the court barred defendant from introducing evidence regarding the Sykes incident, finding the matter involved the victim's defense of self, others, and dwelling against a trespasser in the night rather than the victim's

aggression. The State withdrew any objection to introducing "the batteries against Mignon Boswell, because that seems fair *Lynch* material" but objected to evidence regarding the victim having AIDS, which defense counsel argued as evidence that defendant could have thought during the incident "one of the reasons he may be coming at me is he doesn't care what happens to him because he has AIDS and he's dying anyway." The court found the AIDS evidence of questionable relevance and reserved ruling on the matter until defendant chose to testify.

¶ 6 The jury heard the trial evidence, as summarized in our direct appeal order, which did not include Boswell's testimony though defense counsel told the jury in his opening statement that he would call Boswell if the State did not. After being instructed on first degree murder, self-defense justification, and second degree murder by unreasonable belief in self-defense, the jury found defendant guilty of first degree murder and that he personally discharged a firearm proximately causing death. In his unsuccessful post-trial motion, defendant challenged the court's exclusion of the Sykes incident but not any ruling on the rest of the Boswell Report.

¶ 7 On direct appeal, defendant contended that trial counsel was ineffective for (1) failing to inspect the autopsy report before it was entered into evidence given to the jury, so that he did not discover that an investigator's report containing hearsay was attached, and (2) giving a poor closing argument. We addressed the latter by explaining in detail that each of the challenged arguments was reasonable, and the former by finding that counsel had no reason to believe that the autopsy report had an extraneous attachment and that there could be no prejudice on the overwhelming evidence of guilt:

> "Mr. Carpenter testified defendant was the aggressor in the shooting; Ms. Shields and Mr. Carpenter testified the victim was not holding a knife at the time he was shot; Dr. Arunkumar testified there was no evidence of close range firing in her

> examination of the gunshot wounds sustained by the victim; defendant testified during cross-examination that, at the time of the shooting, the victim was not close enough to stab him; and defendant admittedly told the police 'quite a few stories' inconsistent with his trial testimony and initially falsely denied shooting the victim." *Washington*, No. 1-09-1817, at 10.

On defendant's contention that his conviction should be reduced to second degree murder, we held that a rational trier of fact could have found the mitigating factor of unreasonable belief in self-defense was not present because defendant admitted that the victim was not close enough to be able to stab him when he fired, and because the jury could credit the testimony of Shields and Carpenter over defendant's testimony that he thought the victim was advancing on him with a knife. Lastly, defendant contended that the court erred by barring him from introducing *Lynch* evidence. We agreed with the trial court that the evidence of the Sykes incident was not admissible as *Lynch* evidence, and we found no prejudice on the overwhelming evidence.

¶ 8 Defendant filed a *pro se* petition for *habeas* relief, which the court denied on January 17, 2012. As stated above, we affirmed that decision on appeal.

¶ 9 Defendant filed his *pro se* post-conviction petition in June 2012. He alleged ineffective assistance of trial counsel for (in relevant part) not presenting Boswell's testimony as mitigating evidence though he had told the jury in opening statement that he would, and ineffective assistance of appellate counsel for not raising on direct appeal the alleged instances of trial counsel's ineffectiveness. Defendant alleged that Boswell would testify to all the elements of the Boswell Report: the Sykes incident, the Atlanta abuse, and the victim's AIDS diagnosis and stated readiness to die. Attached to the petition was defendant's affidavit, averring that counsel

was aware of the contents of the Boswell Report but did not call Boswell as a trial witness, and a copy of the Boswell Report but no affidavit by Boswell.

¶ 10 Defendant filed a *pro se* supplemental petition in August 2012 challenging the sentencing enhancement for personally discharging a firearm.

¶ 11 On November 2, 2012, the court summarily dismissed the petition. The court found that defendant failed to support the Boswell claims with Boswell's affidavit, that additional *Lynch* evidence was irrelevant on the overwhelming evidence, that exclusion of the Sykes incident is *res judicata*, and the balance of the Boswell claims are forfeited as they could have been raised on direct appeal. This appeal followed.

¶ 12 Defendant contends that his *pro se* post-conviction petition stated an arguably meritorious claim of ineffective assistance of counsel for not calling Boswell as a witness, as her account would have supported defendant's case for second degree murder. The State responds that summary dismissal was proper because the petition was not supported by Boswell's affidavit and because defendant cannot establish either prong (unreasonable representation or prejudice) of ineffectiveness. Defendant replies that he satisfied the statutory requirement to provide documentation of Boswell's potential testimony.

¶ 13 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)) provides that a petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). A petition may be summarily dismissed within 90 days of filing and docketing if the court finds the petition is frivolous or is patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit if it fails to present the gist of a meritorious claim because it has no arguable basis in law or fact. *People v. Tate*, 2012 IL 112214, ¶ 9. At this first

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 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. Tate*, 2012 IL 112214, ¶ 10.

¶ 14 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. *Id*., ¶ 18. Generally, a post-conviction petition alleging ineffective assistance 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.

¶ 15 A person commits second degree murder by committing first degree murder with the mitigating factor that "at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2012), citing 720 ILCS 5/7-1 *et seq*. (West 2012). Those principles include self-defense, with the proviso that "the use of force which is intended or likely to cause death or great bodily harm [is justified] only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2012). For second degree murder, the State must prove the elements of first degree murder beyond a reasonable doubt while the defendant must prove a mitigating factor by preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2012). In weighing the evidence, the trier of fact should consider the credibility of the defendant's account in light of the circumstances of the

altercation and the relevant testimony of other witnesses, and should consider both the victim's history of violence and the defendant's behavior during the altercation. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 54.

¶ 16 The *Lynch* rule is that, when self-defense is properly raised, a defendant may present evidence of the victim's violent and aggressive character (1) to show that the defendant's knowledge of that character affected his perception of and reaction to the victim's behavior, or (2) to support the defendant's version of events where there are conflicting accounts. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 94, citing *People v. Lynch*, 104 Ill. 2d 194, 199-200 (1984).

¶ 17 Here, we need not resolve whether Boswell's affidavit was needed for defendant's petition to survive summary dismissal or whether the Boswell Report was sufficient supporting documentation at this stage. Taking the claims in the Boswell Report on their face to the extent they are not rebutted by the record, defendant has failed to show ineffective assistance by trial or appellate counsel. It is a dubious proposition that evidence that the victim had AIDS and expressed a wish to die quickly is evidence of his violent and aggressive character. Moreover, as we have already held on direct appeal regarding the Sykes evidence, we see no reasonable probability that the jury hearing evidence of the rest of the Boswell Report – the Atlanta abuse and the AIDS claim – would have changed the outcome of the trial on the overwhelming evidence of defendant's guilt. Further evidence regarding what was in the *minds* of defendant or the victim just before the shooting would not change that defendant on one hand and Shields and Carpenter on the other gave different accounts of their *actions* during that time, including whether the victim had a weapon in his hand, and the jury believed the latter.

¶ 18 Defendant also contends that his mittimus should be corrected to properly reflect his presentencing detention credit. After defendant initially claimed that he was arrested on

September 9, 2006, the parties now correctly agree that he was arrested on September 19, 2006, and sentenced on June 30, 2009. This results in 1,015 days of pre-sentencing detention credit, rather than the 1,013 days in the mittimus.

¶ 19 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the mittimus to reflect 1,015 days' credit for presentencing detention. The judgment of the circuit court is otherwise affirmed.

¶ 20 Affirmed; mittimus corrected.