THIRD DIVISION
July 15, 2015

No. 1-13-1752

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. 05 CR 18295
	)	
JOHN BROWN,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justice Lavin concurred in the judgment.
Justice Mason dissented.

O R D E R

¶ 1 *Held*: Summary dismissal of a post-conviction petition was reversed where the record did not contradict petitioner's claim that the trial judge, upon being advised the jury could not reach a verdict, responded by telling the jury it would be sequestered for a weekend.

¶ 2 Defendant John Brown appeals the circuit court's summary dismissal of his *pro se* post-conviction petition. On appeal, defendant contends his petition should have survived the initial stage of post-conviction review because it presented an arguable claim that the trial judge's

response to the jury's statement that it was deadlocked effectively coerced the jury into quickly reaching a verdict. We reverse and remand for further post-conviction proceedings.

¶ 3 Defendant was charged with first degree murder in the shooting death of Fred Hamilton on February 3, 2004. Defendant also was charged with aggravated unlawful use of a weapon and unlawful use of a weapon by a felon. Alfred Marley and Edward Leak Jr. were also charged with first degree murder in this case. Defendant and Leak were tried in separate but simultaneous jury trials in 2007. Defendant was convicted of first degree murder and was sentenced to 50 years in prison. Leak and Marley also were convicted of first degree murder. Defendant filed a motion for a new trial, which was denied.

¶ 4 On direct appeal, defendant challenged the denial of his motion to quash his arrest and suppress evidence and argued that the trial court committed reversible error in failing to question the venire in accordance with Illinois Supreme Court Rule 431(b) (Ill. S. Ct. Rule 431(b) (eff. May 1, 2007)). Defendant also contended he was not awarded the correct amount of credit for time served in custody prior to his sentencing. This court affirmed defendant's conviction and sentence but ordered the mittimus corrected to reflect the proper amount of sentencing credit. *People v. Brown*, No. 1-07-3493 (2011) (unpublished order under Supreme Court Rule 23).

¶ 5 On February 14, 2013, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). No affidavits or documentation were attached to the petition. In the petition, defendant asserted, among other claims, that the trial court informed the jury that it would be sequestered if it failed to reach a verdict after a certain time. Defendant alleged that after the jury began deliberating at about 5 p.m., the jury "sent out a couple of times for additional testimony to look over."

¶ 6 Defendant alleged that at about 9 p.m., the jury informed the court that it could not reach a verdict. The petition stated as follows:

> "Instead of sequestering them until the next day, which was Friday, the judge said they would be sequestered into Monday, because the Judge had prior engagements for Friday and wanted to preside over the decision.
>
> Defendant's counsel objected stating that any Judge could preside over the decision on Friday and if defendant was found guilty, Judge Cannon (original presiding Judge) would be the one to sentence defendant.
>
> Judge overruled defense counsel's objection and sent those directions to the jury. In about a half an hour, the jury came back with a guilty verdict. But they also acquitted defendant of three charges."

¶ 7 Defendant further stated in the petition that his trial counsel was ineffective in failing to preserve the issue of alleged jury coercion by including it in his post-trial motion.

¶ 8 On April 9, 2013, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals that ruling.

¶ 9 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq*. (West 2012). At the first stage of a post-conviction proceeding, a defendant need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). The circuit court may dismiss the petition if the allegations therein, taken as true, render the petition "frivolous" or "patently without merit." 725

ILCS 5/122-2.1(a)(2) (West 2012). This court reviews *de novo* the summary dismissal of a post-conviction petition. *Hodges*, 234 Ill. 2d at 9.

¶ 10 If the circuit court does not dismiss the petition, it advances to the second stage, at which counsel may be appointed, and the State may file a motion to dismiss or file an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2012). If the petitioner makes the requisite showing at that stage that the petition and any accompanying documentation present a substantial showing of a constitutional violation, the petitioner is entitled to a third-stage evidentiary hearing. *People v. Domagala*, 2013 IL 113688, citing *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 11 At the first stage of review, a petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Id*. at 16-17. The supreme court clarified the low threshold of *Hodges* by stating a *pro se* petitioner is required only to allege "enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Hodges*, 234 Ill. 2d at 9.

