

NOTICE

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2015 IL App (4th) 140744-U

NO. 4-14-0744

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED

October 23, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JAMES R. MANUEL,)	No. 10CF1156
Defendant-Appellant.)	
)	Honorable
)	Scott Drazewski,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* petition for postconviction relief, as defendant stated the gist of a constitutional claim his trial counsel was ineffective for not investigating his claim he did not have the tattoo used to identify him in court at the time of the offense.

¶ 2 In June 2014, defendant, James R. Manuel, filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). In his petition, defendant alleged (1) he was denied the effective assistance of counsel when counsel failed to conduct a pretrial investigation to obtain business records from a tattoo parlor to demonstrate the victim described an assailant other than petitioner; (2) he was denied a fair trial when the State failed to provide the defense a written statement identifying the tattoo on the forearm of an assailant; and (3) appellate counsel provided ineffective assistance by not raising trial counsel's

ineffectiveness on direct appeal. The trial court found the petition frivolous and patently without merit and dismissed it.

¶ 3 On appeal, defendant argues the trial court erred as his petition states the gist of a constitutional claim. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 In December 2010, defendant and his codefendant, Clarence Thompkins, were charged with home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2008)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). The State alleged the offenses occurred on July 29, 2008, and the victims were Barbara and Richard Hopper. We note Richard's legal name is Lester James Hopper, which is how defendant refers to him in his postconviction petition and on appeal.

¶ 6 In September 2011, a consolidated bench trial was held. On July 29, 2008, two assailants, identified as young black males wearing masks, entered the Hopper residence and declared, "this is a robbery." The assailants stole a number of guns from Richard's collection and left after placing the guns in a "dark, maybe green" duffel bag or "knapsack." Barbara testified the stature of one of the assailants matched one of the men who worked for North American Van Lines, whom the Hoppers hired to move them into their home five months earlier. Records demonstrated Clarence worked for North American Van Lines and assisted with the Hoppers' move. Richard testified one of the men had a tattoo on his right forearm. Richard, who had suffered a traumatic head injury years before the offense, described the tattoo as "strange looking," appearing to him "like two worms crisscrossing." When Clarence and defendant showed Richard their forearms at trial, he did not recognize the tattoos.

¶ 7 Testimony supporting defendant's conviction included statements indicating Clarence and defendant were friends. Defendant's former girlfriend, Megan Bachman, testified Clarence brought a hunter green duffel bag to the basement of a residence she and defendant shared. She believed this occurred in "[m]aybe May," and she had also seen defendant and Clarence with weapons. Another witness, Daniel Diciaula, who was awaiting sentencing on three federal charges, testified he purchased weapons belonging to Richard from a man in a basement with a woman upstairs. Diciaula picked out defendant in a photographic lineup but was unable to identify him at trial.

¶ 8 At the close of evidence, the trial court found the evidence stronger against Clarence than defendant. The court observed the men fit the two general descriptions, as both were young black males. The court observed defendant had two tattoos on his arm. One was a cross, the other had "calligraphy-like" lettering and "a lot of curlicues." The court concluded it was an "amazing coincidence" defendant had a tattoo in the area Richard saw tattoos and defendant's tattoo "could well fit the description" Richard provided. Before reaching a verdict, the court found defendant fit "the description and [had] tattoos on his lower arm," implicating him, when considered with the rest of the evidence. At sentencing, the court sentenced defendant to concurrent terms of 45 years' imprisonment.

¶ 9 On direct appeal, this court affirmed defendant's conviction. *People v. Manuel*, 2013 IL App (4th) 120017-U, ¶ 2. Defendant argued the State failed to prove him guilty beyond a reasonable doubt, challenging Diciaula's testimony against him. *Id.* ¶ 46. Defendant also argued the trial court improperly allowed hearsay testimony. *Id.* ¶ 56.

¶ 10 In June 2014, defendant filed his *pro se* petition for postconviction relief.

Defendant argued, in part, his trial counsel was ineffective for not acquiring business records, known to him, that would have demonstrated the Hoppers described an assailant that did not match defendant's description. In support, defendant attached an affidavit signed by him. In his affidavit, defendant averred, on August 8, 2011, during a court date in which he waived jury trial, defense counsel informed him Richard revealed a recollection about seeing a tattoo on the arm of one of the assailants. On that date, defendant told trial counsel he did not have any tattoos on his arms on the date of the home invasion. Defendant further told counsel he signed a document at the tattoo parlor in August 2008 that would verify he had tattoos of his daughter's name placed on both of his forearms. Defendant instructed counsel to subpoena the document from Psychopathic Ink. In December 2013, defendant received a document entitled, "Tattoo and Piercing Release of Liability."

¶ 11 To his postconviction petition, defendant also attached a copy of the "Tattoo and Piercing Release of Liability." On this document, an individual named "Rowe" was to tattoo defendant. The initials, "J.M." appear next to various statements. It is signed by James Manuel and dated August 22, 2008. Next to the preprinted word "Description" is handwritten "outline old E."

