

SIXTH DIVISION  
December 18, 2015

No. 1-14-2182

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 1857
	)	
YSOLE KROL,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE DELORT delivered the judgment of the court.  
Justices Hoffman and Hall concurred in the judgment.

**ORDER**

¶ 1 **Held:** The circuit court's summary dismissal of defendant's postconviction petition is affirmed. One claim of ineffective assistance of counsel was forfeited because it could have been raised on direct appeal but was not. The other claim of ineffective assistance of counsel is rebutted by the record.

¶ 2 Following a bench trial, defendant Ysole Krol was convicted of first degree murder and sentenced to 35 years in prison. Her conviction and sentence were affirmed on direct appeal in *People v. Krol*, 2013 IL App (1st) 112514-U. Defendant now appeals the circuit court's summary dismissal of her petition for relief pursuant to the Post-Conviction Hearing Act (725

ILCS 5/122-1 *et seq.* (West 2014)). Defendant contends the circuit court erred in dismissing her petition because: (1) it applied the wrong standard of review; (2) her petition presented an arguable claim of ineffective assistance of counsel for failing to present the testimony of Martinez; (3) her petition presented an arguable claim of ineffective assistance of counsel for failing to file a motion to suppress her statements made to the police after she initially invoked her right to counsel. For the reasons that follow, we affirm.

¶ 3 The State charged defendant and her boyfriend, codefendant Sergio Martinez, with two counts of first degree murder and one count of aggravated unlawful use of a firearm in connection with the December 18, 2009, shooting death of Christopher Rivera. Defendant and Martinez had separate, but simultaneous, trials with Martinez electing a jury trial.

¶ 4 The evidence at trial showed that Christopher and his brothers, Isaac Sanchez and Jonathan Rivera, were friends of defendant and Martinez. At some point before December 2009, the friendship deteriorated. On the day in question, defendant was in a car along with Martinez, Martinez's brother, Jose Martinez, and a friend, Joshua Bzdusek. Martinez was in the driver's seat, defendant was in the front passenger seat, and Joshua and Jose were in the back. While they were at a gas station, Martinez made a phone call to Christopher and reminded him that he owed Martinez money. After leaving the gas station, Martinez drove the car to Christopher's house.

¶ 5 Isaac was at home with Christopher and Jonathan, and he heard Christopher and Martinez argue on the telephone. Christopher told Jonathan and Isaac that Martinez was outside, and all three brothers rushed outside with Christopher leading. Jonathan and Isaac denied that any of them brought weapons. Christopher followed Martinez's car, which was moving slowly down

the street. Martinez, Joshua, and Jose enticed Christopher to come closer by waving their hands and yelling at him. Neither Isaac nor Jonathan saw defendant.

¶ 6 Joshua and Jose saw Christopher and his brothers exit their house, and come toward the car. They denied egging the brothers on. Joshua and Jose thought that Christopher might have had a gun, but they never actually saw one. They also heard popping sounds and something hit the car. Joshua and defendant urged Martinez to leave the scene, but their car was boxed in by another car on the street. Jose then heard Martinez tell defendant, “[h]and me the gun.” Similarly, Joshua heard Martinez yell at defendant to “pass [him] the gun.” However, Jose was ducking down in the car and Joshua had closed his eyes, so neither saw if defendant actually handed Martinez the gun. Both heard Martinez fire the gun out the window.

¶ 7 Isaac and Jonathan saw a flash from Martinez’s car and observed Christopher fall to the ground. Martinez’s car rapidly left the scene.

¶ 8 After firing the gun, Martinez drove the car away from the scene. At some point after the shooting, Martinez and defendant switched places in the car, and defendant drove the rest of the way. No one in the car called the police. The medical examiner determined that Christopher died from a single gunshot wound to the forehead.

¶ 9 Detective Zarbock of the Berwyn police department investigated the shooting. He spoke with Jonathan and Isaac, who identified Martinez as the shooter. Eventually, the police brought in defendant, Jose and Joshua for questioning, but at this point, the police had not yet apprehended Martinez. Both Jose and Joshua also spoke to assistant state’s attorneys. Jose admitted to an assistant state’s attorney that defendant and Martinez were angry because their car had been damaged. Joshua admitted to an assistant state’s attorney that Martinez requested a gun from defendant, and she handed him the gun.

