2016 IL App (1st) 122549-U

FIFTH DIVISION
May 20, 2016

No. 1-12-2549

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Respondent-Appellee,	)	
	)	
v.	)	No. 06 CR 1766 (02)
	)	
JAMILLE BROWN,	)	
	)	Honorable
Petitioner-Appellant.	)	John Joseph Hynes,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Upon reconsideration of defendant's postconviction petition in light of the Illinois Supreme Court's decision in *People v. Allen*, 2015 IL 113135, the circuit court's summary dismissal of defendant's postconviction petition is reversed and the matter is remanded for second-stage proceedings.

¶ 2 Defendant, Jamille Brown, appeals from the order of the circuit court of Cook County summarily dismissing her *pro se* postconviction petition at the first stage of postconviction

proceedings.[1] Defendant was convicted by a jury of aggravated vehicular hijacking, armed robbery, and first-degree murder. The trial court sentenced defendant to a total of 43 years' imprisonment in the Illinois Department of Corrections. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Brown*, 2011 IL App (1st) 093619-U (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a *pro se* petition for postconviction relief alleging, *inter alia*, ineffective assistance of trial counsel. The trial court summarily dismissed the petition. Originally, we affirmed the summary dismissal because defendant's petition did not meet the pleading requirements of section 122-2 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2 (West 2012)). *People v. Brown*, 2014 IL App (1st) 122549. In the exercise of its supervisory authority, however, the supreme court has directed us to vacate our judgment and to reconsider the matter in light of *People v. Allen*, 2015 IL 113135, to determine if a different result is warranted. *People v. Brown*, No. 118177 (Ill. Nov. 5, 2015).

¶ 3 On appeal, defendant contends the summary dismissal of her postconviction petition was in error, particularly that portion of the petition alleging ineffective assistance of trial counsel for failing to: (1) present evidence at the motion to suppress hearing that her statement was a product of mental and physical coercion; and (2) transmit the State's 20-year plea offer to her. After reconsidering the merits of this appeal in light of *Allen*, we conclude the circuit court erred in dismissing defendant's postconviction petition at the first stage of review. Accordingly, we vacate our judgment in *Brown*, 2014 IL App (1st) 122549, reverse the circuit court's summary dismissal of the petition, and remand the matter for second-stage proceedings.

[1] We note that the caption of the matter on appeal and in the trial court spelled defendant's name "Jamille." In her videotaped statement, as well as in her *pro se* postconviction petition, defendant spelled her name "Jimille."

¶ 4 BACKGROUND

¶ 5 Defendant's conviction arose from the December 22, 2005, murder of Abimola Ogunniyi, who was shot in the leg by codefendant Elliott Peterson while Peterson, Joyce McGee (another codefendant), and defendant were hijacking his vehicle. On January 17, 2006, defendant was charged by indictment with multiple counts of first-degree murder, felony murder, armed robbery, aggravated vehicular hijacking, armed violence, aggravated robbery, vehicular hijacking, robbery, aggravated unlawful restraint, and unlawful restraint. The State proceeded to trial only on the counts for first-degree murder, aggravated vehicular hijacking, and armed robbery.[2] For purposes of the current appeal, we will reiterate here only those facts which are germane to the issues raised in this appeal.

¶ 6 Motion to Suppress Statement

¶ 7 On March 3, 2009, defendant filed a motion to suppress her statement to police in which she asserted that: (1) her statements to police should be excluded because she was not given all of her *Miranda* rights, namely, she was not informed that she could request that questioning be stopped; and (2) her statement was a product of "psychological and mental coercion." On April 2, 2009, during a case status, the following exchange took place:

> "[Assistant State's Attorney]: Your Honor, I did have discussions with Counsel [defendant's trial counsel]. I did take a look at his Motion to Suppress Statements, which is the motion that's on file. It has been set down. I did indicate to him that I would need specificity as to Paragraph No. 4 [regarding the psychological and mental coercion]. He indicated he will go and interview his client and if there were any charges [*sic*], he would make me aware of them.

[2] Defendant and McGee were tried in simultaneous but severed proceedings; the defendant was tried by a jury; McGee elected a bench trial.

THE COURT: All right. When do you think you will have that for me?

[Trial Counsel]: Next week, Judge. Not a problem.

THE COURT: I will give you ten days. If it's not done, let me know beforehand. I don't want to continue this again just for that reason. All right?

[Assistant State's Attorney]: Yes, your Honor."

The trial court set the evidentiary hearing on defendant's motion to suppress for May 27, 2009.

