2015 IL App (1st) 132729-U

THIRD DIVISION
September 9, 2015

No. 1-13-2729

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division
	)	
JAMES WASHINGTON,	)	No. 04 CR 10963
	)	
Petitioner-Appellant.	)	The Honorable
	)	Carol M. Howard,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in summarily dismissing the petitioner's *pro se* postconviction petition where the petitioner made a "gist" of a meritorious claim of ineffective assistance of trial counsel based upon counsel's failure to instruct the jury on the meaning of a "dangerous weapon," an essential element of each of the offenses with which he was charged. Furthermore, the *mittimus* must be corrected to reflect that the petitioner was convicted of aggravated kidnapping on the basis of committing the offense while armed with a dangerous weapon, rather than having inflicted harm on the victim.

¶ 2 The petitioner, James Washington, appeals from the circuit court's summary dismissal of his *pro se* postconviction petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2004)). The petitioner contends that the circuit court erred in dismissing

his *pro se* petition where he stated the gist of a meritorious claim that his trial counsel was ineffective for failing to object to the trial judge's refusal to provide an answer to the jury's question regarding the legal definition of a "dangerous weapon," an essential element of each of the offenses with which he was charged. The petitioner further contends that the trial court erred in summarily dismissing his petition where he stated the gist of a meritorious claim that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. Finally, the petitioner contends that his *mittimus* should be corrected to reflect that he was convicted of aggravated kidnapping based upon being armed with a dangerous weapon, not based upon the infliction of harm to the victim. For the reasons that follow, we reverse and remand and order the *mittimus* corrected.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following facts and procedural history. On May 3, 2004, the petitioner was charged, *inter alia*, with the commission of the offenses of armed robbery, aggravated kidnapping and aggravated vehicular hijacking for his participation in the abduction of the victim, Abdallah Farraj, on April 17, 2004. The State alleged in the indictment that the petitioner committed each of the offenses "while armed with a dangerous weapon, to wit: a firearm, in violation of Chapter 720, Act 5, Section 18-2(a); 18-4(a); 10-2-A, of the Illinois Compiled Statutes 1992, as amended."[1]

[1] We note that although the petitioner committed the charged offenses in 2004, the State charged him using the versions of the statutes in effect prior to 2000, because the mandatory sentencing enhancements that were added to the statutes by way of the 2000 amendments (see Public Act 91-404) had been declared unconstitutional by our supreme court in *People v. Walden*, 199 Ill. 2d 392 (2002), and *People v. Moss*, 206 Ill. 2d 503 (2003). The petitioner made no objection to the indictment.

¶ 5 The petitioner's jury trial began in 2006.[2] At trial, the State first presented the testimony of the victim, Abdallah Farraj.[3] Farraj testified, through an interpreter, that at about 10 a.m. on April 17, 2004, he and his cousin, Ayman, made a delivery of candy, cigarettes and tobacco products to Martino's grocery store at 3240 East 91st Street in Chicago. After making the delivery, Farraj sat in the delivery truck while he waited for Ayman, who was inside the store completing paperwork concerning the delivery. Farraj testified that, while sitting in the truck, he noticed the petitioner coming toward him along the side of the truck. Farraj said he started to get out, but the petitioner pointed a gun to his head and forced him back into the truck and made him sit on a safe that was located between the front driver and passenger seats of the truck. Another man (the petitioner's accomplice) then entered the driver's side of the truck and drove away. As the truck was pulling away from the store, the petitioner told Farraj not to move.

¶ 6 According to Farraj, a few blocks from the market, the driver stopped the truck and the petitioner forced Farraj out of the truck. Farraj testified that the petitioner, while still pointing the gun at him, forced him into the back cargo area of the truck and then closed and locked the sliding cargo bay door. Farraj testified that while he was in the cargo area, the truck began moving and then stopped for a brief time. While the truck was stopped, Farraj heard noises coming from the front of the truck. Soon the truck began moving again and within a short time Farraj heard police sirens. Soon thereafter the truck came to a sudden halt.

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[2] We note that although by the time the petitioner's trial began our supreme court overturned *Moss* and *Walden* (See *People v. Sharpe*, 216 Ill. 2d 481 (2005)), the petitioner's prosecution nevertheless proceeded in accord with the indictment and the petitioner raised no objection to the State proceeding in this manner. Accordingly, the State prosecuted the petitioner pursuant to the pre-2000 statues under which it was required to prove that the petitioner committed the offenses of robbery, kidnapping and vehicular hijacking while "armed with a dangerous weapon." The term "dangerous weapon" was not defined by the charging statutes.

[3] These underlying facts have been set forth in our supreme court's review of the petitioner's direct appeal. See *People v. James Washington*, 2012 IL 107993.

¶ 7 The State presented other witnesses whose testimony established that a police broadcast was issued with a description of the truck that was taken. Chicago police sergeant Timothy Koren testified that he was working beat duty in the area, when he noticed a truck fitting the description and began following it. When Sergeant Koren activated his lights and siren, the truck pulled into a parking lot. Sergeant Koren saw two men jump from the front of the truck while the truck was still moving. The truck eventually came to a stop when it hit a parked car. Sergeant Koren broadcast a description of the fleeing men over the police radio and within minutes the petitioner was captured, although his accomplice was never apprehended and no gun was recovered. Farraj was released from the back of the truck and it was then discovered that the safe that had been in the front of the truck was missing.

