FOURTH DIVISION
September 30, 2015

No. 1-13-2732 and 1-13-3831
(CONSOLIDATED)

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 18351
	)	
WILLIAM WILLIAMS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Summary dismissal of defendant's *pro se* post-conviction petition affirmed where defendant failed to present an arguable claim of ineffective assistance of trial and appellate counsel.

¶ 2 Defendant William Williams appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). He contends that the circuit court erred in dismissing his petition because he presented arguable claims of ineffective assistance of trial and appellate counsel requiring further proceedings under the Act.

¶ 3 After a bench trial, defendant was found guilty of two counts of first degree murder, and was sentenced to 80 years in prison in connection with the 2007 stabbing death of the victim, Brandy Ford. On direct appeal, defendant challenged his 80-year sentence as excessive. *People v. Williams*, 2012 IL App (1st) 100477-U. In the resulting Rule 23 order, this court extensively set out the facts adduced at trial, which we will repeat below to aid in a full understanding of this case:

> "At trial, Chareen Castro testified that during the time frame in question, she was defendant's girlfriend. Castro and defendant lived together in an apartment they shared with Amanda Saunders and James Miller. Around 11 p.m. on August 7, 2007, Castro and defendant were in bed, asleep, when Castro was awakened by the sound of defendant's phone beeping. When the beeping continued, she checked the phone and found a text message stating, "Can you come over for a while and bring a condom." Castro replied to the message and then called the number repeatedly until a woman answered. The woman reported that she and defendant had "hung out" the night before and had had sex. Castro woke defendant and confronted him, but he threw the phone against the wall and

went back to sleep. Castro testified that when defendant woke up around 5:45 a.m., she confronted him again and told him to pack his bags. Castro then left for work. Defendant walked her part way to her bus stop, but then said he had to go back home.

Castro testified that later in the day, she and a friend called the woman's telephone number, but a Chicago police detective answered. Castro spoke with the detective, who then came to her workplace to talk with her. Castro gave the detective a key to her apartment.

Amanda Saunders testified that around 9 or 10 a.m. on the date [of the offense], she saw defendant in their living room. He seemed upset and nervous and was only wearing shorts. Defendant showed Saunders two small cuts on the top of his left hand and said he did not remember how he got the injuries. He asked if he could show her something and dumped bloody clothing out of a bag onto the floor. When Saunders asked what happened, defendant said, “I don't really remember,” and “I'm f*** up.” Saunders went to her bedroom, where she asked James Miller to talk with defendant. Later, Saunders found defendant's gym shoes soaking in the bathtub.

James Miller testified that he went into the living room, where he saw a shirt and pair of shorts lying on the floor, covered in blood. Miller asked defendant what happened, and defendant replied “that he went over there and kicked in her door and beat her in the head with a crowbar. And he said the b***

won't die. And then he went to the kitchen and grabbed two butcher knives." Miller did not know who defendant was talking about and went back to his bedroom. In court, Miller identified a photograph of the victim as a woman he and defendant had first met two days earlier. The victim had flirted with defendant outside her apartment, and then the group went upstairs and smoked marijuana together. After Miller and defendant left the apartment, Miller had no further contact with the victim.

Melissa Mitchell testified that on the date [of the offense], she lived in the apartment downstairs from the victim. About 6:50 a.m. that day, she was awakened by the sound of crashing, banging, and screaming coming from the victim's bedroom. Mitchell called 911. She heard someone walk from the bedroom to the kitchen, and then back to the bedroom, at which point she heard the victim screaming, "Stop. Please. No." Mitchell also heard the victim screaming, "Stop. Mom. God, please. No. Why." At some point, the screaming stopped and Mitchell just heard pleading and some bumping, which she described as the sound of something getting stuck and thrown to the floor. When Mitchell heard someone leaving the apartment, she looked through the peephole of her front door into the building's stairwell. She saw a shirtless man come down the stairs and wipe his arms with an article of clothing. In court, she identified defendant as the man she saw in the stairwell.

Chicago police detective Brian Spain testified that he was assigned to investigate the victim's death. He recovered a cell phone from the victim's bedroom and determined that the last call received on that phone was from a contact designated "Will." While Detective Spain was en route to the police station, the cell phone rang, and he picked up. Detective Spain spoke with two women on the phone, one of whom was Chareen Castro. He thereafter interviewed Castro in person and obtained consent to search her apartment. When Detective Spain went to the apartment, he found defendant at home and arrested him. At the police station, he interviewed defendant. The interview was recorded electronically and played in court. Defendant did not confess during the interview.