¶ 8 A supplemental motion to suppress was filed on May 25, 2009. The motion set forth more facts regarding the alleged psychological and mental coercion. The motion expressly stated that the interrogating officers "yelled and raised their voices to the defendant, threatened the defendant with forcing her to have her baby in jail in unsanitary circumstances and threatened to charge her along with the co-defendants with the crime itself if she did not make a statement."

¶ 9 On the day of the hearing, the assistant State's Attorney informed the trial court that defendant's supplemental motion was not supported by an affidavit from defendant. The assistant State's Attorney requested defendant "be sworn today to those facts that are in *** [trial counsel's] motion." Trial counsel had no objection to defendant being "sworn in to the facts." Consequently, defendant swore "the contents of the motion to be true and accurate to the best of [her] knowledge." A suppression hearing was then held.

¶ 10 Trial counsel presented his opening statement arguing that the motion raised two issues: (1) that defendant did not receive a complete set of *Miranda* warnings; and (2) that officers "overcame her desire not to talk about the case by threatening her [and] threatening to take her baby away from her." Trial counsel noted defendant was pregnant at the time the interrogation occurred. He further asserted the officers threatened defendant with forcing her to deliver the

baby in county jail in unsanitary conditions. The State presented no opening statement.

¶ 11 Thereafter, the State called its first and only witness, Lieutenant James Twohill of the Burbank police department. Twohill testified that on December 27, 2005, he was sergeant of Burbank investigations. At 12:53 p.m. that day, he and Lieutenant Tom Harold of the Evergreen Park police department conducted an interview of defendant. Twohill read defendant her *Miranda* rights from a preprinted card. Twohill further testified he did not inform defendant that she could stop the questioning at any time. Additionally, Twohill stated he did not raise his voice or yell at defendant and that he did not threaten defendant with losing her baby or tell defendant her baby would be born in jail in unsanitary conditions. Twohill testified defendant had no complaints regarding her treatment by police.

¶ 12 During Twohill's testimony, the State introduced into evidence defendant's December 27, 2005, videotaped interview. The State played a portion of the interview for the court wherein Twohill read defendant her *Miranda* rights. The videotape reflected that Twohill did not inform defendant that she could stop the questioning at any time. In addition, the videotape demonstrated defendant was not physically, psychologically, or mentally coerced during the interrogation and that the officers did not yell or raise their voices to defendant. The videotape further indicated that the officers did not make threats toward defendant's unborn child at that time. Near the end of the interview, when asked if she had been treated well, defendant responds affirmatively. The officers then asked defendant, "You have no complaints about the way anybody treated you here?" In response, defendant slightly bowed her head, shaking it from side-to-side indicating she did not have any complaints.

¶ 13 On cross-examination Twohill testified that he first met defendant on December 26, 2005, and spoke with her "very briefly" at the police station. Defendant was not a suspect and,

therefore, was not informed of her *Miranda* rights at that time. Later that day, defendant accompanied Twohill and other unidentified officers to locate and identify "J-Mo," an individual who Twohill indicated was, at that time, a suspect in the matter. Defendant was in a van with the officers for "no more than an hour." Afterwards, the officers dropped defendant off at a family member's home.

¶ 14 Twohill further testified on cross-examination that on December 27, 2005, he "received information" that defendant had "voluntarily arrived" at the police station. Twohill "went there immediately to conduct the interview." Twohill, however, did not know exactly when defendant had arrived at the station. Twohill testified that Lieutenant Harold escorted defendant into the interview room, where Twohill was waiting outside. Twohill, Harold, and defendant walked into the interview room together, which is when the videotape begins. Prior to beginning the interview at 12:50 p.m., Twohill stated he had not spoken with defendant and neither had any other officers.

¶ 15 On redirect, Twohill testified that on December 27, 2005, he and Harold were at task force headquarters in Chicago Ridge when Harold received a telephone call that defendant was at the Evergreen Park police department. The two officers left immediately and arrived at the Evergreen Park police department "no more than 15 minutes" later. When they arrived at the Evergreen Park station, Harold went to get defendant who was "waiting in a report room away from the Detective Division." Twohill further testified that the first time he spoke with defendant on December 27, 2005, was when he commenced defendant's interview.

¶ 16 On re-cross, Twohill testified he did not see defendant walk into the station and believed "she arrived [at the station] when Lieutenant Harold received a phone call."

¶ 17 The State rested and defendant moved for a directed finding, which was denied by the

trial court. The defense then rested without calling any witnesses. In closing arguments, trial counsel asserted that defendant did not receive "the final *Miranda* warning" and noted that the officers did not have defendant acknowledge each right individually. Trial counsel pointed out that the officers did not inform defendant that she did not have to answer further questions. Trial counsel further asserted that Twohill did not know what happened in the police station prior to defendant being interviewed. Trial counsel maintained this information was "important on the voluntariness issue" as it is "the State's burden to prove that none of this happened. That her voluntariness was not overcome." Trial counsel concluded that because the State did not offer any evidence as to what happened to defendant earlier in the day, the State did not meet its burden and, therefore, the motion should be granted.