¶ 8 Chicago police detective Lorenzo Sandoval next testified that he spoke to the petitioner at Area Two division headquarters after the petitioner's arrest on April 17, 2004. Detective Sandoval testified that, after the petitioner was advised of his rights, the petitioner told him that a few days earlier he had been approached by a person named "Johnny," who had asked him if he would like to make some money. The petitioner further told the detective that thereafter, on April 17, 2004, he drove his car to the area near Martino's grocery store and met up with Johnny. The petitioner said that, at Johnny's direction, he drove a truck from the area. At some point they stopped and removed a safe, placing it somewhere on Anthony Street. After dropping off the safe, they continued on in the truck until they heard police sirens. The petitioner said he jumped from the truck when he saw Johnny jump out. The petitioner never told the detective that he had a gun.

¶ 9 Detective Sandoval also testified that, on the following day, April 18, 2004, he was present

when the petitioner spoke to an assistant state's attorney and stated that he was "accountable for the robbery and kidnapping of [*sic*] that occurred on the 17th of April at 3240 East 91st Street."

¶ 10 After the State presented its evidence, defense counsel, outside the presence of the jury, moved for a directed finding on all counts, stating, "[The] State has not proven that a firearm was in fact used. They charged a firearm, they have not proven a firearm was used." The prosecutor replied, "I believe we have met our burden in this matter. Through the testimony of *** Farraj *** when you have the witness testify the petitioner pointed the gun at the victim ***." The trial court denied the petitioner's motion.

¶ 11 The court then held a jury instruction conference during which the following colloquy took place:

"Ms. Sims [defense counsel]: Judge, we earlier requested a jury instruction IPI 18.07, [4] definition of firearm. Also, shown [*sic*] you the Public Safety Act which gives definition of a firearm and the exclusions.

The Court: 18 what?

Ms. Sims: 18.07A. If I can make a record?

The Court: Sure. Go ahead.

[4] This instruction defines a "firearm" in accordance with the Firearm Owners Identification Card Act (see 430 ILCS 65/1.1 (West 1994)), as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas," excluding, *inter alia*: (1) "any pneumatic gun, spring gun, paint ball gun, or B-B gun" which expels (a) "a single globular projectile not exceeding .18 inch in diameter or which has a maximum muzzle velocity of less than 700 feet per second" or (b) "breakable paint balls containing washable marking colors; (2) "any device used exclusively for signaling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;" (3) "any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition;" and (4) "an antique firearm (other than a machine-gun)***."

Ms. Sims: The instructions [*sic*] as written anticipates exclusions. Public Safety Act lists the exclusions which are not considered a firearm. We request that instruction be given.

The Court: State?

[Assistant State's Attorney]: We object to this instruction being given. There's been testimony that the victim said the petitioner had a gun. There's no testimony as to the gun being recovered. This issue *** or this instruction goes to whether a piece of evidence is actually a gun or not. This will only confuse the jury with regards to the gun. It's very simple, Your Honor, straight forward, they heard the evidence. They know a gun was not recovered. And there could be the inference made.

The Court: Well, as to that issue, the instruction you cite, in the footnote says this instruction is for use only in conjunction with offenses charged under 720 ILCS 5/24-1.1.[5] There's nothing here.

Also in the indictment, the person is charged with armed robbery, by use of force or threatening use of force, took a safe from the person or presence of, he carried upon his person or was otherwise armed with a dangerous weapon. Says to wit a firearm, the dangerous weapon, it includes bludgeon or something else.

I don't feel the State has to prove that up. The fact that he was armed with a weapon is sufficient and this definition 18.07 would not be."

¶ 12 After the trial court denied defense counsel's request to instruct the jury with Illinois Pattern Jury Instruction 18.07A, defense counsel did not request a jury instruction on the definition of a "dangerous weapon." Rather, the instruction conference was completed, the jury was brought

[5] We note that 720 ILCS 5/24-1.1 defines the crime of unlawful use or possession of a weapon by a felon, which is not an offense the petitioner was charged with.

back to the courtroom and the defense rested without presenting any evidence. The matter immediately proceeded to closing argument.

¶ 13 In closing argument, the State told the jury that, although the gun was never recovered, Farraj's testimony that a gun was held to his head throughout the ordeal sufficiently established that a dangerous weapon was used in the commission of the charged offenses. Countering that argument, defense counsel attempted to persuade the jury that, because no gun was ever recovered by the police, or introduced into evidence at trial, and the victim never described the gun's features, its color and size, the evidence did not prove that a dangerous weapon was used to commit the offenses. As Counsel argued:

> "[Y]ou cannot find Mr. Washington guilty unless you believe there's a dangerous weapon and we don't know. There was just simply not enough evidence. As I said, it could be a toy for all we know."

