

No. 1-13-0340

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 10904
)	
DERICK LEWIS,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Defendant's postconviction petition set forth an arguably meritorious claim of ineffective assistance of trial counsel where the petition alleged counsel failed to call a witness whose testimony corroborated defendant's account of events.

¶ 2 Following a jury trial, the defendant, Derick Lewis, was found guilty of one count of robbery and three counts of aggravated criminal sexual assault and sentenced to a total of 46 years' incarceration. He filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), which the circuit court summarily dismissed. On appeal, defendant contends that his petition set forth arguably meritorious claims that his appellate

counsel and trial counsel were ineffective. He argues that his trial counsel was ineffective for failing to call two witnesses whose testimony, defendant alleges, would contradict the testimony of two State witnesses. He also argues that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred when it barred the introduction of the victim's two arrests for prostitution under the Illinois rape-shield statute, section 115-7 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-7 (West 2008)). We reverse and remand.

¶ 3 Defendant was charged by indictment with five counts of aggravated criminal sexual assault, five counts of criminal sexual assault, and two counts of robbery. The charges arose from an encounter between defendant, the victim, T.W., and several of defendant's friends on April 16, 2007.

¶ 4 Prior to trial, the State moved *in limine* to bar the defendant from introducing evidence of T.W.'s two prior arrests related to prostitution, under section 115-7 of the Code. 725 ILCS 5/115-7 (West 2008). Defendant responded that the evidence of T.W.'s arrests was constitutionally required under the statute. Defendant noted that T.W. had been arrested for prostitution both before and after the night in question. The trial court ruled that the arrests were not relevant to T.W.'s "bias, prejudice, or motive to testify," and granted the State's motion.

¶ 5 At trial, T.W. testified that at about 4 a.m. on April 16, 2007, she accepted a ride from defendant. Calvin Kelly and another man were in the back seat. T.W., who was 19 years old, left the car after several minutes because the men's comments were making her "uncomfortable." As she waited at a bus stop, defendant drove by, and she again got into his vehicle. Only defendant and Kelly were now in the car. She and defendant sat in the back seat while Kelly drove. Defendant and T.W. argued, and defendant pushed her head several times. She pushed defendant

back. They arrived at Kelly's apartment and found two women, Keisha Burton and Latoya Carlton, sleeping. The women woke up and spoke to defendant in a bedroom. The women subsequently attacked T.W. After some time, defendant broke up the altercation and led T.W. to a bathroom to wipe blood from her clothing and face. He told her to take off her clothes or he would "put those girls back on you." Defendant then sexually assaulted her in the bathroom. Upon returning to the living room, defendant demanded that she give him money. She gave defendant \$30 from her purse. Defendant and Kelly left the apartment. The women took T.W. and their neighbor, Walter Clark, to buy breakfast, and they all returned to the apartment building. Clark subsequently drove T.W. to a currency exchange. T.W. told Clark she had been assaulted, and the police were called.

¶ 6 Clark testified generally consistently with T.W.'s account. After breakfast, Burton gave Clark \$20 to drive T.W. to a nearby currency exchange, where he told a teller that T.W. had been raped and needed help.

¶ 7 Kelly testified that he, defendant, and Jason Baggot were drinking and driving around in defendant's truck. They saw T.W. walking along the street and called out to her, but she would not hang out with them because there were too many men in the truck. Baggot was driven home and Kelly and defendant later drove past T.W. again. She got into the truck and subsequently indicated that she would perform unspecified sexual acts if each man paid her \$40. The men declined because the price was too high. Kelly told T.W. that there was a man at his apartment complex who would pay for sex. When they reached Kelly's apartment, Burton and Carlton attacked and beat T.W. until defendant stopped them. T.W. was crying and hurt. Defendant led her to the bathroom and told her she did not know who she was "messing with." T.W. said she

"didn't know what she did, but she was sorry for it." Kelly heard "bumping, moaning, things like that" coming from the bathroom.

¶ 8 Detective Taraszkiwicz and assistant state's attorney Michael O'Malley testified that in previous interviews Kelly had not mentioned anything about an agreement for sexual acts for money. Kelly also stated that defendant had repeatedly touched T.W.'s head in the truck, despite her protestations, and that defendant had threatened T.W. to remove her clothes or he would set Burton and Carlton "back on" her.

¶ 9 Carlton testified that when defendant arrived at the apartment, he asked her and Burton to "fight" T.W. because she had scratched his eye. Carlton and Burton attacked the victim. Defendant ordered the victim to go into the bathroom with him and to do what he said. While they were in the bathroom, T.W. stated "I thought you were going to take me home," and "stop, stop, I've never had it like that." After defendant and the victim returned to the living room, defendant demanded money from T.W. Defendant told Carlton that he knew where she lived and that he would do the same thing to her if she told anyone about what had happened. After defendant and Kelly left, Carlton and Burton brought T.W. to Clark, and they all went out for breakfast. Carlton later gave Clark \$20 to buy T.W. a bus ticket.

¶ 10 Defendant testified that T.W. accepted the ride after he told her that he and Kelly wanted to have sex with her. She left the car when they ultimately disagreed on a price. When she got in the car a second time, he gave her \$60 and they discussed "partying," a term understood to include sex. At the apartment, defendant had Carlton and Burton attack the victim, and he helped her into the bathroom to clean up. Defendant testified that the victim then performed the sex acts in the bathroom that they had agreed upon earlier. When they came out, she refunded \$30 to

defendant because she did not have sex with Kelly.

