2015 IL App (1st) 133804

FOURTH DIVISION
December 3, 2015

No. 1-13-3804

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
	)	
Respondent-Appellee,	)	
	)	
v.	)	No. 03 CR 1613
	)	
CRAIG CHARLES,	)	Honorable
	)	Thomas V. Gainer Jr.,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the circuit court's order which summarily dismissed defendant’s first-stage postconviction petition; defendant's postconviction petition had an arguable basis in law and fact where it alleged ineffective assistance of counsel for failure to investigate an insanity defense. Although trial counsel requested two behavioral clinical examinations of defendant and provided examining doctors with defendant's prior medical records, counsel was ineffective

> when he failed to tell the examining doctors about bizarre behavior described by defendant's next of kin which defendant allegedly exhibited shortly before the offenses were committed; merely listing defendant's next of kin within defendant's file without relating the bizarre behavior described by the relative to the examining doctors fell below an objective standard of reasonableness.

¶ 2 Defendant Craig Charles was convicted of several criminal offenses arising out of an armed robbery after entering into a blind guilty plea. Defendant made several unsuccessful attempts to withdraw his guilty plea before the trial court arguing he was medically unfit to enter the guilty plea.

¶ 3 In this appeal, defendant argues that the trial court erred when it summarily dismissed his *pro se* postconviction petition alleging ineffective assistance of counsel for failure to investigate an insanity defense. Defendant's ineffective assistance of counsel claim is based largely on an affidavit attached to the petition from Amy Williams, his niece. We accept as true the allegations in Williams' affidavit at this stage in the proceedings. Williams stated that in the months leading up to the January 6, 2003 armed robbery, defendant was obsessed with God and claimed God was talking with him and defendant was acting in bizarre ways in response to orders from God. Williams further stated in her affidavit that she told defendant's attorney about defendant's behavior. However, the record shows the attorney did not transmit this information to the examining physicians. In his petition, defendant argued that counsel was ineffective where he failed to investigate Williams' testimony and give information regarding Williams' testimony to the doctors who conducted his fitness examinations. The trial court summarily dismissed the petition at the first stage in the proceedings. Defendant argues that if counsel had investigated Williams' allegations and relayed the information she provided to his doctors, his doctors arguably would not have found him fit and sane, and he would not have entered into a guilty plea and instead would have insisted on proceeding to trial on an insanity defense. For the reasons

that follow, we reverse the trial court's summary dismissal of defendant's *pro se* postconviction petition and remand this case for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 Following a 2003 armed robbery, defendant Craig Charles was charged with several criminal offenses. The charges arose out of a robbery of a currency exchange where it was alleged that defendant robbed the currency exchange at gunpoint and injured an elderly man in the process. After leaving the currency exchange and driving for several miles, the police pulled defendant over for an unrelated traffic offense. Upon being pulled over, defendant fled from the police, first in his car and then on foot. A struggle ensued between defendant and the police during which defendant stated, "I want to die. I'm going to die", and placed his hands on the police officer's gun. The police officer was ultimately able to knock defendant to the ground and place him into custody.

¶ 6 Following defendant's arrest and arraignment, defense counsel sought a behavioral clinical examination (BCX) of defendant. Forensic Clinical Services (FCS) doctors Roni Seltzberg and Susan Messina examined defendant and found him to be fit and sane, and defense counsel proceeded to trial. Defendant then filed a motion to quash his arrest and suppress evidence, and both motions were denied. The parties engaged in a 402 conference. When defendant learned that the judge would sentence him to 40 years in jail based on the evidence presented at the 402 conference, he asserted that he was crazy and asked defense counsel to assert an insanity defense. Defense counsel advised defendant that this would not be appropriate, and the matter was continued to the next day.

¶ 7 The next day, defense counsel stated that he had spoken with defendant at length and reviewed evidence that would be presented against him at trial, and defendant agreed to enter

into a blind plea agreement, pleading guilty to the Class X offense of armed robbery, the Class 2 offense of aggravated unlawful use of a weapon (AUUW), and the Class 3 offenses of attempted disarming a peace officer and aggravated battery. The trial court judge then admonished defendant of each charge, the class of each charge, and the potential sentencing range for each charge. Defendant stated that he understood the nature of the charges against him and the possible penalties and that he still wished to plead guilty. Defendant further stated that he understood his right to a jury trial, and that by pleading guilty he was giving up that right, along with the right to confront witnesses and present witnesses on his own behalf. Defendant advised the court that he was pleading guilty of his own free will, that he had not been promised anything in regard to the sentence, and had not been threatened to plead guilty. The trial court then found that defendant was advised of his rights, understood his rights, understood the nature of the charges, the possible penalties and that defendant's plea was voluntary. The matter was then continued for sentencing.