¶ 12 In August 2014, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. Regarding defendant's ineffective-assistance-of-counsel claim, the court concluded defendant forfeited the issue by not raising the matter on direct appeal. The court further held the defendant could not establish counsel was ineffective because the release of liability did not describe the tattoo or the location of the tattoo and did not establish defendant had no other tattoos. The court further found defendant suffered no prejudice as

Richard was unable to identify defendant or his tattoo.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Under the Act, there is a three-stage process by which a defendant may acquire postconviction review of a claim his conviction led to a substantial denial of his constitutional rights. *People v. Jones*, 213 Ill. 2d 498, 503, 821 N.E.2d 1093, 1096 (2004). At the first stage, a petitioner files a postconviction petition, in which he or she "need present only a limited amount of detail." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The role of the trial court, at the first stage, is to examine the postconviction petition to determine whether it is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). The court, without input from the parties, considers the allegations of the petition, taking them as true and liberally construing those allegations, to ascertain only "whether the petition alleges a constitutional deprivation that is unrebutted by the record." *People v. Couch*, 2012 IL App (4th) 100234, ¶ 11, 970 N.E.2d 1270. The threshold is low, meaning the defendant need only state the gist of a constitutional claim, pleading facts sufficient "to assert an arguably constitutional claim." *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754. If the court finds the petition frivolous and patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014). Because this case involves a first-stage dismissal of defendant's postconviction petition, our review is *de novo*. *Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 16 Defendant argues his petition states the gist of a constitutional claim he was denied the effective assistance of counsel due to his trial counsel's failure to investigate his claim

he did not have the tattoo used to identify him when the offense was committed. Defendant contends the trial court, in dismissing his petition, erroneously concluded the release of liability did not describe the tattoo. Defendant points to the description line, which indicates "outline old E," and argues this shows he received a tattoo in "Old English lettering." In addition, defendant points to his affidavit as establishing he did not have tattoos on his arms on the date he was accused of committing the home invasion.

¶ 17 In contrast, the State argues trial counsel was not ineffective. The State, citing no authority, maintains counsel's decision not to investigate defendant's claim was a matter of trial strategy that is "virtually unchallengeable." The State further argues the tattoo-parlor records are not exculpatory. The State emphasizes defendant had multiple tattoos, meaning the release could have been for another tattoo. The State also points to the decision of the court in dismissing the postconviction petition as showing the release of liability did not describe the tattoo received or show defendant had no prior tattoos.

¶ 18 Each defendant has the constitutional right to the effective assistance of counsel. *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767 (quoting U.S. Const., amends. VI, XIV). To succeed on a claim one was denied this right, a defendant must show counsel's performance was deficient and the deficient performance resulted in prejudice. *Id.* This requires a defendant prove (1) counsel's representation fell below an objective standard of reasonableness, and (2), absent the error, a reasonable probability exists the outcome of the proceeding would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003).

¶ 19 Trial counsel has a duty to conduct " 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary'." *Domagala*, 2013 IL

113688, ¶ 38, 987 N.E.2d 767 (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

When the record shows counsel had reason to know, from an objective standpoint, a possible defense was available, the failure to investigate that defense fully can constitute ineffective assistance of counsel. *Id.*

¶ 20 In this case, the postconviction record establishes defendant averred having no other tattoos on his forearm before August 2008. Defendant sought a tattoo of his daughter's name. The release of liability indicates the description of the tattoo as "outline old E."

Defendant, upon learning Richard would testify regarding the tattoo, told his counsel he did not have the tattoo and informed counsel where to find records of the tattoo. Defendant, after his conviction, found the tattoo record.

¶ 21 We agree with the trial court the "release of liability" is not exculpatory on its face. However, the release of liability need not be considered alone. In his affidavit, defendant provided sworn testimony he had no other tattoos on his forearms at the time the offense was committed. Defendant further averred he told counsel of this at the August 8, 2011, court date at which he waived trial by jury. We note the docket sheet indicates a hearing was held on that date.

¶ 22 In addition, at this stage, we consider only whether it is *arguable* defendant was denied a constitutional right. We find it is. At trial, a key issue for the trial court was the tattoo. The court relied on Richard's description of the tattoo in finding defendant guilty. The court observed one of defendant's two tattoos on his forearms had "calligraphy-like" lettering and "a lot of curlicues." The court found it to be an "amazing coincidence" defendant had a tattoo in the area Richard saw tattoos and defendant's tattoo "could well fit the description" provided by

Richard. The court further found this identification testimony, when considered with the other evidence, was sufficient to find him guilty. Given the trial court's statements, it is arguable there is a reasonable probability the outcome of the trial would be different if counsel investigated defendant's claims and found this release of liability. The term on the release, "outline old E," liberally construed as it must be (see *Couch*, 2012 IL App (4th) 100234, ¶ 11, 970 N.E.2d 1270), leads to the reasonable inference the tattoo defendant received after the offense could be "calligraphy-like" with "curlicues" and resemble "intertwined snakes." If defendant did not have a tattoo like the assailant, doubt arises defendant was the assailant.

¶ 23 We disagree with the State's contention trial counsel's decision not to investigate was a matter of strategy. The evidence at trial against defendant was, as the trial court held, "circumstantial." The only testimony placing him in the home at that time was a general description of two young black males and a tattoo that fit the description provided by Richard. Without a tattoo, the evidence would have been the general description of two young black males, the testimony placing Clarence and defendant together with a duffel bag at some point, and testimony by a federal convict awaiting sentencing identifying defendant in a photo lineup as the one who sold him Richard's gun. In these circumstances, the alleged decision not to investigate defendant's contention he did not have the tattoo, which at this stage we accept as true (see *id.*) is unreasonable.

¶ 24 Defendant has stated the gist of a constitutional claim he was denied the effective assistance of counsel for the failure to investigate. We remand for further proceedings under the Act.

¶ 25 III. CONCLUSION

¶ 26 We reverse the trial court's judgment and remand for further proceedings.

¶ 27 Reversed and remanded.