¶ 10 Detectives Zarbock and Arnonny interviewed defendant, which they video-recorded. The State played the recording at trial. Before the interview, defendant acknowledged that she originally invoked her right to counsel, and confirmed that she reinitiated a conversation with the detectives. Arnonny then advised defendant of her *Miranda* rights, and she agreed to speak about the incident. In the interview, defendant told the detectives that she was in a car with Martinez, Jose, and Joshua. She acknowledged that she used to be a friend of Isaac and Christopher, but the relationship deteriorated. Christopher and Isaac had recently made harassing phone calls and sent text messages to her and Martinez. While driving in Christopher's neighborhood, she recognized three people, including Christopher and Isaac, running behind her car. Defendant thought she heard gunshots and felt something hit the car.

¶ 11 When the detectives asked defendant from where Martinez obtained the gun used to shoot Christopher, defendant first claimed that Martinez had the gun on his "waist or lap or something." She denied touching it. Later in the interview, defendant admitted that Martinez asked her to take a gun out of the glove compartment. She complied and gave Martinez the gun. Defendant thought that she only touched the gun with her fingertips because she and Martinez were reaching for the gun at the same time. In the video, defendant motioned with her hands, demonstrating her slight touch. She did not think the gun was loaded and only thought Martinez was going to "scare" Christopher and his brothers. She maintained throughout the interview that she never saw the gun before that day. After Martinez shot Christopher, Martinez put the gun back in the glove box, and defendant helped close the glove box. As they were driving away from the scene, Martinez said "I think [Christopher] fell," and defendant no longer saw Christopher on his feet. Martinez then drove to a location a few blocks from defendant's home, stopped the car and told defendant to drive the rest of the way to her home. Martinez took the

gun and left. Defendant drove Joshua and Jose back to her home, and she parked the car in her garage. They cleaned the exterior of the car so the car would look like it had never left the garage, which defendant initially said was Martinez's idea. Later, she expressed uncertainty over who suggested cleaning the car.

¶ 12 After the State rested, Martinez's trial counsel informed the court that Martinez would testify in his defense. Defendant's trial counsel informed the court that it needed a couple of minutes to discuss with defendant how to proceed with her defense. After a brief recess, trial counsel told the court that it was defendant's decision to not testify or present any other evidence on her behalf. After the trial court admonished defendant on her rights to present a defense, testify on her behalf and present witnesses on her behalf, she confirmed that it was her voluntary decision to rest. Defendant rested before Martinez testified.

¶ 13 Following argument, the court found defendant guilty of first degree murder, finding "when defendant handed the gun to the co-defendant, defendant knew or should have known that her co-defendant intended to shoot at the victim and that such conduct created a strong possibility of death or great bodily harm." Moreover, the court found that defendant and Martinez had a common criminal design that could be inferred from defendant's actions, including switching positions with Martinez in the car, dropping Martinez off, cleaning off the car and never reporting the shooting to the police. The court sentenced defendant to 35 years in prison, which included a mandatory 15-year firearm enhancement.

¶ 14 Defendant appealed, arguing there was insufficient evidence to convict her of first degree murder based on an accountability theory and her mandatory 15-year firearm enhancement was improper because she was not given notice of the enhancement. This court affirmed her conviction and sentence in *People v. Krol*, 2013 IL App (1st) 112514-U.

¶ 15 In March 2014, defendant filed a postconviction petition through private counsel. The petition alleged, *inter alia*, that her trial counsel was ineffective for failing to file a motion to suppress her statements to the police. The petition stated that after defendant invoked her right to counsel, she “did not change her mind, initiate any conversations with the police nor waive her right to counsel while in custody.” Based upon the premise that using her statements to the police was improper, defendant’s petition asserted her trial counsel was ineffective for failing to move to suppress the “direct evidence that [defendant] may have been accountable for the actions of another.” Defendant’s affidavit, attached to the petition, stated that she gave a Berwyn police department detective her attorney’s business card and told the detective that she would only talk if her attorney was present. She added, “I did not initiate or start any conversation with the Berwyn Police after I told them I wanted a lawyer present during any questioning.”

¶ 16 In support of this allegation, defendant attached to her petition four police reports from the Berwyn police department. The first report stated that Detective Fellows and Officer Hadjioannou met with defendant in an interview room on December 19, 2009. They advised her of her *Miranda* rights, and she indicated she understood them. Defendant, however, handed Fellows her attorney’s business card and informed him that she did not want to speak with the police unless her attorney was present. The interview ended. A second report stated that Detectives Armony and Zarbock conducted a video-recorded interview with defendant.