¶ 18 In its closing argument, the State asserted that defendant was given all of her *Miranda* rights as shown in the videotape of the interview and from Twohill's testimony. The State further asserted that the December 27, 2005, interview was a "totally different phase to this investigation." In addition, defendant indicated on the videotape that she was treated well and there was no indication that she was not treated well by any officer at any time. Accordingly, the State requested that defendant's motion to suppress be denied.

¶ 19 After listening to the arguments of counsel, the testimony of Twohill, and viewing the videotape of defendant's interview, the trial court determined that "the Miranda warnings do not require any 'fifth' warnings with regards to the right to have questioning stopped at any time." The trial court also determined that defendant "clearly indicated that she understood all her rights and answered, yes, to that question." With regards to voluntariness of defendant's statement, the trial court determined that the State met its burden of proof as the testimony of Twohill and the contents of the videotape demonstrated "she had no complaints about any one or the way she was

treated there at the police station." Accordingly, the trial court denied defendant's motion to suppress.

¶ 20 Plea Offer

¶ 21 On the day of jury selection, the trial court asked the State whether any plea offers were made to defendant. The assistant State's Attorney informed the trial court and defendant, that in exchange for defendant's plea to the felony murder count and the armed robbery or aggravated vehicular hijacking count, the State had offered defendant 30-years' imprisonment. Trial counsel acknowledged that the State's recitation of the offer was correct and that he had communicated that offer to his client. Defense counsel further informed the court that his client was electing to proceed with trial. The trial court then asked defendant if that was her understanding of the offer and she acknowledged that it was. Defendant was thereafter admonished regarding the minimum and maximum penalties she was facing if she proceeded to trial. Defendant expressed that she understood the possible penalties and stated she had discussed this with her attorney and would proceed to trial.

¶ 22 Evidence at Trial

¶ 23 This court previously detailed the evidence adduced at defendant's trial in our decision on direct appeal (*Brown*, 2011 IL App (1st) 093619-U):

> "The evidence established that on December 22, 2005, the victim was dispatched to a nonexistent address on Chicago's southside, where he was unable to locate the caller in need of a taxi. Upon a second call to the dispatcher, the victim picked up three passengers, the defendant and her two codefendants. He was asked to take the three to the [*sic*] 96th Street and Pulaski.

According to the defendant's videotaped statement, the three had agreed to rob an armored truck. In order to carry out their plan, they needed a vehicle to follow the armored truck before executing the robbery. They decided to hijack a cab to get the needed vehicle. Codefendant McGee called the livery service twice from her cell phone to arrange for a cab.

Before the three left codefendant Peterson's apartment, the defendant saw Peterson arm himself with a weapon whose length she approximated by using her hands and noted it had wood on it. The victim was killed by a shotgun blast. When the cab reached the requested destination, McGee told the victim to go the rear of the residence by way of the alley. Once in the alley, Peterson put his weapon to the victim's head and had him get out of the car. The two exited on the driver's side of the car. Peterson instructed the victim to remove his clothing. In the meantime, the defendant and codefendant McGee also exited the car on the passenger side of the car. According to the defendant, the victim was taking off his blue jean jacket when 'all I heard was a pah.' The defendant stated Peterson shot the victim from a distance of about three feet and the victim fell in the snow.

After clearing the cab of some items, the three reentered with the defendant driving. The defendant saw Peterson place the shotgun into what she described as a 'book bag.' The defendant identified a shotgun depicted in a photograph as the same gun she saw Peterson possess and use on the victim.

The three abandoned the cab. Before leaving the cab, the defendant saw Peterson remove a 'black box' from the glove box and throw it away. Peterson also removed $200 to $300 from a wallet that was also in the glove box. The three walked in the direction of

a bus stop on 95th Street near Christ Hospital. On their way, the defendant and McGee entered a Walgreen's store and purchased a candy bar with a $20 bill Peterson took from the wallet. A videotape of the purchase was shown to the jury. The three took a bus to Peterson's apartment.

The defendant concluded her statement by acknowledging that she had been treated well by the police. The defendant reiterated that what she had stated was the truth. A detective responded: 'You know the only thing that upsets me? *** What really *** upsets me is this poor guy was laying there bleeding and the three of [you, not one of you] *** called 911.'