¶ 12 On appeal, defendant contends the circuit court erred in dismissing his post-conviction petition at the first stage of review. He asserts his petition should be remanded for further proceedings because the trial court's purported off-the-record statement to the jury that it would be sequestered if it could not reach a verdict denied him a fair trial. Defendant further argues the judge and his trial counsel were ineffective in failing to ensure the described colloquy was

transcribed, as required by Illinois Supreme Court Rule 608(a)(8) (Ill. S. Ct. Rule 608(a)(8) (eff. Dec. 13, 2005)), and he contends his claim is not contradicted by the record.

¶ 13 In response, the State first asserts that defendant has forfeited the ability to now raise this claim because defendant did not preserve the jury coercion issue for the record and did not raise the issue in his direct appeal. The latter point does not preclude our review, however, because where the facts of a post-conviction claim rely on matters outside the record, such a claim is not ordinarily forfeited in this way because such matters may not be raised on direct appeal. See *People v. English*, 2013 IL 112890, ¶ 22. Thus, the State's main contentions are that the defendant has no official record of the court's alleged remarks and that defendant did not offer any affidavits, including his own, or a bystander's report to corroborate the conversation.

¶ 14 The petition must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent. 725 ILCS 5/122-2 (West 2012); *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). The petitioner must provide supporting documents or explain the absence of such materials, and the failure to either provide such support or explain its absence is fatal to a post-conviction petition. *Id*.

¶ 15 Here, defendant describes within his petition a conversation between the trial judge and defense counsel. In explaining why he did not supplement his petition with a transcript of that exchange, defendant cites Supreme Court Rule 608(a)(8), which provides, in pertinent part, that the record on appeal must include:

> "the report of proceedings, including *** communications from the jury during deliberations, and responses and supplemental instructions to the jury and objections, arguments and rulings thereon ***." Ill. S. Ct. Rule 608(a)(8) (eff. Dec. 13, 2005).

¶ 16 There is little case law analyzing the validity or plausibility of a defendant's explanation of the absence of materials to support his post-conviction petition. As *Delton* stated, the defendant must either attach such materials or explain their absence; however, the supreme court in *Delton* did not indicate how the defendant's explanation of the absence of those materials should be weighed.

¶ 17 Our supreme court recently addressed the evidentiary requirements of this stage in *People v. Allen*, 2015 IL 113135, ¶ 36, stating the fact that a defendant is permitted to put forth an explanation of the failure to attach evidence supporting a petition "further indicates legislative intent that petitions with substantive merit would advance to the second stage, even where the evidence attached suffers from remediable procedural defects." Accordingly, we find that by claiming the ineffectiveness of trial counsel, he has sufficiently explained the absence of supporting documentation for his claim, for purposes of this initial stage of post-conviction review. Compare, *e.g.*, *People v. Brown*, 2014 IL App (1st) 122549, ¶ 60 (defendant's failure to provide any explanation for compliance with section 122-2 supports dismissal of post-conviction petition at the first stage of review).

¶ 18 The State next argues that the record contradicts defendant's claim. We disagree.

¶ 19 At the first stage of post-conviction review, all well-pleaded facts must be taken as true unless they are positively rebutted by the trial record. *People v. Brown*, 236 Ill. 2d 175, 189 (2010). When a claim is based on matters outside the record, the Act does not intend such claims to be adjudicated on the pleadings. *People v. Smith*, 352 Ill. App. 3d 1095, 1105-06 (2004). With those permissive standards in mind, a review of defendant's allegations reveals that his claim is not completely contradicted by the trial record.

¶ 20 The record indicates that on October 18, 2007, after receiving instructions, the jury went "out" at 5:15 p.m. and a jury verdict was returned at 9:35 p.m. The report of proceedings indicates that the court received a note from defendant's jury at 6:30 p.m. requesting transcripts of two witnesses. At 6:35 p.m., the court received a note seeking a transcript of the testimony of a third witness. The testimony of those three witnesses was provided to the jury.

¶ 21 Defendant alleges in his petition that at about 9 p.m., the jury informed the court it could not reach a verdict. According to defendant, the judge then stated, in the presence of defense counsel, that the jury would not merely be sequestered overnight but in fact would be sequestered "into Monday" for the judge's scheduling convenience. Defendant alleges that the jury returned soon after with a guilty verdict, which the record logged as occurring at 9:35 p.m. Although the State asserts that described exchange was not credible, the defendant's account is not contradicted by the record. The record does not reflect any activity between 5:15 p.m. and the return of the jury verdict at 9:35 p.m., other than the requests for additional testimony at 6:30 p.m. and 6:35 p.m. Because the record is silent in that regard, even though defendant's claim is not borne out by the record, defendant's version of events also is not completely contradicted by the record.