¶ 8 The trial court sentenced defendant to 40 years for his armed robbery conviction, 14 years for his AUUW conviction, 10 years for his aggravated battery conviction, and 10 years for his attempt disarming a peace officer conviction. In response, defendant filed p*ro se* motions to withdraw his guilty plea and reconsider his sentence. Without defendant and without counsel being present in court, the trial court denied defendant's motion to reduce his sentence, but did not address his motion to withdraw his guilty plea. Defendant appealed, and the appellate court found those rulings were issued in violation of Illinois Supreme Court Rule 604(d) and remanded the matter for compliance.

¶ 9 On remand, the trial court appointed the Office of the Public Defender of Cook County to represent defendant, but defendant soon thereafter retained private counsel on his second motion

to withdraw his plea. Private counsel requested a fitness determination as to whether defendant was fit to enter his guilty plea. While those results were pending, defendant decided to represent himself. The results of the fitness examination found defendant to be fit to enter his guilty plea.

¶ 10 At the hearing on defendant's second motion to withdraw his guilty plea, which was denied, and a subsequent hearing on his motion to reconsider that denial, defendant litigated questions relating to his suppression motion, his mental condition, and trial counsel's performance. Below is a summary of the relevant evidence the trial court heard at those hearings.

¶ 11 At the hearing on defendant's second motion to withdraw his guilty plea. LaShawn Smith testified that she was pregnant with defendant's child at the time of the offenses. She stated that defendant had been talking about suicide and she had taken him to Cook County Hospital. She testified that defendant's counsel had asked her for a list of defendant's doctors and medications, and that she gave him that information. She further testified that defendant's counsel had stated that he would present an insanity defense if the matter went to trial, and she was shocked when he refused to present such a defense. Smith admitted that she was not present for any discussions between defendant and his counsel about trial strategy or his plea.

¶ 12 Defendant's trial counsel then testified. He denied agreeing to mount an insanity defense or telling defendant's family that he would. He testified that he believed that defendant understood the nature of the charges, the penalties involved, and the evidence against him. Defense counsel testified that defendant told him that he was at the crime scene, revealed what had happened, and stated that he wanted to die by having the police shoot him. As a result, defense counsel referred defendant to FCS to determine whether he had "a mental disease or defect ***." He further stated that he gave FCS the "whole file," which included: police reports,

defendant's medical history, and the psychiatric history that defendant's family had provided. Both doctors Messina and Seltzberg found defendant to be fit and sane. Because he had given FCS all the information he had, he felt "there was no need to do anything further."

¶ 13 Counsel denied that defendant's family told him that defendant was "waking up thinking that [he] was talking to God" or that defendant told them on the morning of the offense "that God told [him] to go get some money for [his] family and afterwards kill [him]self." Because this information was not relayed to him, he did not forward it along to FCS. The trial court then denied defendant's *pro se* motion for leave to withdraw his plea as well as his *pro se* motion to reduce his sentence.

¶ 14 Defendant filed a motion to reconsider the trial court's order denying him leave to withdraw his plea. At that hearing, Dr. Seltzberg testified that she had evaluated defendant multiple times between 2003 and 2011 for fitness and sanity. For those evaluations, Dr. Seltzberg testified that she reviewed the following materials: police reports, defendant's statement, a medication profile from Cermak that showed anti-hypertensive medications and no psychotropics, psychiatric and psychological summaries from Forensic Clinical Services from 1984 and 1986, an updated criminal history record and medication profile from 2004, and a report of proceedings from May 18, 2004. Dr. Seltzberg's records indicated that defendant had periodic medication, which included his 2011 prescription for Quetiapine, which is "a mood stabilizing antipsychotic agent with some sedating effects given at bedtime." The records she reviewed gave her no reason to believe that defendant was "laboring under any major mental health issue." Defendant reported auditory hallucination at one time, but "there were various suggestions of malingering in the past."

¶ 15 Dr. Seltzberg did not list any family history among the documents she had reviewed. She said she was not familiar with any statements indicating that defendant "had problems with hallucination and delusion as to seeing God and thinking God was telling him things." Amy Williams, defendant's niece, was listed as defendant's next of kin in Dr. Seltzberg's records, but she never responded to a request for an interview. The trial court then denied defendant's motion to reconsider its denial of leave to withdraw his guilty plea.

¶ 16 Following the hearing on defendant's motion to reduce his sentence, where several witnesses attested to defendant's potential for rehabilitation, the trial court reduced defendant's armed robbery sentence to 34 years and his aggravated unlawful use of a weapon sentence to 12 years.

¶ 17 Defendant appealed that trial court's convictions and sentence arguing that: (1) his aggravated unlawful use of a weapon conviction was void under *People v. Aguilar*, 2013 IL 112116; (2) his extended terms for the lesser offenses were improper; and (3) his mittimus needed to be corrected. On rehearing, we found the AUUW conviction was proper because it was a Class 2 offense and only the aggravated battery extended-term sentence was improper. We also directed the circuit court to correct defendant's mittimus. Defendant filed a petition for leave to appeal to the Illinois Supreme Court, and that petition is still pending.