¶ 17 The third report stated that defendant “originally invoked her right to counsel, but later [that night] changed her mind and wished to speak with Detectives to give her side of the story.” Armony gave defendant her *Miranda* rights, she indicated she understood them and agreed to speak with Armony and Zarbock. Defendant also signed a *Miranda* waiver form. The final

report stated that the following day, defendant's attorney spoke with his client at the police station.

¶ 18 The petition's second claim relevant to this appeal alleged that her trial counsel was ineffective for failing to present in her defense the testimony of Martinez who testified at his jury trial. The petition argued that it was "abundantly clear" that the testimony of Martinez would have "exonerated [defendant] for the first degree murder of Christopher Rivera on the theory of accountability." The petition further observed that at Martinez's trial, he testified that after requesting the gun from defendant, she "froze." They both then reached for the gun, and "[s]he probably lightly touched it" before he fired. The petition noted that Martinez's testimony would have been admissible at her trial. The petition argued that Martinez's testimony would have "enriched" defendant's theory of defense that she lacked the concurrent intent to promote or facilitate the murder of Christopher.

¶ 19 In addressing defendant's first allegation of ineffective assistance of counsel, the circuit court found that defendant initially invoked her right to counsel, but then "[a]pparently, a day passed and at that time, she waived those rights according to the record and did give a statement to the police." The court further found the claim a matter of trial strategy, which would not be second-guessed. Concerning defendant's other allegation of ineffective assistance of counsel, the court found that even had Martinez testified on behalf of defendant, the trial court would have had to weigh his testimony against all the other evidence at the trial, including the testimony of Joshua and Jose. The court observed that defendant's "petition showed counsel gave his opinion" on presenting Martinez's testimony in her case, and it was "[d]efendant's decision to not put on evidence," as illustrated by an on-record conversation between trial counsel, the State and the trial court. The court further found the claim a matter of trial strategy.

The circuit court summarily dismissed defendant's postconviction petition, finding it frivolous and patently without merit. This appeal followed.

¶ 20 Under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), a defendant may challenge her conviction based on a substantial denial of her federal or state constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2014). The Act has three stages of review. *People v. Domagala*, 2013 IL 113688, ¶ 32. The circuit court should not dismiss a petition at the first stage if it “alleges sufficient facts to state the gist of a constitutional claim.” *People v. Allen*, 2015 IL 113135, ¶ 24. The petition's allegations must be accepted as true and construed liberally. *Id.* ¶ 25. In the first stage, the circuit court must determine whether the defendant's petition is “frivolous” or “patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is considered “frivolous” or “patently without merit” when it has “no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition will have “no arguable basis either in law or in fact” when it “is based on an indisputably meritless legal theory or a fanciful factual allegation.” *Id.* Where the record contradicts a defendant's legal theory, her theory is meritless. *Id.* “Fanciful factual allegations include those which are fantastic or delusional.” *Id.* at 17. We review a circuit court's first-stage dismissal *de novo*. *Allen*, 2015 IL 113135, ¶ 19.

¶ 21 Defendant first contends that the circuit court failed to review her petition under the “lenient” standard of review applicable at the first stage of the Act, the arguable-basis standard. See *Hodges*, 234 Ill. 2d at 16. Instead, she argues the court utilized the more “stringent” standard of review applicable at the second stage of the Act, the substantial-showing standard. See *Domagala*, 2013 IL 113688, ¶ 33. Defendant asserts this error requires us to reverse and remand her petition for second-stage proceedings.



¶ 22 Initially, we note the circuit court explicitly found defendant’s petition was “frivolous and patently without merit,” which is the arguable-basis standard. See *Hodges*, 234 Ill. 2d at 16. Even assuming, *arguendo*, that despite its explicit statement, the circuit court applied the wrong standard of review, such error alone would not warrant a reversal and remand for second-stage proceedings. Because our review is *de novo*, “we may affirm, on any proper ground, a procedurally proper summary dismissal that was based on an improper ground.” See *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006). Here, the circuit court’s dismissal was procedurally proper because it summarily dismissed defendant’s petition within 90 days and without the input of any party. See *id.* Therefore, even if the trial court applied the wrong standard of review, we can apply the proper standard on appeal and determine if summary dismissal was justified. See *id.*

¶ 23 Defendant next contends that her petition set forth an arguable claim of ineffective assistance of counsel where her trial counsel failed to present the testimony of Martinez in her defense at trial. The State argues that defendant has forfeited review of this claim because it could have been raised on direct appeal.