The jury found the defendant guilty of aggravated vehicular hijacking, armed robbery and first-degree murder. The jury specially found that first-degree murder was committed by the use of a firearm. Following the denial of posttrial motions, the defendant was sentenced to 28 years for first-degree murder with an additional 15 years based on the use of a firearm." *Id.* ¶¶ 5-11.

¶ 24 Direct Appeal

¶ 25 On direct appeal, defendant raised three issues: (1) that she was deprived of a fair trial by the introduction of an autopsy photo; (2) prosecutorial misconduct; and (3) that her 43-year sentence was excessive. *Id.* ¶ 13. Both parties agreed that defendant's mittimus must be corrected to reflect a single conviction of murder. *Id.* We affirmed defendant's conviction and sentence. *Id.* ¶ 37. We concluded that the introduction of the autopsy photograph did not deprive defendant of a fair trial; that the claimed instances of prosecutorial misconduct did not rise to the level of second prong plain errors; and that defendant's sentence was not excessive. *Id.* We further corrected the mittimus to reflect a single conviction of murder. *Id.*

¶ 26 Defendant's *Pro Se* Postconviction Petition

¶ 27 In May of 2012 defendant filed a *pro se* petition under the Act (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant's *pro se* petition alleged trial counsel was ineffective for several reasons, specifically trial counsel failed to: (1) argue "the rule of accountability" and argue for a lesser included offense; (2) properly argue her motion to suppress statements; (3) file a motion to suppress evidence, namely, the contents of a backpack recovered from codefendant Peterson's apartment; (4) challenge a juror who spoke English as a second language; and (5) advise her of a 20-year plea bargain from the State. Defendant pursues only issues (2) and (5) in this appeal; that trial counsel rendered ineffective assistance of counsel by failing to present evidence and testimony that her statement to police was the product of physical and mental coercion and failing to inform her of an offer by the State to enter a 20-year plea bargain.

¶ 28 In support of her petition, defendant attached portions of the record of proceedings, excerpts of case law, three affidavits containing her own statements, and two letters–one from Cashmere Wallace, her brother, and the second from Camille Kershaw, her mother. In defendant's first affidavit she averred that before trial the State offered her a 30-year plea bargain, but that she turned the offer down. She further averred that the assistant State's Attorney then informed trial counsel that they would offer 20 years; however, trial counsel declined the offer because he assumed defendant would not accept the offer and believed he could win the trial. In her second affidavit, defendant stated that prior to trial her counsel informed her mother and brother of the 20-year plea offered by the State. She further asserted that trial counsel informed her mother that he "turned the deal down." In her third affidavit, defendant averred that she informed trial counsel that "two days prior to my confession, I was physically assaulted & threatened of my unborn child begin [*sic*] taken from me." She further

averred that she "also informed my brother, Cashmere Wallace, that I was hit in my head while in the van with officers."

¶ 29 The letter from defendant's brother stated, "The [e]arly [m]orning of December 27, 2005 me, and my sister got high. [S]he confined [*sic*] in me that office [*sic*] Two[h]ill had slapped her in the head, while in the van." The letter was signed by Cashmere Wallace, but was not sworn or notarized. The letter from defendant's mother stated, "December 27, 2005 I [d]rove [m]y [d]augher Jimille Brown to Evergreen police [s]tation, she was highly [i]ntoxicated with [m]arijuana, and [e]cstacy." The letter was signed by Camille Kershaw, but was not sworn or notarized. Both letters consist of two pieces of paper; the top half consisting of the contents of the letter and the bottom half consisting of the date, the typed name, and the handwritten signature of the "author." These two pieces of paper are held together with a single piece of white-colored tape, which was placed on the back of the paper and was attached to the petition as one sheet of paper.

¶ 30 On August 10, 2012, the circuit court summarily dismissed defendant's *pro se* petition in a written order. Regarding the claims at issue on appeal, the court first determined defendant's argument regarding trial counsel's failure to present evidence that her statements to police were the product of mental and physical coercion were "specifically contradicted by the record." The circuit court pointed out that the motion to suppress contained allegations regarding the verbal threats against defendant; however, defendant had sworn to the contents of the motion. At no point did defendant allege the interrogating officers physically assaulted her. In addition, the circuit court noted the allegations were specifically denied by the officer at the hearing. Further, in the videotaped confession defendant indicated she was treated well by the police and had no complaints about her treatment. The circuit court also referenced the fact that trial counsel

argued defendant's statement was involuntary because she was threatened by the detectives in opening and closing statements during the hearing on the motion to suppress as well as in the motion for a new trial. The circuit court concluded this allegation was "completely contradicted by the record."

