FIRST DIVISION
January 25, 2016

No. 1-13-3524
2016 IL App (1st) 133524-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	09 CR 11653
	)	
IAN VALENCIA,	)	
	)	Honorable James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when it summarily dismissed defendant's *pro se* first stage postconviction petition where the petition set forth an arguable basis for a claim of ineffective assistance of trial counsel based on defendant's allegation that he waived his right to testify due to trial counsel's incorrect legal advice.

¶ 2 After a bench trial in 2010, defendant, Ian Valencia, was convicted, *inter alia,* of attempted first degree murder. His conviction was upheld by this court in *People v. Valencia*, 2012 IL App (1st) 1022312-U. In 2013, defendant initiated proceedings for relief pursuant to the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant's

pro se petition alleged actual innocence based on newly discovered evidence, ineffective assistance of counsel based on numerous grounds, and that his conviction and sentencing were unconstitutional. The trial court found defendant's petition to be frivolous and patently without merit and dismissed the petition. For the reasons set forth below, we reverse.

¶ 3 BACKGROUND

¶ 4 Defendant's conviction for attempted first degree murder stems from a shooting that took place on June 11, 2009. A summary of the evidence presented at defendant's bench trial follows.

¶ 5 Nelson Villagomez testified at trial that on the date of the shooting at approximately 4:45 p.m., he and his brother, Freddie Villagomez, were walking northbound from the bus stop at the intersection of North Kimball Avenue and West Belle Plaine in Chicago toward their home. As the two were walking, a gray Oldsmobile pulled up next to them. Defendant was in the passenger seat and Walter Quevedo was driving. During the bench trial, Nelson testified that defendant started "gang banging," specifically, saying "royal" and making a gang sign. Neither Nelson nor Freddie threw up any gang signs in response. This encounter lasted approximately 10 seconds. Nelson testified that he did not have any connection with any gangs. Freddie then walked in front of him as they crossed the street toward their home. Nelson further testified that he then observed the Oldsmobile parked in an alley about half a block from his home, which he estimated was a couple hundred feet away. With both arms raised and his palms up, Nelson looked at the Oldsmobile and said "What you want to do?" Nelson stated that he observed defendant's hand come out of the passenger window, saw flames come out of the gun, and heard approximately six gunshots. Nelson looked to see if his brother was out of the way and dropped to the ground. Nelson testified that defendant shot "in [his] direction." After the shooting, Nelson checked on his brother and called the police, giving them a description of the vehicle and

its occupants. The police arrived soon thereafter and took Nelson and Freddie to a location on West Wilson Avenue where officers had defendant and Quevedo in custody. Nelson positively identified defendant and Quevedo within minutes of the shooting.

¶ 6 Freddie testified that as he and his brother walked home from the bus stop, defendant and Quevedo pulled up alongside them in a gray Oldsmobile. Defendant threw gang signs at them, but Freddie did not know what gang sign defendant was showing and could not remember what defendant yelled at them. Freddie waved his hands and told defendant he was not a gang banger. Freddie testified that he heard his brother say something to defendant but could not remember what was said. Freddie, walking in front of Nelson, then crossed Kimball Avenue towards their apartment. At that time, Freddie heard five to six gunshots coming from an alley across the street. He testified that he did not look to see where the gunshots were coming from and instead ran into his apartment building. After the shooting stopped, Freddie went back outside to check on his brother. Along with Nelson, Freddie positively identified defendant and Quevedo at a show-up that took place minutes after the shooting.

¶ 7 Officer John Becker also testified at defendant's trial. He testified that on the date of the shooting, he was working with his partner Officer Valentine and Sergeant Daniels. They responded to a radio dispatch of a shooting on North Kimball Avenue with the suspects described as Hispanic males in a silver or gray Oldsmobile with temporary tags. As they were driving towards the scene of the shooting, the officers observed a vehicle matching the dispatch's description, made a U-turn, and stopped the vehicle. The officers ordered the men to show their hands and exit the vehicle and they complied. Officer Becker testified that he then radioed to the other officers, who were with the victims, and informed them that a possible offender from the shooting was in custody. Officer Becker stated that the other officers said they would bring the

victims over to the area where he was. Officer Becker testified that a minute or two later, the other officers drove by with the victims in their car in order to conduct a show-up and he heard over the radio that the victims had positively identified defendant and Quevedo. Defendant and Quevedo were given *Miranda* warnings and placed under arrest.