¶ 11 In its closing argument, the State argued that T.W. was a young girl who had made a naïve mistake of getting into defendant's truck. Defendant's trial counsel then argued that T.W. was in a location frequented by prostitutes late at night, and had agreed to have consensual sex with defendant for money.

¶ 12 The jury found defendant guilty of robbery and three counts of aggravated criminal sexual assault, based on various sexual acts. The trial court sentenced defendant to 10 years' imprisonment for the robbery and 12 years' imprisonment on each sexual assault charge. The judge stated that each sentence was to run consecutively, for an aggregate 46-year term.

¶ 13 Defendant appealed arguing that the trial court had improperly responded to a jury question. This court affirmed his conviction. *People v. Lewis*, 2011 IL App (1st) 092257-U.

¶ 14 Defendant subsequently filed a *pro se* postconviction petition alleging, *inter alia*, that trial counsel was ineffective for failing to call Baggot and Burton as witnesses. The petition also argued that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred by barring admission of T.W.'s prostitution arrests. Defendant attached an affidavit from Burton to his petition, in which Barton averred that she would have testified that the police had threatened her and that defendant never threatened Carlton. The petition noted that defendant could not reach Baggot for an affidavit because defendant had divorced his wife, who was Baggot's cousin, and his incarceration prevented him from locating Baggot.

¶ 15 The trial court summarily dismissed the petition. Defendant appeals.

¶ 16 Defendant contends that both trial and appellate counsel provided constitutionally deficient representation; he has abandoned the rest of his petition's claims on appeal. The Act

allows a defendant to challenge their conviction or sentence based on a substantial violation of his rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). A postconviction proceeding consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage of proceedings, as in this case, a postconviction petition may be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A post-conviction petition is frivolous or patently without merit only if the allegations in the petition, liberally construed in favor of the petitioner, do not form the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. All factual allegations in the petition must be taken as true, unless they are contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). We review the first stage dismissal order of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 17 To prevail on a claim of ineffective assistance of counsel a defendant must show that counsel's performance "was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In a first stage postconviction petition proceeding, a petition alleging ineffective assistance of counsel must show "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 18 Defendant contends that his petition set out an arguable claim that his trial counsel was ineffective for failing to call Burton as a witness. He notes that Burton's affidavit states that she was ready to testify at his trial. She would have testified that defendant did not threaten Carlton

after leaving the bathroom. He argues that the jury may have viewed the threat as an admission of guilt by the defendant, and inferred that he had a guilty conscience. Defendant argues that Burton's testimony would have impeached Carlton's testimony and corroborated defendant's testimony that he and T.W. engaged in consensual sex.

¶ 19 The State responds that defendant cannot establish that trial counsel was ineffective because the decision of whether to call a witness is a strategic choice. The State also argues that defendant cannot establish prejudice because the evidence against him was overwhelming.

¶ 20 Typically decisions regarding which witness to call are matters of trial strategy and are reserved to the discretion of trial counsel. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Such challenges are "generally immune from claims of ineffective assistance of counsel." *Id.* However under the liberal standard of a first-stage postconviction review, trial counsel's representation may arguably fall below an objective standard of reasonableness where counsel fails to investigate and present a witness that supports the defendant's theory of the case. See *People v. Hodges*, 234 Ill. 2d 1, 22 (2009). Moreover, matters of trial strategy are generally more appropriate for consideration on the second stage of proceedings. *People v. Tate*, 2012 IL 112214, ¶ 22.

¶ 21 We find that defendant's petition set forth an arguable claim that trial counsel's failure to call Burton was objectively unreasonable and prejudicial to defendant. Burton's affidavit states that she was ready to testify at defendant's trial, but was not given the chance. She would have testified that defendant never threatened Carlton, impeaching Carlton's testimony which suggested that defendant had a guilty conscience. In doing so, she would have also corroborated defendant's account. The issue of consent was largely a matter of credibility, and the testimony

of each witness concerning the events on that evening was material to the jury resolving that issue. Therefore, under the liberal first-stage standard set forth in *Hodges*, we find defendant's petition presents an arguable claim that trial counsel's failure to call a witness who could corroborate defendant's version of the night's events was objectively unreasonable. Similarly, given the importance of witness credibility to this case, we find the petition presents an arguable claim of prejudice to defendant. Because defendant's petition presents an arguable claim that trial counsel's representation was objectively unreasonable and prejudiced defendant, it adequately alleges an arguably meritorious claim of ineffective assistance of counsel.

¶ 22 The State argues that Burton's affidavit does not state where she was during the events in question, and thus "the mere fact that [Burton] may not have heard defendant threaten [Carlton] does not establish that defendant never made such a threat." However, Burton's affidavit does not state that she did not hear the threat; she avers that the threat did not happen. Moreover, the factual question of where Burton was located and her credibility are determinations that should be made at the evidentiary stage and not at the dismissal stage. See *Coleman*, 183 Ill. 2d at 391 (1998).

¶ 23 Having found that defendant's petition adequately alleges an arguably meritorious claim that trial counsel was ineffective for failing to call Burton as a witness, we need not determine defendant's other claims. Where a postconviction petition contains a single claim that is not frivolous or patently without merit, the entire petition must be remanded for the appointment of an attorney and second-stage proceedings. *People v. Rivera*, 198 Ill. 2d 364, 371 (2001). Accordingly, we reverse the dismissal of defendant's postconviction petition and remand the matter to the circuit court of Cook County for second-stage proceedings under the Act.

1-13-0340

¶ 24 Reversed and remanded.