¶ 31 The circuit court also determined that defendant's factual allegation that she received ineffective assistance of counsel due to trial counsel's failure to advise her of a 20-year plea offer was contradicted by the trial record. The circuit court noted that the trial court asked the State whether any plea offers were made. In response, the assistant State's Attorney informed the court and the defense that in exchange for defendant's plea to all counts, the State had offered defendant 30 years' imprisonment. The circuit court stated in its order that trial counsel acknowledged this offer and indicated he had communicated this offer to his client, but that defendant elected to proceed to trial. The trial court also asked defendant if this was her understanding of the offer and she indicated it was. The circuit court concluded the record "shows that the only offer ever made to the defendant was for 30 years in prison" and, therefore, "[t]he factual allegations in the petition are meritless."

¶ 32 Thereafter, defendant filed a notice of appeal. On July 25, 2014, this court issued an opinion in which we agreed with the State's argument that the defendant's petition was properly dismissed because the affidavits were not notarized and, therefore, did not satisfy the pleading requirements of section 122-2 of the Act (725 ILCS 5/122-2 (West 2012)). In affirming the dismissal of defendant's petition we held that the two letters from her mother and brother were not capable of being sworn to in future proceedings. This holding was based on the fact that both letters consisted of two pieces of paper; the top half consisting of the contents of the letter and the bottom half consisting of the date, the typed name, and the handwritten signature of the

author. These two pieces of paper were held together with a single piece of white-colored tape, which was placed on the back of the paper and was attached to the petition as one sheet of paper. Regarding the three unnotarized affidavits defendant authored on her own behalf, we held they failed to provide independent corroboration of the facts alleged in her petition. Specifically, we found the affidavits contained hearsay statements, that these statements were uncorroborated by any other evidence attached to the petition, and the statements in the affidavit were inconsistent with the allegations of defendant's petition. We further held that despite the insufficient affidavits, defendant's petition failed to present other evidence that provided independent corroboration for her allegations. Lastly, we found defendant failed to provide an explanation as to why the affidavits, records, or other evidence was not attached and affirmed the circuit court's summary dismissal of her petition.

¶ 33 On November 5, 2015, our supreme court issued a supervisory order directing us to vacate our July 2014 order and to reconsider the matter to determine if another result is warranted in light of its subsequent decision in *Allen*. Upon reconsideration, we conclude the circuit court erred in summarily dismissing defendant's postconviction petition for the reasons that follow.

¶ 34 ANALYSIS

¶ 35 On appeal, defendant contends that her petition stated the gist of a meritorious claim that defense counsel rendered ineffective assistance at trial. Specifically, defendant asserts her trial counsel was ineffective for two reasons: (1) for failing to present evidence that her statement to police was the product of mental and physical coercion; and (2) for failing to inform her of a 20-year plea offer. We note that defendant makes no argument on appeal as to the other allegations in her petition.

¶ 36 In response, the State first addresses the sufficiency of defendant's petition arguing: (1) that defendant forfeited her arguments regarding ineffective assistance of counsel because they were not raised in her direct appeal; and (2) that the State asserts that defendant's petition lacked independent corroboration as required by section 122-2 of the Act. The State concludes that the insufficiency of defendant's petition is a basis on which to uphold the court's summary dismissal. In the alternative, the State addresses the substance of defendant's petition, asserting defendant's contentions are rebutted by the record as defendant was never offered a 20-year plea bargain and evidence was adduced at the evidentiary hearing that defendant's statement was not a product of coercion.

¶ 37 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq.* (West 2012). A postconviction proceeding not involving the death penalty contains three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage of a postconviction proceeding, a defendant need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Id.* at 11-12. "If the circuit court does not dismiss the petition as 'frivolous or *** patently without merit' (725 ILCS 5/122-2.1(a)(2) (West 2008)), the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2008)), and where the State, as respondent, enters the litigation (725 ILCS 5/122-5 (West 2008))." *People v. Tate*, 2012 IL 112214, ¶ 10. At this second stage, the circuit court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). If no such showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. If, however, a

substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Id.*; 725 ILCS 5/122-6 (West 2012). This court reviews the summary dismissal of a post-conviction petition *de novo. Tate,* 2012 IL 112214, ¶ 10. We first consider the sufficiency of defendant's petition.

¶ 38 Sufficiency of the Petition

¶ 39 The State asserts defendant's petition was insufficient to survive first-stage review for two reasons: (1) defendant has forfeited her arguments regarding counsel's ineffectiveness; and (2) defendant failed to provide any evidence in support of her claims as required by section 122-2 of the Act. We address each argument in turn.