¶ 18 On August 2, 2013, defendant filed the instant petition for postconviction relief. In the petition, defendant raised the following claims: (1) ineffective assistance of appellate counsel for failing to argue trial counsel was ineffective in failing to investigate an insanity defense before defendant's guilty plea; (2) ineffective assistance of appellate counsel for failing to argue the plea was involuntary due to trial counsel's inaccurately telling him that he was agreeing to a stipulated bench trial; (3) ineffective assistance of trial counsel based on cumulative errors; and (4)

defendant was denied the benefits of his bargain where he pled guilty on the unfulfilled promise that he would get a hearing on mitigation before sentencing.

¶ 19 On the issue of the insanity defense, defendant argued that trial counsel was ineffective because he failed to give FCS doctors key information relating to his mental health before they found him fit and sane, including information regarding defendant's obsession with pleasing God, his belief that God had told him to get money "for his family and then kill his [*sic*] self so he could go to heaven[,]" and his attempt to sacrifice his niece's son "so that their family would [be] forgiven of their sins." Defendant argues that this information would have supported an insanity defense had counsel "properly utilized" it, and that counsel should have ensured that the FCS doctors considered it in rendering their opinions.

¶ 20 Defendant further alleged that there is a reasonable probability that he would not have pled guilty had counsel properly investigated his insanity defense. Defendant acknowledged the expert opinions that he was sane at the time of the offenses, but alleged that Dr. Seltzberg formed her opinion "without the benefit of considering [his] mental history leading up to the crime, as well as the day of the crime." He argued that opinions rendered without key information are "of no weight and must be disregarded."

¶ 21 Attached to defendant's petition is an affidavit from Amy Williams as well as defendant's trial counsel's response to an ARDC complaint filed by defendant. In the affidavit of Amy Williams, Williams avers that she is the niece of defendant, and she lived with defendant for 18 months leading up to the January 6, 2003 armed robbery. During that time, defendant had been working at AT&T. Work was going well, but when defendant began having problems with his mental illness, "he was no longer successful in deal making" and "was not making any money to take care of the family[.]" He then became depressed and reported that he began talking to God.

He said that "God told him he wasn't a good father because he wasn't taking care of his family and wasn't a good servant to him[.]"

¶ 22 Williams averred that defendant began ordering his family members to do as God said, and listen to God. At work, he began preaching to his clients and "said they was all devils, terrified these peoples to the point they called the police and had to have him removed from their place of business ***." Defendant grew more depressed and would often "awake in the middle of the night" and talk to God while crying. She further averred that "[m]y uncle felt like GOD was making him suffer for his sins and wanted to kill his [*sic*] self to stop the pain, me and his fiancé took him to the Cook County Hospital [in] September of 2002 and he was hospitalized for three (3) days and given some medication that he would not take because he said GOD was allowing the devil to trick him."

¶ 23 Williams averred that in December 2002 defendant was in the parking lot of their complex completely nude saying that God was coming to pick him up. Once they were able to get him back into the house, defendant began talking about suicide again and Williams and defendant's fiancé brought defendant to Cook County Hospital again, where he stayed for another three days.

¶ 24 After returning from the hospital, on January 2, 2003, Williams awoke to her baby crying and found defendant with a knife to her baby's throat saying that they needed to sacrifice the baby to God so that he would forgive them of their sins and so they would go to heaven. Following this incident, defendant would not come into the house "because he felt like he did not deserve to live inside the house because he was not paying any bills, so he stayed in his car in the dead of winter."

¶ 25 Williams averred that on the morning of January 6, 2003, defendant said he was "going to get some money for his family and after he would die and go be with GOD!" They tried to stop defendant from leaving the home, and they later learned that he had been arrested.

¶ 26 Williams' affidavit states that she told all of this information to defendant's counsel and also gave him a list of other family members who could testify to defendant's condition. Prior to the day she signed the affidavit, which was June 19, 2013, no one had contacted her or interviewed her about her observations of defendant.

¶ 27 In defendant's counsel's response to his ARDC complaint, which was also attached to defendant's *pro se* postconviction petition, defense counsel states that he ordered a forensic clinical examination of defendant when it became clear that "there was defin[it]ely something wrong with his thought processes. [Defendant] repeatedly would deny being involved in any Armed Robbery at all. He could not understand why the police were trying to 'lie on him.'" Counsel's response states that defendant would deny that he was present at the scene of the armed robbery and deny being found with stolen money, documents, or a gun. According to counsel, the reports regarding defendant's mental state did indicate that defendant "did suffer from forms of 'mental illness,' [but] not enough to affect his legal rights in the context of 'Miranda,' and insanity defenses." Nonetheless, "in an attempt to explore and understand his mental abilities [himself], I spoke to his family and secured from them numerous reports regarding his past mental history (available upon request)." At that point, and with the BCX indicating that defendant was fit and sane, "[i]t was time to defend the case."