¶ 14 In rebuttal argument, the State asked the jury, "How do we know there was a gun? Because on April 17, 2004, at 10 o'clock, *** Farraj's life changed that day. He told you that this petitioner put a gun to his head and made him sit in the middle of the truck." The State also said that when a gun is "at your head, you know it's there."

¶ 15 After hearing all of the arguments, the jury was instructed in the following manner. The court first admonished the jury that it should find the petitioner guilty of aggravated kidnapping, armed robbery, and aggravated vehicular hijacking if it found he committed the offenses of kidnapping, robbery and vehicular hijacking "while armed with a dangerous weapon." The jury was further instructed that to prove the offense of aggravated kidnapping, the State could prove either that the petitioner was armed with a dangerous weapon or that the petitioner also committed an armed robbery against Farraj (which itself required proof of a dangerous weapon). The jury was

not instructed as to the definition of "dangerous weapon," nor did trial counsel request such an instruction.

¶ 16 While the jury was deliberating, it sent out five questions. Among them, the jury first asked whether the charges could be reduced from their armed or aggravated forms, and the court responded that they could not. About ten minutes later, the jury sent out two more questions asking for the legal definitions of "reasonable doubt" and "dangerous weapon." In response, the trial judge, without objection from the petitioner's counsel, told the jury, "No, you have been given all your instructions, continue to deliberate." Subsequently, the jury returned a verdict, finding the petitioner guilty of all of the charged offenses.

¶ 17 After a sentencing hearing, the petitioner was sentenced to concurrent terms of 25 years, 15 years and 15 years for aggravated kidnapping, aggravated vehicular hijacking, and armed robbery, respectively.

¶ 18 The petitioner appealed contending that the State had failed to prove beyond a reasonable doubt that he was armed with a dangerous weapon because no weapon was recovered or introduced into evidence and because no testimony was provided as to the size and weight or metallic nature of the weapon. On appeal, this court cited the charges as set forth in the indictment, and found that the evidence was insufficient to uphold the petitioner's convictions because the State had not presented sufficient evidence that the petitioner had committed the offenses while armed with "a dangerous weapon." See *People v. Washington*, No. 1-06-3159 (unpublished order pursuant to Illinois Supreme Court Rule 23). Accordingly, the appellate court remanded the cause to the circuit court with instructions that judgment and sentences be entered on the lesser-included offense of kidnapping, vehicular hijacking and robbery. See

People v. Washington, No. 1-06-3159 (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 19 The State filed a petition for leave to appeal to the Illinois Supreme Court which was granted, and the petitioner cross-appealed. See *People v. Washington*, 2012 IL 107993, ¶ 26. A majority of our supreme court reversed the holding of the appellate court finding that the evidence at trial supported a finding that the petitioner was armed with a dangerous weapon during the commission of the kidnapping, vehicular hijacking and robbery, and that there was no variance between the proof at trial and the indictment by which the petitioner was charged. *People v. Washington*, 2012 IL 107993, ¶¶ 35-41. In doing so, the majority found relevant that the victim testified that the petitioner pointed "a gun" at him, forced him into the truck and then held "a gun" to his head while he sat between the petitioner and his accomplice in the front of the truck. *Washington*, 2012 IL 107993, ¶ 35. The victim also testified that the petitioner pointed the "gun" at him when he was later forced into the cargo area of the truck. *Washington*, 2012 IL 107993, ¶ 35. The majority found that "[t]his evidence established that, for several minutes, [the victim] had an unobstructed view of the weapon [the petitioner] had in his possession during the commission of the crimes," and that he explicitly testified that it was "a gun." *Washington*, 2012 IL 107993, ¶¶ 35-36. Accordingly, the majority held that taking this evidence in the light most favorable to the State, the jury could have found beyond a reasonable doubt that the petitioner was armed with a dangerous weapon when he committed the offenses with which he was charged. *Washington*, 2012 IL 107993, ¶ 37.

¶ 20 In addition, the majority of the court disagreed with the appellate court's reduction of the petitioner's convictions to their lesser included offenses on the basis that the allegations in the indictment varied from the State' proof at trial. *Washington*, 2012 IL 107993, ¶ 39. In doing so,

the majority of the court first recognized that when the crimes were committed in 2004, the sentencing enhancements contained in the 2000 amended statues had been held unconstitutional and the State therefore charged the petitioner under the predecessor statues, pursuant to which it was required to prove that the petitioner had committed the offense "while armed with a dangerous weapon." *Washington*, 2012 IL 107993, ¶ 40. The petitioner never objected to being charged in this manner. *Washington*, 2012 IL 107993, ¶ 40. The majority noted the jury was fully instructed that in order to find the petitioner guilty it had to find that he committed the charged offenses "while armed with a dangerous weapon," and that the evidence presented at trial was sufficient to establish that he committed the crime while using one, namely a gun. *Washington*, 2012 IL 107993, ¶¶ 40-41. The majority then concluded that because the indictment charged the petitioner with committing the offenses of armed robbery, aggravated kidnapping and aggravated vehicular hijacking "while armed with a dangerous weapon, to wit: a firearm ***," the petitioner was in fact, fully apprised of the charges lodged against him, so that there was no variance "fatal, or otherwise between the indictment and the proof at trial." *Washington*, 2012 IL 107993, ¶ 41.