¶ 40 *Forfeiture*

¶ 41 "The scope of the [postconviction] proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Harris,* 224 Ill. 2d 115, 124 (2007). Accordingly, issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding. *People v. Petrenko,* 237 Ill. 2d 490, 499 (2010). A postconviction claim that depends on matters outside the record, however, is not ordinarily forfeited because such matters may not be raised on direct appeal. *People v. English,* 2013 IL 112890, ¶ 22; *People v. Youngblood,* 389 Ill. App. 3d 209, 214 (2009).

¶ 42 In the present case, defendant asserts two arguments regarding what she alleges was her trial counsel's ineffectiveness. The first argument, that her trial counsel failed to inform her of a 20-year plea offer, could not have been raised on direct appeal. Information regarding this claim was outside of the record, therefore, we find the argument is not forfeited. See *People v. Harris,* 206 Ill. 2d 1, 15 (2002) (finding "[t]he facts relating to this claim do not appear on the face of the

original appellate record, and *res judicata* and waiver therefore do not apply in this instance"). Second, defendant asserts that trial counsel was ineffective for failing to present evidence at her suppression hearing to corroborate her claim that she was mentally and physically coerced into providing her statement to police. In that this claim is based on purported corroborative evidence of coercion which was not presented, the facts relating to this claim are outside the record. Accordingly, we will also consider this portion of defendant's claim. See *id.*

¶ 43 *Compliance With Section 122-2 of the Act*

¶ 44 Whether defendant's postconviction claims survive the first stage of the postconviction proceedings is dependent upon whether defendant's petition conforms to the requirements of the Act. See *People v. Collins,* 202 Ill. 2d 59, 66-67 (2002); *People v. Delton,* 227 Ill. 2d 247, 255 (2008). Section 122-2 of the Act requires that the petitioner either provide "affidavits, records, or other evidence" to support the petitioner's allegations *or* explain the absence of such documentation. 725 ILCS 5/122-2 (West 2012). "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges,* 234 Ill. 2d at 10 (citing *Delton,* 227 Ill. 2d at 254). This is because, "[t]he legislature intended that the circuit court at the first stage would look to whether the petition alleges a constitutional deprivation and whether petitioner's proffered evidence substantially indicates the availability of admissible evidence in support of his claim, in a way that can be corroborated through later proceedings." *Allen,* 2015 IL 113135, ¶ 33. The lack of notarization on a statement styled as an evidentiary affidavit does not prevent the court from reviewing the petition's substantive virtue as to whether it set forth a constitutional claim for relief. *Id.* ¶ 34. In fact, such statements "properly qualify[y] as 'other evidence.' " *Id.* (quoting 725 ILCS 5/122-6 (West 2008)). If, however, the petitioner fails to attach any evidence, then the

petitioner must provide an explanation as to why the affidavits or other documents are unobtainable. *Collins*, 202 Ill. 2d at 66-67 (citing 725 ILCS 5/122-2 (West 2000)).

¶ 45 The State contends that defendant's petition was properly dismissed at the first stage because defendant failed to provide any evidence in support of her claims as required by section 122-2 of the Act. 725 ILCS 5/122-2 (West 2012). Specifically, the State points out that defendant submitted affidavits that were not notarized and, therefore, do not satisfy the pleading requirements of section 122-2. Relying on *Collins*, 202 Ill. 2d at 66-68, the State concludes that the failure to meet the pleading requirements of section 122-2 is fatal to defendant's postconviction petition. In response, defendant claims that "the lack of notarization on the evidentiary statements attached to a *pro se* petition is a 'technicality' that would not prevent a petition from advancing to the second stage," relying on *People v. Parker*, 2012 IL App (1st) 101809, ¶ 75.

¶ 46 Our supreme court specifically addressed the issue of whether an unnotarized affidavit can satisfy section 122-2 of the Act in *Allen*. In that case, the defendant alleged in his postconviction petition actual innocence and constitutional violations, generally pertaining to his claim that the State suborned perjury to convict him and coerced confessions from him and his codefendants. *Allen*, 2015 IL 113135, ¶ 14. Attached to his petition was a "signed statement" from Robert Langford (Langford statement). *Id.* The Langford statement indicated that Langford, along with a now-deceased accomplice, committed the murder for which the defendant was convicted. *Id.* The Langford statement was dated, signed, and contained a statement that it was made under the penalty of perjury. *Id.* The circuit court dismissed the petition as frivolous and patently without merit. *Id.* ¶ 15. The appellate court affirmed the dismissal, holding that due to the lack of notarization on the Langford statement, the petition did

not comply with section 122-2 of the Act. *Id.* ¶ 17. The appellate court also rejected an argument by the defendant that, even if the Langford statement did not qualify as an affidavit, it would still qualify as "other evidence." *Id.*