¶ 28 The trial court summarily dismissed defendant's postconviction petition in a written order. With respect to defendant's potential insanity defense, the court noted that defendant had been found fit and sane, and found that defendant's claim that counsel was ineffective was based

on "matters of record which could have been raised on appeal" and were thus waived. The court further found that trial counsel's effectiveness had already been fully litigated at the hearing on defendant's motion to withdraw his guilty plea. Last, the trial court noted that it was in no position to determine whether appellate counsel was ineffective for failing to raise petitioner's ineffective assistance of trial counsel claims where this issue was fully litigated, was waived on appeal, and where defendant's appeal is still pending before the Illinois Supreme Court.

¶ 29 Defendant timely filed a notice of appeal[1] challenging the trial court's summary dismissal of his *pro se* postconviction petition. For the reasons that follow, we reverse the trial court's summary dismissal of defendant's *pro se* postconviction petition.

¶ 30 II. ANALYSIS

¶ 31 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001); *People v. Jones*, 211 Ill. 2d 140, 143-44 (2004). To be entitled to postconviction relief, a defendant must demonstrate that he has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. McNeal*, 194 Ill. 2d 135, 140 (2000). The scope of the postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Accordingly, any issues which could have been raised on direct appeal, but were not, are procedurally defaulted and any issues which have previously been decided by a reviewing court are barred by the doctrine of *res judicata. People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

[1] The notice of appeal was mailed on November 14, 2013, but was file-stamped November 19, 2013. On March 25, 2014, the Illinois Supreme Court issued a supervisory order directing this court to deem defendant's notice of appeal timely filed.

¶ 32 Under the Act, a postconviction proceeding not involving the death penalty contains three stages. *People v. Gaultney,* 174 Ill. 2d 410, 418 (1996). At the first stage of postconviction proceedings, the trial court examines the petition independently, without input from the parties. *Id.* A petitioner need present only a limited amount of detail and is not required to include legal argument or citation to legal authority. *Edwards,* 197 Ill. 2d at 244-45. A *pro se* petitioner is not excused, however, from providing any factual detail whatsoever on the alleged constitutional deprivation. *People v. Delton,* 227 Ill. 2d 247, 254 (2008). Thus, under the Act, a petition which is sufficient to avoid summary dismissal is simply one which is not frivolous or patently without merit. *People v. Hodges,* 234 Ill. 2d 1, 11 (2009). The summary dismissal of a postconviction petition is reviewed *de novo. People v. Coleman,* 183 Ill. 2d 366, 388-89 (1998).

¶ 33 In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court. 725 ILCS 5/122–2.1(c) (West 2012). The trial court must summarily dismiss the petition if it is frivolous or patently without merit. 725 ILCS 5/122–2.1(a)(2) (West 2012). Our supreme court has explained that a *pro se* postconviction petition is frivolous or patently without merit only if it "has no arguable basis either in law or in fact." *Hodges,* 234 Ill. 2d at 16. A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Id.* Fanciful factual allegations include those that are fantastic or delusional. *Id.* at 17.

¶ 34 Here, the trial court summarily dismissed defendant's postconviction petition. With respect to defendant's ineffective assistance of counsel claim, the trial court found that this claim had been "fully litigated at the hearing on his motion to withdraw his guilty plea." The trial court

also found that the facts in support of defendant's ineffective assistance of counsel claim were "all matters of record which could have been raised on appeal and apparently were not and are thus waived."

¶ 35 A. Waiver

¶ 36 The State first argues that defendant has waived his ineffective assistance of counsel claim relating to his potential insanity defense where he could have raised that claim during the remand on his motion to withdraw his guilty plea or on direct appeal. Defendant argues that his ineffective assistance of counsel claims relating to an insanity defense were not waived because that claim is "based primarily on matters outside the record: Williams' affidavit." As such, defendant argues that he could not have raised these allegations on direct appeal or on remand, or at any time prior to this petition being filed, as the State suggests.

¶ 37 "The purpose of the post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction *that have not already been adjudicated or could have been.*" (Emphasis in original.) *People v. Silagy*, 116 Ill. 2d 357, 365 (1987). Thus, in postconviction proceedings, all issues actually decided on direct appeal are *res judicata*, and all those which could have been presented but were not are deemed waived. *People v. Adams*, 338 Ill. App. 3d 471, 475 (2003); *People v. Kitchen*, 189 Ill. 2d 424 (1999). The doctrines of *res judicata* and waiver are relaxed, however, if fundamental fairness so requires. *People v. Steidl*, 177 Ill. 2d 239, 250-51 (1997); *People v. Thompkins*, 161 Ill. 2d 148, 158 (1994). Where facts relating to the competency of counsel are not in the record or are newly discovered, the waiver rule is relaxed. *People v. Orange*, 168 Ill. 2d 138, 149 (1995).