¶ 21 In their dissent, Justices Kilbride and Theis, argued that the majority failed to acknowledge let alone, explain how the petitioner's lack of objection to being prosecuted under the wrong criminal statues could affect his conviction. *Washington*, 2012 IL 107993, ¶ 51 (Kilbride, J., dissenting, joined by Theis, J.). According to the dissent, the majority had failed to consider whether it is proper to prosecute the petitioner under the substantive provision of the statues that were not in effect either at the time the petitioner committed the offenses or at the time of the petitioner's trial, and instead sidestepped the issue by implicitly finding that the petitioner had forfeited any challenge to the Sate's improper use of an outdated statute. *Washington*, 2012 IL

107993, ¶ 52 (Kilbride, J., dissenting, joined by Theis, J.). The dissenting justices asserted that the proper holding would have been that the court was constrained by the offenses and statues applicable at the time of the offense (2004), under which the petitioner could have been found guilty if armed either with a dangerous weapon, other than a firearm, or while armed with a firearm. *Washington*, 2012 IL 107993, ¶ 53 (Kilbride, J., dissenting, joined by Theis, J.). Furthermore, because it was undisputed that there was no evidence presented at trial for the use of a non-firearm dangerous weapon, there was no evidence that the crime was committed while armed with a dangerous weapon. *Washington*, 2012 IL 107993, ¶ 53 (Kilbride, J., dissenting, joined by Theis, J.). Moreover, the jury was instructed only on the use of a dangerous weapon, albeit without being provided with a definition of a "dangerous weapon," and was not instructed on the use of a firearm. *Washington*, 2012 IL 107993, ¶ 53 (Kilbride, J., dissenting, joined by Theis, J.). Accordingly, the dissenting justices would hold that the State had failed to prove the petitioner guilty of any aggravated statutory offense. *Washington*, 2012 IL 107993, ¶ 53 (Kilbride, J., dissenting, joined by Theis, J.).

¶ 22 On April 29, 2013, the petitioner filed a *pro se* postconviction petition, wherein he alleged, *inter alia*, that: (1) his trial attorney was ineffective for "failing to object to the judge's answer to the jury questions," and; (2) his appellate counsel was ineffective for failing to raise the issue of the jury's request for a legal definition of a dangerous weapon. In support, the petitioner attached *inter alia*: (1) his own affidavit swearing to the truth of the allegations in his petition; and (2) copies of letters from his appellate counsel, Laura Weiler, stating that the supreme court's decision in the petitioner's cause "leaves room" for the petitioner to "argue in a post[]conviction petition" among other things that his trial "attorney was ineffective for failing to object when the state failed to reindict" him under the proper statute. The letter further invited the petitioner to

include an allegation that appellate counsel was ineffective for "failing to raise this on direct appeal."

¶ 23 On July 25, 2013, the circuit court summarily dismissed the petition. In a written order, the court found that the trial judge did not abuse his discretion by not defining "dangerous weapon" for the jury and that the issue had been forfeited because it could have been raised earlier. The court further found that trial counsel's decision not to challenge the judge's response directing the jury to continue deliberating was a matter of trial strategy and therefore counsel was not ineffective. Finally, with respect to appellate counsel, the trial court concluded that appellate counsel's decision not to raise the issue on appeal was not "patently erroneous" and that even had counsel raised the issue on appeal, the petitioner had failed to establish that the outcome of the proceedings would have been different. The petitioner now appeals contending that the court erred when it summarily dismissed his *pro se* postconviction petition because he stated a "gist" of arguably meritorious claims of ineffective assistance of trial and appellate counsels.

¶ 24 II. ANALYSIS

¶ 25 We begin by setting forth the well established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a three-step process by which a convicted defendant may assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a substitute for, or an addendum to, direct appeal. " *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); see *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, any issues that were decided on

direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are waived. *Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006).

¶ 26 At the first stage of a postconviction proceeding, such as here, the trial court must only determine whether the petition sets forth a "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); see also 725 ILCS 5/122–2.1 (West 2012); *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30 (citing *People v. Jones*, 213 Ill. 2d 498, 504 (2004)). At this stage of postconviction proceedings, all well-pleaded allegations in the petition must be construed as true, and the court may not engage in any factual determinations or credibility findings. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing"); see also *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) ("[A]t the dismissal stage of a post-conviction proceeding, whether under section 122-2.1 or under section 122-5, the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act. Moreover, our past holdings have foreclosed the circuit court from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding.").