¶ 22 Defendant's petition also sets forth facts that, when taken as true, would arguably support a meritorious constitutional claim. A trial court's remarks to the jury are improper where, under the totality of the circumstances, the language used actually interfered with the jury's deliberations and coerced a guilty verdict. *People v. Fields*, 285 Ill. App. 3d 1020, 1029 (1996). Although informing a jury that it will be sequestered is not necessarily coercive, "[e]xtremely brief deliberations after a reference to sequestration may, however, invite an inference that the

reference to sequestration coerced the jury into rendering a verdict." *People v. Defyn*, 222 Ill. App. 3d 504, 516 (1991). Whether or not the trial court in this case actually referred to sequestration of the jury, as described in defendant's petition, is not subject to determination by this court at this juncture. See, *e.g.*, *People v. DuPree*, 397 Ill. App. 3d 719, 735 (2010) (whether defendant's attorney would refute allegations of off-the-record exchange described in defendant's affidavit in support of post-conviction petition is not dispositive of whether the petition's allegations, taken as true, stated the gist of a meritorious constitutional claim).

¶ 23 Accordingly, the circuit court's order dismissing defendant's post-conviction petition as frivolous and patently without merit is reversed. This case is remanded to the circuit court with directions that counsel be appointed for defendant and defendant's entire petition be advanced to the second stage of post-conviction proceedings, as the Act does not permit partial summary dismissals. See *People v. Cathey*, 2012 IL 111746, ¶ 34, citing *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

¶ 24 Reversed and remanded with directions.

¶ 25 JUSTICE MASON, dissenting.

¶ 26 The postconviction petition filed in this case is both procedurally and substantively deficient as it is unverified as required by section 122-1 of the Act and is unsupported by any "affidavits, records, or other evidence" as required by section 122-2. 725 ILCS 5/122-1, 122-2 (West 2012). While we can excuse the former, we cannot excuse the latter. Brown, who was presumably present for the claimed events that give rise to his postconviction claims, fails to supply even his own affidavit or offer any explanation for his delay in raising these allegations or his inability to support his allegations with any evidence at all. This petition, which accuses the

trial judge of egregious misconduct with absolutely no support in the record of Brown's trial, was properly dismissed at the first stage and, therefore, I respectfully dissent.

¶ 27 At the outset, it should be noted that the postconviction petition Brown filed contained numerous claims, the majority of which were raised in his motion for a new trial and rejected by the trial court. The only error he pursues on appeal is the dismissal of his claim asserting that his guilty verdict was coerced.

¶ 28 Illinois Supreme Court Rule 608(a)(8) (eff. April 8, 2013) requires that the record on appeal contain, among other things, "communications from the jury and objections, arguments and rulings thereon." Consistent with that rule, the record reflects that a court reporter was present throughout the jury's deliberations in this case.

¶ 29 Brown was tried with a co-defendant, Edward Leak, in simultaneous, but severed jury trials. On October 17, 2007, following the conclusion of the trial and while Brown's jury was deliberating, it sent out three notes. The transcript reveals that the first, received at 6:30 p.m., requested the transcript of the testimony of two witnesses. The court convened the lawyers, informed them of the jury's request and ascertained that the parties agreed to provide the jury with the requested transcripts. The second communication was received at 6:35 p.m. and requested the testimony of William Moore, a forensic investigator. The court again convened a hearing, at which Brown was present, and addressed on the record this request. The final communication from the jury was received at 9:35 p.m. and informed the court that the jury had reached a verdict. The lawyers were called, Brown was present, the jury delivered its verdict and the jury was polled. The transcript concludes with the court continuing Brown's case for posttrial motions and sentencing.

¶ 30 The jury deliberating the charges against Leak likewise sent communications to the trial judge during their deliberations. Sometime prior to 6:30 p.m., that jury asked to see certain evidence. The court reporter transcribed the colloquy between the court and counsel, with Leak present, regarding the jury's request. At 6:45 p.m., Leak's jury requested clarification of a jury instruction. Again the court convened a hearing and with Leak present, responded to the jury's inquiry. At 7:05 p.m., Leak's jury informed the court it had reached a verdict, again memorialized in the transcript.