¶ 38 Our review of the record shows that defendant made several unsuccessful attempts to withdraw his guilty plea. On remand from the trial court's denial of his second *pro se* motion for

leave to withdraw his guilty plea, defendant's counsel testified that he interviewed all family members whose names were turned over to him and he provided defendant's BCX doctors with everything in defendant's file for review. After the trial court denied defendant's motion on remand, defendant filed a motion to reconsider that ruling. During that hearing, Dr. Seltzberg was questioned as to whether she had spoken with Amy Williams, to which she responded that Williams had not responded to her request for an interview. Dr. Seltzberg was further questioned about whether she had seen any medical records from Cook County Hospital or any statements indicating that defendant "had problems with hallucinations and delusion as to seeing God and thinking God was telling him things," to which she responded that such statements did not sound familiar.

¶ 39 While this record seems to suggest that at the time of the remand, there was at least some indication of defendant's bizarre obsessions with God, we cannot say that all the information contained in Williams' affidavit—which includes but is not limited to extensive details of defendant's obsessions with God, an incident in which defendant attempted to sacrifice his niece's child to God, an incident where defendant was found in a parking lot completely nude waiting for God to pick him up, a concession on the day of the offenses that defendant was going to get money and then be with God, and allegations that defendant spent two three-day admissions at Cook County Hospital—was available to defendant such that he could have raised the issue prior to Williams' authoring the June 19, 2013 affidavit. As such, we find that the claims advanced by defendant's postconviction petition that are the subject of this appeal are based on facts not contained in the record on appeal but facts within Williams' affidavit, which was attached to defendant's *pro se* postconviction petition.

¶ 40 When the evidentiary basis for a claim raised in a postconviction petition lies outside the record such that the issue cannot be raised before the reviewing court, the waiver rule may be relaxed, allowing the claim to be presented in a postconviction petition. *People v. Jones*, 364 Ill. App. 3d 1, 4-5 (2005); *People v. Mahaffey*, 194 Ill. 2d 154, 171 (2000); *People v. Hawkins*, 181 Ill. 2d 41, 53 (1998). Further, the "waiver rule will be relaxed if either the evidentiary basis for the claim of ineffectiveness is not contained within the original trial court record and, therefore, could not be considered by a reviewing court on direct appeal or if the facts relating to the competency of trial counsel are newly discovered." *People v. Burns*, 332 Ill. App. 3d 189, 191-92 (2001), *as modified on denial of reh'g* (June 28, 2001); see *Steidl*, 177 Ill. 2d at 250. Because defendant's ineffective assistance of counsel claim relies on evidence not contained in the record on direct appeal, we address those claims in turn. See *Orange*, 168 Ill. 2d at 149.

¶ 41 B. Ineffective Assistance of Counsel

¶ 42 Defendant's claim of ineffective assistance of counsel is reviewed under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, defendant must show counsel's performance was deficient and that prejudice resulted from the deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143 (2007) (citing *Strickland*, 466 U.S. 668). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17; *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 43 i. Factual Basis for Claim of Ineffective Assistance

¶ 44 First we consider whether the allegations in defendant's postconviction petition set forth an arguable basis in fact for his claim of ineffective assistance of counsel. Defendant argues that

his trial counsel was ineffective in conducting an insufficient investigation into an insanity defense before advising him to plead guilty. To support this claim, defendant attached the affidavit of Williams. In the affidavit, Williams avers that prior to the offenses, defendant became fixated on pleasing God and was talking to God. She averred that defendant was removed from his work place after preaching to clients about God and that neighbors found defendant in the parking lot of their complex completely nude saying that God was coming to pick him up. She further averred that one night she found defendant holding a knife to her baby's neck stating that they needed to sacrifice the baby to God so that God would forgive them of their sins and so they would go to heaven. Following this incident, defendant began sleeping in his car "because he felt like he did not deserve to live inside the house because he was not paying any bills[.]" Williams averred that on two occasions she brought defendant to Cook County Hospital, where he was admitted for three days each time. Defendant was released from Cook County Hospital a few days before his offenses. On the morning of the offenses, defendant said he was "going to get some money for his family and after he would die and go be with GOD!" The affidavit further alleges that Williams made defense counsel aware of all of these bizarre events that occurred prior to the offenses. The petition further alleges that defense counsel failed to give this information to the examining doctors who gave their opinions as to defendant's sanity. We note that Dr. Seltzberg, one of the examining doctors, testified that she reviewed the following materials before rendering her opinions: police reports, defendant's statement, a medication profile from Cermak that showed anti-hypertensive medications and no psychotropics, psychiatric and psychological summaries from Forensic Clinical Services from 1984 and 1986, an updated criminal history record and medication profile from 2004, and a report of proceedings from May 18, 2004. We also acknowledge that defense counsel denied

getting the information about Williams' testimony in a letter to the ARDC. However, defense counsel's denial merely creates an issue of credibility which must be resolved by the factfinder after hearing.