¶ 47 Our supreme court first determined that the Langford statement was not an affidavit as it was not "a 'statement sworn to before a person who has authority under the law to administer oaths.' " *Id.* ¶ 31 (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002)). The court then went on to consider "whether the lack of notarization on this statement renders the petition frivolous or patently without merit, or whether the Langford statement might otherwise qualify as sufficient evidence to survive the first stage." *Id.* The court held that the lack of notarization "does not prevent the court from reviewing the petition's 'substantive virtue' as to whether it 'set[s] forth a constitutional claim for relief.' " *Id.* ¶ 34 (quoting *People v. Hommerson*, 2014 IL 115638, ¶ 11). The court explained that the failure to notarize "does not limit the Langford statement's identification of the 'sources, character, and availability' of evidence alleged to support the petition, or destroy its ability to show that the petition's allegations are capable of independent corroboration." *Id.* (quoting *Delton*, 227 Ill. 2d at 254). Accordingly the court held that, "the circuit court may not dismiss at the first stage solely for failure to notarize a statement styled as an evidentiary affidavit." *Id.*

¶ 48 The *Allen* court went on to explain that "other evidence" need not be competent, admissible evidence at the time it is attached to the petition. *Id.* ¶ 37. According to the court, "It is enough for first-stage purposes that the defendant has provided substantive evidentiary content showing his claims are capable of corroboration and independent verification." *Id.* A petition need merely " 'identify with reasonable certainty the sources, character, and *availability* of the alleged evidence supporting the petition's allegations.' " (Emphasis in original.) *Id.* ¶ 43 (quoting

Delton, 227 Ill. 2d at 254). In examining the Langford statement, our supreme court concluded that "under the forgiving standards of the first stage" it met the requirements of the Act. *Id.*

¶ 49 Thus, under *Allen*, the lack of notarization of the documents attached to defendant's petition here does not solely justify the first-stage dismissal of defendant's petition. See *id.* ¶ 34. Instead, "under the forgiving standards of the first stage," we must consider them as other evidence. *Id.* ¶ 43. In the present case, defendant submitted a total of five documents along with her petition: three unnotarized statements from herself; and two letters, one from her mother and one from her brother. According to *Allen*, the claims within the documents attached need only be "capable of corroboration and independent verification." *Id.* ¶ 37. The documents attached to defendant's petition here are of such a character. Although the letters from defendant's mother and brother each consisted of two pieces of paper taped together with the type-written text on one half and a handwritten signature on the other half, we observe that any issues with the reliability and authenticity of the documents attached in support of a postconviction petition may be addressed at the second stage. See *id.* ¶ 38 (the second stage is appropriate for "filtering out forgeries"). Consequently, in light of *Allen*, we will look to the attached documents in our determination of whether the petition stated a gist of a constitutional claim in order to proceed to the second stage. See *id.* ¶ 34.

¶ 50 *Gist of a Constitutional Claim*

¶ 51 On appeal, defendant asserts that her petition stated the gist of a constitutional claim that defense counsel rendered ineffective assistance at trial. Specifically, defendant asserts her trial counsel was ineffective for two reasons: (1) for failing to present evidence that her statement to police was the product of mental and physical coercion; and (2) for failing to inform her of a 20-year plea offer.

¶ 52 In response, the State maintains that the record contradicts defendant's claim that trial counsel was ineffective for failing to argue her confession was a product of physical coercion during the suppression hearing. According to the State, defendant was sworn to the contents of the motion, which did not allege that the interrogating officers physically coerced her and defendant stated in her videotaped confession that she was treated well by the officers. The State also asserts that defendant's claim of a 20-year plea offer is contradicted where the record demonstrates that the trial judge specifically asked defendant if she received any plea offers and defendant replied that she had received one.

¶ 53 At the first stage of a postconviction proceeding, the trial court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. A petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *Id.* at 11-12. More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Id.* at 16-17. "The court is further foreclosed from engaging in any fact finding or any review of matters beyond the allegations of the petition." *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, a defendant "need only present a limited amount of detail in the petition" and the "threshold for survival" is "low." *Hodges*, 234 Ill. 2d at 9. A *pro se* defendant need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Id.* "Thus, in our past decisions, when we have spoken of a 'gist,' [of a constitutional claim] we meant only that the section 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Id.* "At the first stage of proceedings, we must accept as true all

facts alleged in the postconviction petition, unless the record contradicts those allegations." *People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 16 (citing *Coleman*, 183 Ill. 2d at 385).