¶ 24 The purpose of proceedings under the Act (725 ILCS 5/122-1 *et seq.* (West 2014)) is to inquire into constitutional issues involved in a defendant’s original conviction and sentence that could not have been raised nor were raised on direct appeal. *People v. English*, 2013 IL 112890, ¶ 22. If an issue has already been raised and decided on direct appeal, the issue is barred by *res judicata*. *Id.* If the issue could have been raised on direct appeal, but was not, the issue is forfeited. *Id.* When a postconviction petition’s claim depends on matters outside the record, the forfeiture rule does not apply. *People v. Brown*, 2014 IL App (1st) 122549, ¶ 41. However, if the postconviction petition and the supporting documentation do nothing more than recite

matters contained within the record, the claim is forfeited. *People v. Keener*, 275 Ill. App. 3d 1, 7 (1995).

¶ 25 Here, the original appellate record was sufficient to support defendant's argument that trial counsel may have been ineffective for failing to present Martinez's testimony at defendant's trial. First, because of the simultaneous nature of defendant and Martinez's trial, the manner in which Martinez testified was in the record and available for appellate counsel's review. See *id.* at 6 ("Attorneys representing clients before the appellate courts are presumed to have knowledge of the contents of the record."). Thus, the information critical in determining whether or not Martinez's testimony would have helped defendant's defense and in turn, whether or not she was prejudiced by her counsel's failure to present Martinez was in the record on direct appeal. See *Domagala*, 2013 IL 113688, ¶ 36 (to prove a claim of ineffective assistance of counsel, the defendant must show that her counsel's allegedly deficient performance prejudiced her) citing *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, defendant's petition merely cites to matters already in the record. The petition's only supporting documentation related to this claim is excerpts from the trial transcript, including Martinez's testimony and an on-record discussion between trial counsel, the State and the trial court concerning which witnesses, if any, defendant would present. The petition merely asserts legal conclusions concerning the significance of such matters without providing any new information. See *Keener*, 275 Ill. App. 3d at 7.

¶ 26 Finally, it is clear that the decision not to present any witnesses, including Martinez, was made by defendant after consultation with her trial counsel, as exemplified by the on-record discussion among defendant, trial counsel, the State, and the trial court. At the conclusion of the State's case, the court inquired who the respective defendants' witnesses would be. Martinez's counsel said it would present Martinez and Detective Zarbock. Defendant's counsel asked the

court if he could approach the bench outside the presence of the jury, which the court allowed.

The following colloquy occurred:

“[Assistant State’s Attorney]: At this particular point – counsel, you’re going to have to step up here, too – at this point, Judge, counsel may decide to rest. He may not decide to rest, but he has still has [sic] a right under *People v. Ruiz* if [Martinez] takes the stand, he has the right to cross examine him, the particular defendant as a witness. So I’m aware of that. He’s aware of that.

[Trial counsel]: I guess, Judge, maybe just how this works out, if we rest now, our case is essentially over. So even if [Martinez] testifies, I don’t know if your Honor is considering that in our case because our case is already concluded.

[Assistant State’s Attorney]: Which you could consider as well. If he rests right now, then you wouldn’t consider it against them.

[Trial counsel]: Right, so, Judge, what I would like is just a couple minutes and my client is not going to testify but I just want to make sure it’s her decision.

THE COURT: And I would ask her if it’s her decision as well.

[Trial counsel]: Right. So if I can have a couple minutes with my client, I think I know what the answer is to that and we can bring her back in.

[Assistant State's Attorney]: And then you have no other witnesses?

[Trial counsel]: Correct. \*\*\*"

The court briefly recessed, and when it resumed, trial counsel stated "I did speak with my client and it is her wish to not take the witness stand and for us to rest, your Honor." The court subsequently admonished defendant with a series of questions concerning her right to testify, her right to present witnesses on her behalf and her right to engage in any other defense beyond her counsel's argument. Defendant affirmatively responded to the court's admonishments that she understood these rights, and it was her decision, voluntarily, to not testify and not present witnesses on her behalf. Therefore, because defendant's claim concerning Martinez's testimony relies on matters entirely within the original appellate record and could have been raised on direct appeal, she has forfeited her challenge of it. See *English*, 2013 IL 112890, ¶ 22.