¶ 31 Brown claims that notwithstanding the court reporter's certification of the transcript as "all of the proceedings" had in connection with his trial, there was, in fact, a fourth note from his jury, received at 9:00 p.m., in which the jury informed the court it was deadlocked. According to Brown's unsupported petition, the court, contrary to the four previous communications from Brown's and Leak's juries and in contravention of Rule 608, failed to have the proceedings transcribed (although she apparently made arrangements for Brown to be present), informed the parties that she had a commitment on Friday and if the jury could not reach a verdict that evening, she would sequester them until Monday and, over defense counsel's objection, so informed the jury. Neither the jury's note nor the trial judge's alleged response appear anywhere in the record on appeal.

¶ 32 We are also asked to believe that Brown's defense counsel, having objected to the court's threat to hold the jury hostage for three days whether or not they reached a verdict on Friday, simply failed to raise this issue in her motion for a new trial, which included numerous claimed errors during Brown's trial. We must also assume that defense counsel, upon examining the record and discovering the absence of this critical note, inexplicably failed to (i) bring this matter

to the trial judge's attention, (ii) prepare a bystander's report or (iii) inform counsel from the State Appellate Defender of the issue so that it could be pursued on appeal.

¶ 33 Had the foregoing events occurred during Brown's trial and appeal, they would indeed raise serious issues, not the least of which are violations of several canons of the Code of Judicial Conduct. See Ill. S. Ct. Rule 61 (eff. Oct. 15, 1993) (requiring judges to observe "high standards of conduct"); Ill. S. Ct. Rule 62 (eff. Oct. 15, 1993) ("A judge should respect and comply with the law"); Ill. S. Ct. Rule 63 (eff. July 1, 2013) ("A judge should be faithful to the law and maintain professional competence in it."). But given Brown's failure to support his petition with even his own affidavit (thus avoiding any possible perjury issues), this is precisely the type of "fantastical and delusional" claim (*People v. Hodges*, 234 Ill. 2d 1, 16-17 (2009)) that is appropriately dismissed at the first stage.

¶ 34 My colleagues reason that because the events Brown describes do not appear in the record, they are thus not "completely refuted by" that record and should survive first-stage dismissal, entitling Brown to appointment of counsel and requiring the State to respond to the petition. Such reasoning turns on its head the justification for reserving judicial review of certain claims of trial error for postconviction proceedings. Illinois courts have frequently commented that a defendant's claim of ineffective assistance of trial counsel should await the filing of a postconviction petition because such claims generally concern matters *de hors* the record. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) (record on direct appeal inadequate to support defendant's ineffective assistance claim; court noted the claim could be raised in a postconviction petition, where a factual record could be developed); *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990) (declining to adjudicate in defendant's direct appeal his claim of ineffective assistance

of trial counsel finding that it required consideration of matters outside the record). But unlike communications between defense counsel and a client, which generally take place outside the presence of the trial judge, the record in criminal cases preserves all of the interactions between the trial judge and the parties that occur in open court. If, as here, a defendant claims in a postconviction petition that the trial judge engaged in inappropriate and prejudicial conduct off the record, but in open court and in defendant's and his counsel's presence, we should not advance such claims for further hearing, thus consuming scarce judicial, prosecutorial and public defender resources, without insisting that there be some minimal form of substantiation of the factual basis for the claim. There is none here.

¶ 35 This is not a case like *People v. DuPree*, 397 Ill. App. 3d 719 (2010), cited by the majority, where the defendant supplied his own affidavit regarding an alleged off-the-record exchange between himself and his lawyer. There we found that first-stage dismissal was inappropriate given the existence of defendant's sworn statements. Here, because Brown's petition is unsupported by anything—even his own affidavit—first-stage dismissal is not just appropriate; it is mandatory.

¶ 36 No matter how low the threshold is that warrants advancing a postconviction petition to the second stage, Brown's petition fails to pass muster. My quarrel is not with the sufficiency of the factual allegations of Brown's petition, but with the utter lack of support for those allegations or an explanation for the absence of such support, which the Act requires. While we could excuse the lack of a formal verification given the difficulty incarcerated prisoners encounter in securing the services of a notary (*People v. Hommerson*, 2014 IL 115638, ¶ 11), defects in a supporting affidavit (*People v. Allen*, 2015 IL 113135, ¶ 34 (finding first-stage dismissal