¶ 27 Although the "gist" is a low threshold, (*Jones*, 213 Ill. 2d at 504), the Act nevertheless allows the trial court to summarily dismiss any petition it finds frivolous or patently without merit. *Ross*, 2015 IL App (1st) 120089, ¶ 30; see also *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit only if it has no arguable basis either in law or in

fact. *People v. Tate*, 2012 IL 112214, ¶ 9. Our supreme court has explained that a petition lacks an arguable basis where it "is based on an indisputably meritless legal theory or a fanciful factual allegation"—in other words, an allegation that is "fantastic or delusional," or is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 11-12; *People v. Brown*, 236 Ill. 2d 175, 185 (2010); see also *Ross*, 2015 IL App (1st) 120089, ¶ 31. Our review of summary dismissal is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 28 A. Ineffective Assistance of Counsel

¶ 29 On appeal, the petitioner first argues that the circuit court erred in summarily dismissing his *pro se* postconviction petition because he stated the "gist" of an arguably meritorious claim of ineffective assistance of trial counsel, where trial counsel failed to object to the trial judge's refusal to provide the jury with a legal definition of a "dangerous weapon" upon the jury's request. The State initially responds that the petitioner has forfeited this issue for review by failing to raise it in his direct appeal.

¶ 30 While we agree with the State that the petitioner did not raise this issue during the direct appeal so as to waive the issue for review, the petitioner has overcome the forfeiture hurdle by asserting that appellate counsel was ineffective for failing to raise this claim on appeal. See *Blair*, 215 Ill. 2d at 450-51 (A claim that is forfeited may nevertheless be considered in a postconviction petition "where the alleged forfeiture stems from the incompetence of appellate counsel."); see also the *Plummer*, 344 Ill. App. 3d at 1020 (the "Illinois Supreme Court has repeatedly recognized that waiver or procedural default may not preclude an ineffective assistance claim for what trial or appellate counsel allegedly ought to have done in representing a criminal defendant.")

¶ 31 Turning to the merits of the *pro se* petition, for the reasons that follow, we further find that

the petitioner has met his burden in establishing the "gist" of a claim of ineffective assistance of trial counsel so as to be able to proceed with his petition to the second stage of postconviction proceedings.

¶ 32 It is well settled that claims of ineffective assistance of counsel are resolved under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, the petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced as a result of counsel's conduct. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94)).

¶ 33 Under the first prong of *Strickland*, the petitioner must prove that his counsel's performance was deficient because it fell below an objective standard of reasonableness " 'under prevailing professional norms.' " *Lacy*, 407 Ill. App. 3d at 456-57 (citing *Colon*, 225 Ill. 2d at 135); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004). In this respect, it is the petitioner's burden to overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Lacy*, 407 Ill. App. 3d at 456-57.

¶ 34 Under the second prong of *Strickland*, the petitioner must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Lacy*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally

unfair." *Evans*, 209 Ill. 2d at 220; see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694)).

¶ 35 In the context of a "low threshold" first stage postconviction proceeding, a petition alleging ineffective assistance of counsel may not be summarily dismissed where: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17; *Brown*, 236, Ill. 2d at 185; see also *Lacy*, 407 Ill. App. 3d at 456.

¶ 36 In the present case, the petitioner asserts that he made an arguable basis that trial counsel was ineffective for failing to tender a definition of a "dangerous weapon" and for failing to object to the trial court's refusal to respond to the jury's request for that definition. Specifically, the petitioner first points out that counsel should have requested that the jury be instructed with the definition of a "dangerous weapon" as is articulated under Illinois Pattern Jury Instruction 4.17 (IPI Criminal No. 4.17 (4th edition)) for purposes of the armed robbery and aggravated vehicular hijacking charges. The State on the other hand, asserts that trial counsel's decision not to include the instruction or object to the trial court's refusal to instruct the jury on this matter constituted sound trial strategy. For the reasons that follow, we disagree with the State.

¶ 37 Initially, we note that in *People v. Tate*, 2012 IL 112214, ¶ 22, our supreme court explicitly held that any argument as to counsel's strategy is "inappropriate for the first stage" of postconviction proceedings, such as here, "where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness." As the court in *Tate* explained such questions regarding the soundness of counsel's strategy are "more appropriate to the second stage of postconviction proceedings, where both parties are represented by counsel, and where

the petitioner's burden is to make a substantial showing of a constitutional violation." *Tate*, 2012 IL 112214, ¶ 22.

¶ 38 What is more, under the record before us we are not entirely persuaded by the State's argument as to the unassailability of trial counsel's strategy.

¶ 39 In that respect, we note that IPI 4.17 defines a "dangerous weapon" in the following manner: "An object or an instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use and the circumstances of the case." IPI Criminal No. 4.17, Committee Notes (4th edition). The committee notes to the IPI state that "[t]his definition is appropriate where the alleged weapon is not inherently dangerous," and point to *People v. Skelton*, 83 Ill. 2d 58 (1998) as instructive. See IPI Criminal No. 4.17, Committee Notes (4th edition). In addition, the committee notes state that the instruction should not be given in, among other things, "aggravated kidnapping cases," and those cases where the statue defines a dangerous weapon. See IPI Criminal No. 4.17, Committee Notes (4th edition).