¶ 27 Nevertheless, defendant argues that "there is no record evidence explaining why counsel elected not to have the court consider [Martinez's] testimony." We find this argument unpersuasive. The record makes clear that this was defendant's decision after consultation with trial counsel. Furthermore, defendant essentially argues that something strategically unsound occurred during her and trial counsel's off-record conversation. However, defendant's petition does not support this theory with any evidence or explain why such evidence cannot be included, which is defendant's burden. See 725 ILCS 5/122-2 (West 2014) (stating the "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached"). Defendant cannot argue the absence of evidence supporting her claim should somehow work in her favor when it is her burden to provide it or explain its absence.

¶ 28 Defendant's third contention on appeal is that her petition set forth an arguable claim of ineffective assistance of counsel where her trial counsel failed to file a motion to suppress her statements to the police when, as stated in her affidavit, she never reinitiated a conversation with the police after initially invoking her right to counsel. The State initially argues this claim was forfeited because it could have been raised on direct appeal. However, as defendant notes, the claim relies on matters in her postconviction petition's affidavit, namely her assertion that she did not reinitiate a conversation with the police. This information is outside the record. See *Brown*, 2014 IL App (1st) 122549, ¶ 41. Defendant, therefore, has not forfeited review of this claim. On the merits, the State argues that defendant's claim must fail because the record contradicts it.

¶ 29 Here, the record positively rebuts defendant's assertion that she never reinitiated a conversation with the police. At the beginning of defendant's recorded interview with Detectives Armony and Zarbock, Zarbock asked defendant to confirm that initially she wanted her attorney present and refused to speak to the police, which she confirmed. Defendant said she was then moved to a holding cell. Zarbock asked defendant to confirm that while in the holding cell, Officer Novotny came to give defendant a phone, and she told him that she wanted to speak with the police, which she confirmed. Defendant further confirmed that when she told Novotny she wanted to speak with the police, he reminded her that she already exercised her right to counsel and the police could not speak with her unless she initiated the conversation. Armony subsequently gave defendant her *Miranda* rights, she responded affirmatively to understanding each right and she signed a *Miranda* waiver form. This conversation positively rebuts the petition's claim that she did not reinitiate a conversation with the police. See *People v. Romero*, 2015 IL App (1st) 140205, ¶ 26 (when a defendant's allegations are rebutted by the record, they

are “[i]ndisputably meritless legal theories”). Moreover, the third police report attached to defendant’s petition corroborates the video-recorded evidence. It clearly stated that defendant “originally invoked her right to counsel, but later changed her mind and wished to speak with Detectives to give her side of the story.” Therefore, the record rebuts the petition’s contention that she did not reinitiate a conversation with the police, and the petition has no arguable basis in law. See *Hodges*, 234 Ill. 2d at 16.

¶ 30 Additionally, nowhere in defendant’s petition or affidavit does it allege that she told her trial counsel that she never reinitiated a conversation with the police. The petition simply makes the allegation that she did not reinitiate a conversation with the police. Trial counsel cannot be found ineffective based on information solely within the knowledge of defendant, and of which she never apprised trial counsel. See *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 47 (stating a “[trial] counsel could not have been ineffective for failing to call an alleged witness of whom he had no knowledge”).

¶ 31 Nevertheless, in supporting this claim, defendant relies on *People v. Smith*, 326 Ill. App. 3d 831, 845 (2001), where this court reversed a postconviction petition’s summary dismissal. In *Smith*, a juvenile defendant alleged his trial counsel was ineffective for failing to file a motion to suppress his involuntarily, incriminating statements to the police when the defendant was interrogated by the police for 10 minutes outside the presence of his mother. *Id.* at 841-42. However, the record did not rebut the defendant’s allegations (*id.* at 843-44), and his trial counsel actually filed a motion to suppress, but chose not to pursue it, demonstrating counsel’s awareness of the motion’s possible merit. *Id.* Here, the record rebuts defendant’s allegation. Furthermore, the record is devoid of any notion that trial counsel was aware that a motion to suppress might have merit.

¶ 32 In sum, because defendant could have raised her ineffective assistance of counsel claim concerning Martinez's testimony on direct appeal, but failed to do so, she has forfeited the claim here. Additionally, because defendant's ineffective assistance of counsel claim concerning the violation of her right to counsel is positively rebutted by the record, that claim has no arguable basis in law. Accordingly, we find the circuit court properly summarily dismissed defendant's petition.

¶ 33 Affirmed.