inappropriate where "affidavit" attached to the petition was not notarized, but purported to contain the declarant's fingerprint)) or unsuccessful efforts by *pro se* petitioners to obtain supporting records (*People v. Collins*, 202 Ill. 2d 59, 68 (2002) (acknowledging that the attachment of affidavits, records or other evidence would sometimes place an "unreasonable burden" on postconviction petitioners)), Brown's petition fails to meet even the most rudimentary of requirements. We are not informed that any records exist or that there is any witness who will corroborate Brown's claim and Brown offers no excuse for the absence of this information. By advancing Brown's petition to the second stage, we effectively excuse Brown's complete non-compliance with section 122-2's requirements, a result no reported decision has ever condoned. See *Collins*, 202 Ill. 2d at 66 (petitioner's failure to attach evidentiary support or explain reason for its absence warranted dismissal: "In this case, defendant is 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 justifies such a comprehensive departure." (emphasis in original)); *People v. Delton*, 227 Ill. 2d 247, 254 (2008) ("[S]uch a position would contravene the language of the Act that requires some factual documentation which supports the allegations to be attached to the petition or the absence of such documentation to be explained.").

¶ 37 Our supreme court has recognized that the purpose of section 122-1's *procedural* requirement that a postconviction petition contain a verification affidavit is to ensure that the petition's allegations are "brought truthfully and in good faith." *People v. Hommerson*, 2014 IL 115638, ¶ 9. In contrast, section 122-2's requirement that the petitioner attach "affidavits, records, or other evidence" is *substantive* and is designed to provide some indication that the petition's allegations are "capable of objective or independent corroboration." *Collins*, 202 Ill. 2d

at 67. While under the forgiving standards applicable to first-stage review of *pro se* postconviction petitions, Brown's unnotarized attestation that the facts stated in his petition "are true and correct in substance and in fact" can satisfy section 122-1's procedural requirement that the petition be "verified," that same statement cannot serve the dual purpose of meeting section 122-2's substantive requirement that the petition attach supporting affidavits, records or other evidence. *Collins*, 202 Ill. 2d at 66 (refusing to allow petitioner's four-line verification that facts presented in petition "were true and correct to the best of my recollection," to serve also as the supporting documentation required under section 122-2). Under well-settled law, Brown's failure to provide any corroboration for his claim of judicial misconduct or explain the reason for the absence of such corroboration is "fatal" to his petition. *Id.*

¶ 38 Wholly apart from Brown's failure to support his petition with his own affidavit, he also fails to explain the absence of any other supporting evidence. For example, although Brown does allege that he asked his defense counsel for a copy of his indictments and a witness' deposition relative to other issues he raised in the petition, he does not claim that he asked his attorney to corroborate his claim regarding the jury's fourth note and the trial court's response. Although we may excuse postconviction petitioners from obtaining affidavits from trial counsel attesting to their own ineffectiveness (*People v. Hall*, 217 Ill. 2d 324, 333-34 (2005)), that is not the case here. Given the fact that Brown asserts his defense counsel objected to the court's response to the jury's indication that it was deadlocked, we would expect that counsel would be willing to back up her client's claims in this regard. (Of course, had Brown recited that he asked his attorney to corroborate his claim and she refused, that would be a strong indicator that Brown's claims are both fabricated and lack any objective and independent corroboration.)

¶ 39 Further, this claim could have been, but was not raised on direct appeal. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010) (postconviction proceeding not intended to be a substitute for direct appeal and is limited to claims that were not, and could not have been raised previously); *People v. Harris*, 224 Ill. 2d 115, 128 (2007) (quoting *People v. Derengowski*, 44 Ill. 2d 476, 479 (1970) (" 'it is not within the view of the Act to have claims determined which could have been presented upon a direct review of the conviction' ")); *People v. Scott*, 194 Ill. 2d 268, 274 (2000) ("[R]ulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised in the earlier proceedings, but were not, will ordinarily be deemed [forfeited]."). Brown's contention that because the alleged jury coercion was not reflected in the record, he could not have pursued the issue on appeal overlooks the fact that his lawyer clearly could have prepared a bystander's report under Rule 323(c) (Ill. S. Ct. Rule 323(c) (eff. Dec. 13, 2005)), thus preserving the issue.

¶ 40 Without any objective or independent support for the allegations of Brown's petition, we are simply left with Brown's unverified and unsupported say-so some six years after his guilty verdict. This is not enough under any standard to warrant second-stage review.

¶ 41 I would affirm dismissal of Brown's postconviction petition.