Chicago police forensic investigator Hubert Rounds testified that he processed the crime scene at the victim's apartment. Investigator Rounds found evidence of forced entry through the back door, a pool of blood in the hallway by the bedroom, blood spatter on the bedroom walls, and a knife at the foot of the bed. There was blood on the bed, as well as on the bedding, which was on the floor, and on the interior knob of the front door. Investigator Rounds also processed defendant's apartment. There, he found drops of blood on the outside stairs and on the rug in front of the bathroom sink.

Dr. Tera Jones, of the Cook County Medical Examiner's office, testified that she performed the victim's autopsy. Dr. Jones noted 75 injuries to the victim's body, specifically, to her face, scalp, neck, chest, abdomen, arms, hands, back,

and left leg. The injuries included 14 stab wounds, 21 incised wounds, at least 4 chop wounds, 5 lacerations, 14 abrasions, 15 bruises, and a compound fracture to the victim's left arm. Dr. Jones explained that a stab wound is one made by a sharp object and is deeper than it is long, while an incised wound is made by a sharp object but is longer than it is deep. A laceration occurs where tearing of the skin is due to a blunt object, and a chop wound is a combination of a laceration and stab wound. Dr. Jones agreed that the injuries to the victim's hands were consistent with being defensive wounds. She testified that the manner of death was homicide and the cause of death was multiple stab and incised wounds.

The parties stipulated that an expert in DNA analysis employed as a forensic scientist with the Illinois State Police Crime Laboratory would have testified that the blood found on defendant's clothing, the knife, and the doorknob of the victim's residence all matched the victim's DNA profile.

Defendant testified on his own behalf. He stated that he had met the victim about three days before her death, and he had sex with her at that time. When he woke up on the day [or the offense], Chareen Castro passed his cell phone to him and asked, “[Are] you f*** her.” Defendant noted that there was a text message from the victim that said something about condoms, and immediately erased the message. He and Castro then had a conversation about the victim during which Castro cried and defendant denied having had sex with the victim. As Castro got ready for work, defendant drank a couple shots of vodka.

Defendant testified that he walked Castro part way to her bus stop, but then “detoured” to the victim's apartment. Defendant rang the doorbell and the victim buzzed him in. Once defendant was inside, the victim grabbed him and pulled him into her bedroom. She told defendant she wanted him to be her man and move in with her. When defendant protested that things were moving too fast, her mood changed and “that's when a knife got presented.” Defendant did not know where the victim pulled the knife from, but she said, “I'm gon' cut your d*** off and kill you” and came at him, swinging wildly. Defendant testified that he was in fear for his life. He tried to grab the victim's arms and got cut on his hand. He and the victim engaged in a “hard tussle” over the knife. Defendant stated that he remembered stabbing the victim, but he did not remember every stab wound and did not remember everything vividly.

Defendant testified that he went down the front stairs, but when he saw two police officers, he panicked. He ran back upstairs, through the victim's apartment, out her back door, and back to his own apartment. There, he got sick repeatedly and took a shower with his shoes on. At some point, the police came to the apartment. Defendant denied having told his roommate James Miller anything about what happened with the victim, but acknowledged lying to the police.

Following closing arguments, the trial court found defendant guilty of two counts of first degree murder." *Williams*, 2012 IL App (1st) 100477-U, ¶¶ 4-16.

¶ 4 This court then went on to review the evidence presented at the sentencing hearing and the trial court's sentencing decision. We concluded that defendant forfeited his sentencing challenge where he did not file a motion to reconsider his sentence, and that there was no error to allow plain error analysis where the record showed that the trial court gave "thorough attention to the relevant sentencing factors." *Williams*, 2012 IL App (1st) 100477-U, ¶ 22. We thus affirmed the judgment and sentence. *Williams*, 2012 IL App (1st) 100477-U, ¶ 23.

¶ 5 On April 19, 2013, defendant filed the *pro se* post-conviction petition at bar. He alleged, among other things, that he was denied his constitutional right to effective assistance of trial counsel who failed to advance a theory that he was acting under a sudden and intense passion provoked by the victim, where the crime was not planned and happened in the heat of the moment. Defendant further alleged that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal.

¶ 4 On July 12, 2013, the circuit court summarily dismissed defendant's petition, finding that the issues raised were frivolous and patently without merit. In its written order, the court stated, in relevant part, that defendant's contention that he killed the victim in the heat of the moment was in direct conflict with his trial testimony that he acted in self-defense after the victim came at him with a knife. The court noted that self-defense and second degree murder based on provocation were not premised on the same elements, and therefore, counsel could not be deemed ineffective for failing to raise a meritless theory. The court further found that defendant failed to establish that if appellate counsel had raised this issue on direct appeal, his conviction or sentence would be reversed.