¶ 40 Neither of the pre-2000 amendment statutes for armed robbery and aggravated vehicular hijacking under which the petitioner was charged and convicted contained a definition of "dangerous weapon," so as to bar the use of IPI 4.17 with respect to those charges. See 720 ILCS 5/18-4 (West 1998) ("A person commits aggravated vehicular hijacking when he *** violates Section 18-3 [vehicular hijacking]; and *** he *** caries on or about his *** person, or is otherwise armed with a dangerous weapon."); see also 720 ILCS 5/18-2 (West 1998) ("A person commits armed robbery when he *** violates Section 18-1 [robbery] while he *** carries on or about his *** person, or is otherwise armed with a dangerous weapon.").

¶ 41 What is more, ever since *Skelton*, our supreme court has repeatedly held that a gun, in and of

itself, is not an inherently dangerous weapon. See *e.g.*, *People v. Ross*, 229 Ill. 2d 255, 275 (2008) ("Illinois cases *do not* create a mandatory presumption that any gun is a dangerous weapon." (emphasis added)); *People v. Skelton*, 83 Ill. 2d at 66-67; see also *People v. McBride*, 2012 IL App (1st) 100375, ¶ 54 ("[O]our supreme court has emphasized that there can be no presumption that a gun is a dangerous weapon even where it is proven that the object involved is a real gun."); see also *People v. Thorne*, 352 Ill. App. 3d 1062, 1072-73 (2004) (noting that a loaded firearm is "dangerous *per se*," but that an unloaded firearm or a toy gun in not inherently dangerous).

¶ 42 In *Skelton*, our supreme court struggled with articulating a definition of "dangerous weapon" for purposes of the armed robbery statute. *Skelton*, 83 Ill. 2d at 66-67. In that case, the court found that as a matter of law, a four-inch toy gun used by the defendant was not an inherently dangerous weapon, because it was "entirely too small and light in weight" and did not "fire blank shells," or "pellets" or "give off a flash." *Skelton*, 83 Ill. 2d at 66. In finding that the toy gun was "harmless," the court first noted that "many objects, including guns, can be dangerous and cause serious injury, even when used in a fashion for which they were not intended." *Skelton*, 83 Ill. 2d at 66. The court further elaborated:

> "Most, if not all, unloaded real guns and many toy guns, because of their size and weight, could be used in deadly fashion as bludgeons. Since the robbery victim could be quite badly hurt or even killed by such weapons if used in that fashion, it seems to us they can properly be classified as dangerous weapons although they were not in fact used in that manner during the commission of the particular offense. It suffices that the potential for such use is present; the victim need not provoke its actual use in such manner." *Skelton*, 83 Ill. 2d at 66.

The court then held that "[i]n the great majority of cases" it should be the province of

the trier of fact to determine whether a "particular object was sufficiently susceptible to use in a manner likely to cause serious injury to qualify as a dangerous weapon." *Skelton*, 83 Ill. 2d at 66. In that case, however, the court found that because "the character of the weapon" was such as to "admit of only one conclusion," the question became one of law, and the court determined that "[i]t simply [was] not, ***, the type of weapon which [could have been] used to cause the additional violence and harm which the greater penalty attached to armed robbery was designed to deter." *Skelton*, 83 Ill. 2d at 66-67.

¶ 43 Since *Skelton*, our appellate courts attempted to refine the definition of "dangerous weapon" by dividing dangerous objects into three categories. See *People v. Ross*, 229 Ill. 2d 255, 275 (2008). The first category consists of objects that are dangerous *per se*, such as knives and loaded guns. *Ross*, 229 Ill. 2d at 275; see also *People v. Lignon*, 365 Ill. App. 3d 109, 116 (2006) (quoting *People v. Thorne*, 352 Ill. App. 3d 1062, 1070-71 (2004)). The second category consists of objects that are not necessarily dangerous weapons but can be used as such, for instance, an unloaded gun or a toy gun made of heavy material, which are incapable of shooting bullets but can be used as a bludgeon. See *Ross*, 229 Ill. 2d at 275; see also *Lignon*, 365 Ill. App. 3d at 116; *Thorne*, 352 Ill. App. 3d at 1071. The third category consists of objects that are not necessarily dangerous but were actually used in a dangerous manner in the course of the robbery. See *Ross*, 229 Ill. 2d at 275; see also *Lignon*, 365 Ill. App. 3d at 116; *Thorne*, 352 Ill. App. 3d at 1071; see also *People v. De La Fuente*, 92 Ill. App. 3d 525, 535-36, *** (1981) (starter pistol actually used to bludgeon the victim found to be dangerous *per se* because of the manner in which it was used: the victim was struck on the head).

¶ 44 Our supreme court, however, has held that "[t]his effort at categorization" is "nothing

more than a recognition of the proper role for the trier of fact." *Ross*, 229, Ill. 2d at 275. According to our supreme court, "there is no mandatory presumption that any gun is a dangerous weapon." *Ross*, 229, Ill. 2d at 275. Rather,"[t]he State may prove that a gun is a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or a bludgeon." *Ross*, 229 Ill. 2d at 275-76; see also *People v. McBride*, 2012 IL App (1st) 100375, ¶ 54 ("[O]our supreme court has emphasized that there can be no presumption that a gun is a dangerous weapon even where it is proven that the object involved is a real gun. [Citations.] Rather, our supreme court has made clear that the State has the burden to prove that the gun was a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or a bludgeon" (internal quotation marks omitted)).