¶ 45 We conclude that the factual allegations in petitioner's postconviction petition, which we must accept as true (*People v. Harris*, 224 Ill. 2d 115, 126 (2007)), cannot be characterized as fantastic or delusional. Such facts, if true, are certainly pertinent to an insanity defense and, in many ways, these facts are supported by the trial record where there is evidence that defense counsel did believe defendant was mentally unstable and accordingly requested mental health examinations of defendant, and where there is also evidence that defendant told the police that he wanted to die on the day of the offenses. Accordingly, we conclude that the petition cannot be deemed frivolous or patently without merit for lack of an arguable factual basis.

¶ 46 ii. Legal Basis for Claim of Ineffective Assistance

¶ 47 Next, we must determine whether the petition is based on an indisputably meritless legal theory. As noted, defendant claims his attorney was ineffective for inadequately investigating an insanity defense and failing to turn pertinent information, namely the information contained in Williams' affidavit, over to the doctors tasked with determining whether he was fit and sane. A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17; *Brown*, 236 Ill. 2d at 185.

¶ 48 a. Deficient Performance of Trial Counsel

¶ 49 Defendant argues it is arguable that his trial counsel's performance fell below an objective standard of reasonableness where defendant's petition and supporting affidavit show

that counsel conducted an unreasonable investigation into an insanity defense by failing to disclose testimony of Williams to defendant's BCX doctors before advising defendant to plead guilty. In Williams' affidavit, she avers that prior to the offenses, defendant became fixated on pleasing God and was talking to God. She averred that defendant was removed from his work place after preaching to clients about God and that neighbors found defendant in the parking lot of their complex completely nude saying that God was coming to pick him up. She further averred that she found defendant one night holding a knife to her baby's neck stating that they needed to sacrifice the baby to God so that he would forgive them of their sins and so they would go to heaven. Following this incident, defendant began sleeping in his car "because he felt like he did not deserve to live inside the house because he was not paying any bills[.]" She averred that on two occasions she brought defendant to Cook County Hospital, where he was admitted for three days each time. Defendant was released from Cook County Hospital a few days before his offenses. On the morning of the offenses, defendant said he was "going to get some money for his family and after he would die and go be with GOD!" Williams' affidavit further avers that she relayed all of this information to defendant's counsel and, subsequent to relaying this information, she was never contacted by anyone regarding her observations of defendant's mental state until she authored this affidavit on June 19, 2013.

¶ 50 The State argues that trial counsel's representation was adequate where he gave his entire file to doctors Messina and Seltzberg after requesting that they conduct a BCX of defendant, and where both doctors found defendant to be fit and sane. The State further argues that defense counsel testified that Williams never gave him any of the information she testifies to in her June 19, 2013 affidavit and, as a result, he did not pass along that information to the FCS doctors because he was not aware of such information.

¶ 51 Trial counsel testified that he spoke with family members about defendant's mental health and secured names of defendant's treating doctors along with their reports and that he turned all of this information over to the FCS doctors. Williams, in her affidavit, confirms that she was interviewed by trial counsel and states that during that interview she relayed information concerning defendant's mental health status to counsel that specifically included all the testimony in her June 19, 2013 affidavit. Further, Dr. Seltzberg testified that Williams' name was in her reports and she did reach out to her. Thus, the issue in this case is not whether trial counsel investigated an insanity defense—the record clearly shows that trial counsel *did* explore a possible insanity defense. Rather, the issue here is how much of counsel's interview with family members, specifically Williams, was he required to relay to the mental health professionals.

¶ 52 The United States Supreme Court has stated that "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (citing *Strickland*, 466 U.S. at 688). "We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... .'" *Id*. at 366-67 (citing *Strickland*, 466 U.S. at 688). "Although they are 'only guides,' [Citation.] and not 'inexorable commands,' [Citation.] these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Id*. at 367. Further, our Illinois Supreme Court has also used American Bar Association (ABA) standards in determining what is reasonable legal representation when deciding ineffective assistance of counsel claims. *People v. Brocksmith*, 162 Ill. 2d 224, 231 (1994) ("However, prevailing norms of practice, as

reflected in, *e.g.*, the American Bar Association standards, guide courts in determining what is reasonable conduct. *Strickland*, 466 U.S. at 688-89.").

¶ 53 The ABA provision cited by defendant states, in pertinent part:

> "(b) Attorney's duty to provide information. The attorney initiating an evaluation should take appropriate measures to obtain and submit to the evaluator any record or information that the mental health or mental retardation professional regards as necessary for conducting a thorough evaluation on the matter(s) referred. Ordinarily, such records and information will include relevant medical and psychological records, police and other law enforcement reports, confessions or statements made by defendant, investigative reports, autopsy reports, toxicological studies, and transcripts of pretrial hearings. The attorney should also obtain and submit to the evaluator any other record or information that the attorney believes may be of assistance in facilitating a thorough evaluation on the matter(s) referred." ABA Standards for Criminal Justice, Standard 7-3.5(b).