¶ 5 In this appeal[1], defendant contends that he presented an arguable claim that trial counsel was ineffective for failing to advance a theory of second degree murder based on strong provocation. He also contends that he presented an arguable claim that appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 6 At the first stage of post-conviction proceedings, defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). However, if a petition has no arguable basis in law or in fact, it is frivolous and patently without merit and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or belied by the record. *People v. Morris*, 236 Ill. 2d 345, 354 (2010), citing *Hodges*, 234 Ill. 2d at 16–17. In considering whether the petition alleges facts sufficient to state the gist of a constitutional claim, "the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122–2.1(c) (West 2006).

[1] This court granted defendant's motion to consolidate case No. 1-13-2732 (assigned to defendant's timely notice of appeal), and case No. 1-13-3831 (assigned to the late notice of appeal filed by the State Appellate Defender), for appeal.

Our review of the dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 7 Defendant first contends that he raised an arguable claim of ineffective assistance of trial counsel for failing to advance a theory of second degree murder based on strong provocation. We observe that this claim involves a matter documented in the record, which could have been raised on direct appeal; since it was not, we find that it is waived. *People v. Coleman*, 168 Ill. 2d 509, 522 (1995). Notwithstanding, the supreme court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of appellate counsel. *Coleman*, 168 Ill. 2d at 522-23. Accordingly, we will examine the merits of defendant's ineffective assistance claim, which could have been raised on direct appeal, as it relates to defendant's claim of ineffective assistance of appellate counsel. *Coleman*, 168 Ill. 2d at 523.

¶ 8 At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶ 19. The test is essentially the same for ineffective assistance of appellate counsel in that defendant must show both that appellate counsel's performance was deficient and that but for his errors, there is a reasonable probability that the appeal would have been successful. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11.

¶ 9 That said, appellate counsel must only raise meritorious issues, so defendant's constitutional claims of ineffective assistance depend on whether his underlying substantive claims of error have merit. *McGhee*, 2012 IL App (1st) 093404, ¶12. If they do not, appellate

counsel cannot be faulted for not raising them on direct appeal. *McGhee*, 2012 IL App (1st) 093404, ¶12. We, therefore, consider whether defendant's underlying ineffective assistance of trial counsel claim would have been successful if raised on direct appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 10 Defendant maintains that trial counsel was ineffective for failing to advance a theory of second degree murder based on strong provocation. Second degree murder requires, in relevant part, proof of all the elements of first degree murder and the following mitigating factor: at the time of the killing, defendant was acting under a sudden and intense passion resulting from serious provocation by the individual killed. 720 ILCS 5/9-2(a) (West 2012). Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. 720 ILCS 5/9-2(b) (West 2012). The only categories of provocation recognized by the supreme court are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. *People v. Garcia*, 165 Ill. 2d 409, 429 (1995). Here, defendant contends that the provocation was based on "mutual combat."

¶ 11 At trial, defendant testified that he had sex with the victim, and that the next day, his girlfriend Castro discovered a text message from the victim on his phone. Defendant drank a couple shots of vodka, and went over to the victim's apartment, where she attempted to seduce him. Defendant told her things were moving too fast, and “that's when a knife got presented.” The victim threatened to kill and emasculate him, and swung the knife wildly. In fear for his life, defendant engaged in a “hard tussle” with her over the knife. Defendant remembered stabbing the victim, but not every stab wound, and the evidence at trial showed that 75 wounds were

inflicted upon the victim, including a wound that separated a portion of the skin from the victim's skull.

¶ 12 Defendant insists that his testimony demonstrated that he first acted in self-defense, but when he wrestled the knife away from the victim, he removed any threat the victim posed and eliminated the situation that caused him to be afraid, turning the encounter into one of mutual combat. He further asserts that his bizarre behavior following the incident, which included acting out of character and removing his pants in a police interview room, suggests that he did not stab the victim with "malice or forethought," but, rather, in the heat of the moment. He also contends that the fact that the stab wounds were haphazard shows that the fighting was mutual.

¶ 13 Mutual combat is one into which both parties enter willingly, or in which two persons, upon a sudden quarrel, and in hot blood, mutually fight on *equal* terms. (Emphasis added.) *People v. Delgado*, 282 Ill. App. 3d 851, 857 (1996). Mutual combat does not constitute a fight in which one of the parties acts in self-defense; rather, it connotes a willingness by both parties to engage in a fight. *Delgado*, 282 Ill. App. 3d at 858-59. The Fifth District has held that struggling with an attacker in an effort to ward off or defend one's self against an assault is insufficient to warrant a provocation jury instruction. *People v. Lewis*, 229 Ill. App. 3d 874, 881 (1992).