¶ 45 In the present case, where defense counsel's entire theory rested on the fact that the State did not meet its burden of proving that the gun was "real" and not a "toy gun" by failing to introduce either the gun itself into evidence or any testimony whatsoever as to the shape, size, or weight of the gun, or its use in a "dangerous manner," it is hard to ascertain a reasonable trial strategy under which a proper instruction tailored pursuant to IPI 4.17 would not have been helpful to the jury in considering the charges of armed robbery and aggravated vehicular hijacking. See *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997) ("Where defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel"); *People v. Lowry*, 354 Ill. App. 3d 760, 765-67 (2004) (holding that defense counsel was ineffective for failing to offer definition of "knowingly" as used in aggravated battery charge against the victim where the defendant gave statement contending that he had not meant to shoot

the victim and the jury sent out a request for the definition of "knowingly"). In fact, it is certainly arguable that this instruction would have directed the jury to consider in which manner the petitioner had used the alleged gun--namely that he merely pointed it at the victim, which absent evidence that the alleged gun was loaded or heavy or metallic or large, may not have been sufficient to persuade the jury that it was a "dangerous weapon." See *e.g.*, *Thorne*, 352 Ill. App. 3d at 1070 (holding that there was insufficient evidence in the record to support a finding that a BB gun used during the commission of the robbery was a "dangerous weapon," because (1) there was no evidence presented at trial that the BB gun was used as a bludgeon or club and (2) there was no testimony as to the BB gun's weight or metallic nature to support a finding that it could have been used in a dangerous manner); *C.f.*, *People v. Bell*, 264 Ill. App. 3d 753, 756 (1993) (holding that police officer's testimony that a replica toy gun could be used as a deadly bludgeon, along with a description of the replica gun as a "very heavy item," was sufficient to establish that the replica gun was a "dangerous weapon"); see also *People v. Bayless*, 99 Ill. App. 3d 532, 537 (1981) (holding that a toy cap gun could have been used as a bludgeon to inflict serious harm due to its weight and metallic nature).

¶ 46 Having found that the petitioner has met the first prong of the *Strickland* analysis, we must next consider whether he has also met the second prejudice prong. In that respect, we reiterate that in order to avoid summary dismissal, the petitioner has the burden to establish only that it was arguable that he was prejudiced, *i.e.*, that but for counsel's complained-of conduct the outcome of his proceedings would have been different. See *Evans*, 209 Ill. 2d at 220 ("[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair.").

¶ 47 The State argues that our supreme court already determined on direct appeal that a reasonable trier of fact under the circumstances could have concluded that the petitioner was armed with a dangerous weapon, namely a real gun, so that the petitioner cannot establish the requisite prejudice. We disagree.

¶ 48 First, as already noted above, "our our supreme court has emphasized that there can be no presumption that a gun is a dangerous weapon even where it is proven that the object involved is a real gun." *People v. McBride*, 2012 IL App (1st) 100375, ¶ 54. Rather, to prove a gun is a dangerous weapon, the State must present evidence that either "the gun was loaded and operable," or "that it was used or capable of being used as a club or a bludgeon." *Ross*, 229 Ill. 2d at 276.

¶ 49 Second, the issue before our supreme court on direct appeal was markedly different than the one we are presented with here. On direct appeal, the supreme court only considered whether when construing the evidence in the light most favorable to the State a reasonable jury could have concluded that the petitioner was armed with a "real gun" so as to permit it to convict the the petitioner of the aggravated versions of the charged offenses, using jury instructions which did not clearly define the aggravating factor. The supreme court did not, however, consider whether, had the jury been instructed on the definition of a "dangerous weapon," pursuant to IPI 4.17, explaining that a real gun is not inherently dangerous unless there is evidence that it was either "loaded and operable" or "that it was used or capable of being used as a club or a bludgeon" there was an arguable probability that the jury would have acquitted the petitioner of the aggravated charges.

¶ 50 Most importantly, the record before us undeniably reveals that the jury was having trouble

believing that the State had met its burden in establishing that a "dangerous weapon" had been used in the commission of the offenses. During deliberations, the jury sent out three questions signifying such qualms. The jury first asked whether it could reduce the charges to their non-aggravated forms. About ten minutes later, it also asked for the legal definitions of "reasonable doubt" and "dangerous weapon." Under this record, we are compelled to conclude that the petitioner has met his burden under the second prong of *Strickland*, by establishing that it was arguable that had the jury been instructed as to the definition of "dangerous weapon" there was a probability that the outcome of his proceedings would have been different. See *Hodges*, 234 Ill. 2d at 17; *Brown*, 236, Ill. 2d at 185; see also *Lacy*, 407 Ill. App. 3d at 456.