¶ 54 Here, William's affidavit avers that she made defense counsel aware of all the statements contained in her affidavit, which relayed numerous instances of bizarre behavior of defendant as well as two hospitalizations of defendant leading up to the date of the offenses. If this is true, and we must accept it as true at the first stage of the postconviction proceedings (*Brown*, 236 Ill. 2d at 184 (the allegations of the petition are to be taken as true and liberally construed)), it is at least arguable that defense counsel's failure to relay Williams' testimony to the doctors tasked

with performing a BCX of defendant fell below an objective standard of reasonableness. Based on the forgoing standards, we believe defense counsel should have submitted Williams' testimony to the doctors if he knew about it. Accordingly, we find that counsel's performance arguably fell below an objective standard of reasonableness. See *Hodges*, 234 Ill. 2d at 17.

¶ 55 The State argues that defense counsel's decision to forgo an insanity defense and proceed to trial after the BCX results indicated that defendant was fit and sane was a tactical decision that falls outside the scope of an ineffective assistance of counsel claim. We do not agree. "As a general rule, whether to present certain witnesses is a tactical decision which will not be reviewed and cannot support a claim of ineffective assistance of counsel." *People v. Bell,* 152 Ill. App. 3d 1007, 1012 (1987). However, "[a]ttorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002) (citing *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002)); *People v. Coleman,* 267 Ill. App. 3d 895, 899 (1994) (An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy). Taking the allegations in Williams' affidavit as true—that she informed defendant's counsel of the facts contained in her June 19, 2013 affidavit—we cannot say that defendant counsel's decision not to provide that information to the doctors performing a BCX of defendant was based on valid trial strategy.

¶ 56 The State also argues that it was defendant's and/or Williams' failure to cooperate with the doctors that resulted in the alleged pertinent information not being relaying to the doctors. However, our courts have held that any failure on the part of defendant or other witnesses "should not excuse [counsel's] failure to fully investigate and discover" a defendant's past

psychiatric history. *People v. Murphy*, 160 Ill. App. 3d 781, 788-89 (1987) (citing *People v. Howard*, 74 Ill. App. 3d 138, 141-42 (1979)).

¶ 57 Last, the State argues that the trial record contradicts the facts contained in Williams' affidavit, thereby making summary dismissal proper. Section 122-2.1(a)(2) of the Act permits trial courts to review the trial record, and our supreme court has consistently upheld the summary dismissal of postconviction petitions when the record from the original trial proceedings contradicts the defendant's allegations and supporting documentation attached to the petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001); *People v. Ramirez*, 162 Ill. 2d 235 (1994). "At the dismissal stage of a post-conviction proceeding, all well-pleaded facts *that are not positively rebutted by the original trial record* are to be taken as true." (Emphasis added.) *Coleman*, 183 Ill. 2d at 385. Specifically, here, the State argues that the testimony in Williams' affidavit is contradicted by the fact that defendant told doctors that he was not suffering from a mental illness, and on the morning of the offenses, defendant stated that he was going to get money after his girlfriend had asked for money several times. The State argues that this evidence in the record contradicts Williams' affidavit since the affidavit is "attempting to assert some basis for insanity."

¶ 58 First, these two facts that the State points out—that defendant said he was not suffering from a mental illness and that defendant stated he was going to get money on the day of the offenses—does not contradict "defendant's allegations and supporting documentation attached to the petition." Defendant's petition alleges that his trial counsel was ineffective for failing to pass along certain information to the mental health professionals. At the heart of defendant's ineffective assistance of counsel claim is: (1) Williams' testimony relating numerous instances of defendant's obsession with God, including an instance where he tried to sacrifice a baby to God

and another where he was found in a parking lot nude waiting for God to pick him up, along with her allegation that defendant was taken to Cook County Hospital on two occasions leading up to the offenses, and (2) Williams' allegation that she passed all of the information contained in her June 19, 2013 affidavit along to defense counsel. These facts are not contradicted by the trial record. As pointed out earlier, some of the information contained in William's affidavit is supported by facts in the trial record, including the fact that defense counsel did in fact think defendant was mentally unstable and defendant expressed his desire to die when he was caught by the police after committing the offenses and fleeing. While defense counsel denies that Williams' relayed the information contained in her affidavit to him, which is also relevant to defendant's ineffective assistance of counsel claim, that contradiction can only be resolved by a credibility determination, which is improper at the first stage of these proceedings. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 13 ("although counsel's letter contradicts some of the defendant's allegations, credibility determinations are improper at this stage of proceedings"); see also *Coleman*, 183 Ill. 2d at 385. Thus, for all the reasons above, we find that defendant has at least presented an arguable claim that his counsel's performance fell below an objective standard of reasonableness.