¶ 14 In this case, there is no indication of mutual combat based on defendant's testimony that he was afraid of the victim and struggled with her as she wielded a knife, wildly swung it, and threatened him. Defendant's account claimed to show that his initial actions were defensive in nature, but does not support his claim that his position changed to mutual combat after he wrestled the knife away from the victim. Rather, defendant's infliction of 75 wounds to the

victim evidenced retaliation that was not proportionate to the provocation and not mutual combat. *People v. Viramontes*, 2014 IL App (1st) 130075, ¶52; *People v. Jackson*, 304 Ill. App. 3d 883, 893 (1999).

¶ 15 Moreover, the evidence at trial showed that defendant told his roommate "that he went over there and kicked in her door and beat her in the head with a crowbar. And he said the b*** won't die. And then he went to the kitchen and grabbed two butcher knives." A downstairs neighbor of the victim heard crashing, banging, and screaming coming from the victim's bedroom, and the victim screaming, "Stop. Please. No." and "Stop. Mom. God, please. No. Why." There was evidence of forced entry through the back door, and blood throughout the victim's apartment. There were 75 injuries to the victim's body, including injuries to the victim's hands that were consistent with being defensive wounds. This evidence does not show mutual combat, but, rather, a one-sided offense by defendant. On these facts, it is not arguable that trial counsel was ineffective for failing to advance a theory of second degree murder based on serious provocation (*Childress*, 191 Ill. 2d at 174), and, accordingly, appellate counsel was not ineffective for failing to raise this meritless issue on appeal (*McGhee*, 2012 IL App (1st) 093404, ¶33).

¶ 16 Notwithstanding, defendant contends that his case is similar to *People v. Parker*, 260 Ill. App. 3d 942, 948 (1994). In *Parker*, 260 Ill. App. 3d at 948, defendant and his son had a heated argument, which led to a shoving match, then his son pulled out a gun, there was a struggle for the gun, and defendant pulled out a knife, fatally stabbing him. Although defendant testified that he stabbed the victim because his "life was at stake," this court found that trial counsel was

ineffective for failing to provide a jury instruction on serious provocation based on mutual combat. *Parker*, 260 Ill. App. 3d at 943-44, 947-48.

¶ 17 This court revisited *Parker* in *Delgado*, noting that *Parker* does not explain how a fight between two individuals, one of whom does not wish to fight and acts only in self-defense, can be considered mutual, a term that connotes a shared or common desire. *Delgado*, 282 Ill. App. 3d at 859. This court also observed in *Delgado*, 282 Ill. App. 3d at 859, that *Parker* failed to address *Lewis*, which held that where defendant's actions are motivated by fear of the decedent and were defensive in nature, there is no mutual combat, as the struggle must be *mutual*. (Emphasis in original.) *Lewis*, 229 Ill. App. 3d at 881. Accordingly, we find that *Parker* is not dispositive of this case.

¶ 18 Finally, defendant contends that trial counsel's performance was especially unreasonable where in closing argument he presented the court with an alternative theory that, if it found the evidence was insufficient to establish that he was acting justifiably in self-defense, then it should convict him only of second degree murder, not under the strong provocation prong but under the unreasonable self-defense prong. Defendant contends that counsel's strategy to ask the court for a mitigating finding of self-defense was incorrect and arguably unreasonable and prejudicial where he should have argued strong provocation. We note that, contrary to defendant's claim that there was no argument on strong provocation, counsel did in fact briefly make that argument based on the theory of mutual combat. *Garcia*, 165 Ill. 2d at 429.

¶ 19 Moreover, we find no arguable prejudice from trial counsel's alleged omission. As our prior recitation of the facts at trial makes clear, there was overwhelming evidence of defendant's

guilt for first degree murder, including evidence that defendant had forced entry into the victim's home, that a neighbor heard the struggle and the victim's pleas, and that the victim suffered exceptionally extensive injuries. There was also evidence showing that defendant confessed to his roommate that "he went over there and kicked in her door and beat her in the head with a crowbar *** [but] the b*** w[ould]n't die." Accordingly, it is also not arguable that appellate counsel was ineffective for failing to raise the issue of ineffectiveness of trial counsel on direct appeal. *People v. Taylor*, 344 Ill. App. 3d 929, 939-40 (2003); *People v. Barrow*, 195 Ill. 2d 506, 524 (2001).

¶ 20 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition.

¶ 21 Affirmed.