¶ 51 On appeal, the petitioner also contends that he has made a "gist" of a meritorious claim of ineffective assistance of trial counsel on the basis of counsel's failure to tender Illinois Pattern Jury Instruction 8.04 (IPI Criminal No. 8.04 (4th edition)) incorporating section 33A-1 of the Criminal Code of 1961 (720 ILCS 5/33A-1 (West 1998)) to define a "dangerous weapon" for purposes of the aggravating kidnapping charge. We do not necessarily agree with the petitioner that counsel's decision not to instruct the jury in this manner, constituted ineffectiveness, rather than trial strategy, since this instruction would have categorized, *inter alia*, the following weapons as dangerous: different types of real firearms, stun guns, tasers, certain sharp-edged instruments, and heavy objects, such as bludgeons, black-jacks and metal knuckles (see 720 ILCS 5/33A-1 (West 1998)), thereby potentially confusing the jury and making it easier for them to convict the petitioner. However, we need not address this issue since we have already found that the petitioner has met his burden in establishing that trial counsel was arguably ineffective for failing to request that the trial court instruct the jury with the definition of a "dangerous

weapon" pursuant to IPI 4.17 for purposes of the remaining charges. As such, the petitioner may proceed to the second stage of postconvcition proceedings with his entire petition. See *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27 ("If a single claim in a multiple-claim postconviction petition survives the summary dismissal stage of proceedings under the Post–Conviction Hearing Act, then the entire petition must be docketed for second-stage proceedings regardless of the merits of the remaining claims in the petition."); see also *People v. White*, 2014 IL App (1st) 130007, ¶ 33, citing *People v. Rivera*, 198 Ill. 2d 364, 374 (2001) (holding that partial summary dismissals are not permitted; if any claim of arguable merit is found in a petition, the entire petition must proceed to the second stage of post-conviction proceedings.)

¶ 52 B. *Mittimus*

¶ 53 On appeal, the petitioner also asserts that his *mittimus* must be corrected to reflect that he was convicted of aggravated kidnapping on the basis of having been armed with a dangerous weapon (720 ILCS 5/10-2(a)(5) (West 1998)), rather than on the basis that he inflicted harm on the victim (720 ILCS 5/10-2(a)(3) (West 1998)). The State, on the other hand, contends that the *mittimus* should continue to reflect a conviction under section (a)(3) of the aggravated kidnapping statute, which permits conviction for aggravated battery where the offender either "[i]nflicts great bodily harm or commits another felony upon his victim," (720 ILCS 5/10-2(a)(3) (West 1998)) and that it should only be corrected to reflect the proper numerical counts under which the petitioner was convicted (count II instead of count I).

¶ 54 We initially note that in this respect the record below is somewhat muddled and confusing. It is clear that the petitioner here was charged with two counts of aggravated kidnapping. Count I charged the petitioner with committing the offense while armed with a dangerous weapon (720 ILCS 5/10-2(a)(5) (West 1998)). Count II, charged the petitioner with committing the offense

while committing another felony--namely robbery (720 ILCS 5/10-2(a)(3) (West 1998)). The *mittimus*, however, reflects that the petitioner was sentenced under count I, but then incorrectly states that he was convicted for "aggravated kidnapping/inflict harm" under the statutory provision that he was charged with pursuant to count II (see 720 ILCS 5/10-2(a)(3) (West 1998)).

¶ 55 The report of the proceedings is similarly confusing. During sentencing, the court noted that there were two counts for aggravated kidnapping and that one would necessarily have to be "merged with the other." The court then stated: "I want to merge. Actually, Count I[,] I suspect that the committing a felony is the more serious than carrying a weapon. For purposes of merger, I want to merge Count II with Count I."

¶ 56 The State argues that from this pronouncement it is clear that the trial judge wanted to merge the less serious of the two offenses ("carrying a weapon"), with the more serious one ("committing a felony"), and that he only confused the counts under which the petitioner was charged. Although we find merit in this argument, the judge explicitly stated in open court that he wanted to merge "Count II with Count I." Absent any further statements by the trial judge on this matter, and without speculating, we cannot guess whether he erred in remembering which count charged the petitioner with which section of the aggravating statute, or whether his comment regarding the more serious of the two aggravating factors was related to his choice regarding the merger. Accordingly, based on the court's own explicit oral pronouncement, we hold that the petitioner was convicted and sentenced pursuant to count I of the indictment, which charged him with aggravated kidnapping for committing kidnapping while armed with a dangerous weapon. See *People v. Peeples*, 155 Ill. 2d 422, 496 (1993) ("Where the sentence indicated in the common law record conflicts with the sentence imposed by the trial judge as

indicated in the report of proceedings, the report of proceedings will prevail and the common law record must be corrected."); see also *People v. Jones*, 376 Ill. App. 3d 372, 295 ("The oral pronouncement of the judge is the judgment of the court, and the written order of commitment is merely evidence of that judgment. [Citation.] When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls.").

¶ 57 III. CONCLUSION

¶ 58 For the aforementioned reasons, we reverse the judgment of the circuit court and remand for further postconviction proceedings. We further order the clerk of the circuit court to correct the *mittimus* to reflect that the petitioner was convicted of aggravated kidnapping for committing kidnapping while armed with a dangerous weapon.

¶ 59 Reversed and remanded; *mittimus* corrected.