¶ 59 b. Prejudice Caused by Deficient Performance

¶ 60 Having found that it is arguable that defense counsel’s representation fell below an objective standard of reasonableness, defendant must also show that it is arguable that the defendant was prejudiced by counsel's performance. *Trujillo*, 2012 IL App (1st) 103212, ¶ 8; *Hodges*, 234 Ill. 2d at 17. Defendant argues that it is arguable that he was prejudiced by defense counsel’s failure to adequately investigate his claim of insanity where the information contained in Williams’ affidavit likely would have resulted in his BCX doctors finding that he was not fit

for trial, which in turn would have caused him not to plead guilty but instead insist on proceeding to trial asserting an insanity defense. The State in turn argues that defendant's argument that he suffered prejudice was merely speculative, thus prohibiting a finding that defendant was prejudiced. Defendant concedes that some speculation is necessarily involved to find arguable prejudice here "because this issue boils down to what would have happened had counsel not been deficient." However, defendant asserts that at this first stage in the postconviction proceedings, he need only show that "there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." Such a showing, defendant argues, "hinges on the viability of a potential insanity defense," which at most requires defendant to show that "his newly discovered evidence would arguably change the doctors[']minds."

¶ 61 The issue of defendant's sanity at the time of the offense is generally a question of fact. *People v. Wilhoite*, 228 Ill. App. 3d 12, 20-21 (1991). The weight to be given an expert's opinion on sanity is measured by the reasons given for the conclusion and the factual details supporting it. *Id*. If an expert's opinion is without proper foundation, particularly where he fails to take into consideration an essential factor, that opinion "is of no weight and must be disregarded." *Id*. Because the record shows doctors Messina and Seltzberg evaluated defendant without the benefit of the testimony contained in Williams' affidavit, an affidavit that discussed bizarre actions of defendant as well as two hospitalizations of defendant at Cook County Hospital, all of which occurred in close temporal proximity to the offenses, we find that defendant has at least shown that it is arguable that he was prejudiced by defense counsel's failure to relay this pertinent information to the mental health professionals. We further note that the examining doctor testified that the medical records she had before her when examining

defendant included hospitalizations of defendant since the 1980s. There are no records from the alleged hospitalizations at Cook County Hospital just prior to the offenses. Any reasonable person would conclude that these hospitalization records would have been critical in evaluating defendant's state of mind at the time of his offenses.

¶ 62 Again we acknowledge that defense counsel testified that Williams never informed him of the information contained in her affidavit. However, at this stage in the proceedings, we must accept Williams' affidavit as true. *Brown*, 236 Ill. 2d at 184 (the allegations of the petition are to be taken as true and liberally construed). Moreover, whether Williams did make defense counsel aware of all the testimony contained in her affidavit depends on whether one believes defense counsel or Williams. As this would require a credibility determination, it is not appropriate to resolve this issue at the first stage of the postconviction proceedings. See *Trujillo*, 2012 IL App (1st) 103212, ¶ 14; *Coleman*, 183 Ill. 2d at 385.

¶ 63 The State cites to *People v. Bew*, 228 Ill. 2d 122, 135 (2008), for the proposition that defendant's claim of prejudice is speculative and thus fails to show actual prejudice as is required to state a claim for ineffective assistance of counsel. However, we find *Bew* to be distinguishable from the present case. In *Bew*, the defendant made an argument that when his trial counsel failed to file a motion to suppress evidence, he was prejudiced because, had counsel filed such a motion, the State would have been forced to proffer a better plea, which the defendant argues he would have accepted. *Bew*, 228 Ill. 2d at 135. However, the court found this argument was merely speculation since there was no evidence that the parties were even involved in serious or active plea negotiations, no evidence that the outcome of such negotiations would have been different had a motion to suppress been filed, and no evidence that the defendant would have accepted a plea had one been offered. *Id*. Here, defendant argues that his

fitness and sanity examination, which did in fact occur, was based on insufficient knowledge, namely the testimony contained in Williams' affidavit. As such, here, not only is it uncontested that defendant received a fitness and sanity evaluation, but it is further uncontested that the doctors who performed the fitness and sanity evaluation did not conduct their examination with the benefit of Williams' testimony, which defendant argues is the source of prejudice to him. Accordingly, where as in *Bew*, there was no evidence that plea negotiations had even been initiated making any argument of prejudice speculative, here, there is no question that the doctors conducting defendant's fitness and sanity examination did not have the evidence contained in Williams' affidavit, and that omission, we believe created an arguable basis of prejudice to defendant.

¶ 64 We have consistently held that to survive summary dismissal, a postconviction petition need present only a limited amount of detail and is not required to set forth a constitutional claim in its entirety. *Edwards*, 197 Ill. 2d at 244. Thus, a *pro se* petitioner is not required to allege facts supporting all elements of a constitutional claim to survive summary dismissal. *Id.* at 244-45; *Brown*, 236 Ill. 2d at 188-89. Because we find that defendant's *pro se* postconviction petition claiming ineffective assistance of counsel claim was not frivolous or patently without merit because it has an arguable basis in law and fact, we must reverse the trial court's summary dismissal of defendant's *pro se* postconviction petition.

¶ 65 III. CONCLUSION

¶ 66 For the reasons above, we reverse the trial court's summary dismissal of defendant's *pro se* postconviction petition and remand the matter for second-stage proceedings.

¶ 67 Reversed and remanded.