¶ 54 Taking into account the three-stage procedure established by the Act, the *Tate* court determined that the *Strickland* standard is properly applied at the second stage of proceedings, where the defendant must "make a substantial showing of a constitutional violation." (Internal quotation marks omitted.) *Tate*, 2012 IL 112214, ¶ 19. The standard for dismissal at the first stage, comparatively, requires "[a] different, more lenient formulation," amounting to a "lower pleading standard than [required at] the second stage of the proceeding." *Id.* ¶¶ 19-20; see *People v. Domagala*, 2013 IL 113688, ¶ 35 ("During the second stage, the petitioner bears the burden of making a substantial showing of a constitutional violation."). Our supreme court explained the standard to be used, referring to it as an " 'arguable' *Strickland* test": at the first stage of proceedings, " 'a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Id.* (quoting *Hodges*, 234 Ill. 2d at 17); see *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶ 55 Defendant asserts her trial counsel was ineffective for failing to argue that her confession was coerced during the hearing on the motion to suppress. While defendant admits in her postconviction petition that trial counsel argued that her confession was coerced at the suppression hearing, defendant maintains that this argument was insufficient because trial counsel did not specifically argue that officers physically assaulted her or that they "threaten[ed] to take her unborn child from her." According to the documents attached to her postconviction petition, defendant informed trial counsel that "two days prior to her confession she was physically assaulted [and] threatened of my unborn child begin [*sic*] taken from me." She further

alleged that she "informed [her] brother Cashmere Wallace, that I was hit in my head while in the van with officers." The document signed by Cashmere Wallace states that on December 27, 2005, defendant informed him that Towhill "slapped her in the head" while she was in the van. According to defendant, trial counsel should have called her to testify at the suppression hearing and his failure to do so constituted ineffective assistance. Defendant further maintains that she suffered prejudice because, had this evidence been presented, the result of the suppression hearing would have been different.

¶ 56 The State contends the record rebuts defendant's assertion where defendant was sworn to the contents of the motion, which did not allege that the interrogating officers physically coerced her. The State also argues that, when testifying at the suppression hearing, Towhill expressly denied defendant was threatened. Moreover, the State notes that in defendant's videotaped confession, she indicates she was treated well by the officers and had no complaints about her treatment.

¶ 57 We conclude defendant has set forth an arguable claim of ineffective assistance of counsel. Our review of defendant's petition and the record reveals defendant alleged that before the suppression hearing she informed trial counsel that two days prior to confessing she was physically and psychologically assaulted. In her third affidavit, defendant stated, "two days prior to my confession, I was physically assaulted" and that she told her brother that she was hit in the head in the van. Accordingly, defendant alleged that she intended for this evidence to be presented during the suppression hearing. The record further indicates that during the suppression hearing, Towhill did not testify as to whether defendant was abused and threatened in the van on December 26, 2005. Consequently, her allegations in the petition are not directly refuted by the record. In addition, Cashmere Wallace's statement indicated that defendant had

informed him that she had been struck by Towhill prior to making her confession. Although Wallace's statement contains hearsay, which we cannot consider (*People v. Gray*, 2011 IL App (1st) 091689, ¶ 16), he does corroborate that the conversation with defendant regarding the alleged abuse that occurred. See *Allen*, 2015 IL 113135, ¶ 37. Taking all of defendant's allegations in her postconviction petition as true (*Hodges*, 234 Ill. 2d at 10), the motion to suppress would have had a reasonable chance to have been granted as the voluntariness of a confession must be based on all of the surrounding circumstances, including the allegation of coercion and abuse prior to the date of the confession. Thus, "under the forgiving standards of the first stage" (*Allen*, 2015 IL 113135, ¶ 43), we conclude defendant sufficiently established that her trial counsel's performance arguably fell below an objective standard of reasonableness. See *Tate*, 2012 IL 112214, ¶¶ 23, 25. Defendant further adequately alleged that she arguably suffered prejudice as the confession was the primary evidence against her. Accordingly, the standard articulated in *Tate* has been met and we reverse the judgment of the circuit court and remand for defendant's petition to proceed to the second stage of postconviction proceedings. See *id.* ¶¶ 19-20, 23-26.

¶ 58 Because we hold defendant sufficiently alleged a constitutional violation, we decline to address defendant's second argument, that trial counsel was ineffective for failing to inform her of a 20-year plea offer, as partial summary dismissals are not permitted under the Act. See *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). We express no opinion at this stage as to whether defendant will ultimately be able to prevail on her ineffective-assistance claim. We merely hold that defendant's claim of a constitutional violation is arguable on its merits.

¶ 59 CONCLUSION

¶ 60 Accordingly, we vacate our July 25, 2014, opinion, reverse the judgment of the circuit

court summarily dismissing defendant's first-stage postconviction petition, and remand the matter for second-stage proceedings.

¶ 61 Reversed and remanded.