¶ 8 Officer Becker stated that when he searched the car, he found a square hole beneath the glove box, in which he found a semiautomatic, unloaded .380-caliber Kel-Tec handgun, and two live .380 caliber rounds. Officer Becker spoke with defendant in the processing room of the 17th district police station at approximately 7:45 p.m. the night of the shooting. Sergeant Daniels again gave defendant *Miranda* warnings. Officer Becker testified that defendant told him and Sergeant Daniels that defendant "got in an altercation with two people over a gang territory." Defendant stated that Quevedo told him that there was a gun under the dashboard on the passenger side. Defendant also stated that he grabbed the gun, "shot at" the victims "until the gun was empty," and then drove away. Officer Becker's conversation with defendant was neither written down nor recorded.

¶ 9 Amy Campbell, an evidence technician, testified that she recovered five RP 380 caliber shell casings from the alley where the shooting occurred, one bullet in the second story siding of a building south of Nelson and Freddie's home, and one bullet in a flowerbed in front of their home. Tonia Brubaker, a forensic scientist specializing in firearm identification, testified to a reasonable degree of scientific certainty that all of the recovered shell casings and bullets came from the gun found under the dashboard in the Oldsmobile.

¶ 10 For defendant's case-in-chief, defense counsel presented the stipulated testimony of Detective Perez, who would have testified that Nelson and Freddie told him that they were

walking southbound on Kimball Avenue when they were approached by the Oldsmobile. The defense then rested without calling any witnesses.

¶ 11 After trial, the court determined the State's witnesses to be credible, specifically finding that "the defendant made the statement that Officer Becker testified to, admitting that he was the shooter." Regarding the issue of defendant's intent, the court remarked, "One shot could be attempt murder. Might not be. Might be a warning. Might be something else. Two shots, three, four, five-five shots. All in the direction of Nelson Villagomez and all with the intent to kill him." The court ultimately found defendant guilty of two counts of attempted first degree murder and one count of aggravated discharge of a firearm. Defendant was sentenced to 6 years' imprisonment for attempted murder, enhanced by a 20-year term for discharging a firearm during the commission of the offense.

¶ 12 On direct appeal, defendant argued that the State failed to prove he had the requisite specific intent to kill Nelson. On May 8, 2012, this court affirmed the trial court's decision and held there was sufficient evidence to prove defendant's specific intent to kill beyond a reasonable doubt. *People v. Valencia*, 2012 IL App (1st) 102312-U, ¶ 16.

¶ 13 On July 12, 2013, defendant filed a *pro se* postconviction petition raising, *inter alia*, the following arguments: (1) defendant is actually innocent of attempted first degree murder; (2) trial counsel was ineffective for incorrectly advising defendant about the admissibility of his juvenile adjudications, which caused defendant to give up his right to testify at trial; (3) trial counsel was ineffective for failing to interview Quevedo; (4) trial counsel was ineffective for telling defendant to reject the State's plea offer of nine years imprisonment in exchange for a guilty plea to one count of Class 1 aggravated discharge of a firearm, because defendant would not be convicted of attempted murder at trial and would get a lesser sentence on a lesser charge; and (5)

the 20-year mandatory firearm enhancement violates the United States and Illinois constitutions as applied to 17-year-olds.

¶ 14 Defendant supported his petition with numerous affidavits. In support of his actual innocence claim, defendant attached the affidavit of James Galambos, whom defendant met while they were both incarcerated at Stateville Correctional Center. Galambos attested that he witnessed the shooting and that he "saw the gun pointed upward at an angle, not towards the man that was yelling." In support of his claims of ineffective assistance of counsel, defendant attached affidavits from himself, Quevedo, Jacqueline Castillo, Jennifer Carcione, and David Tamraz. All affidavits were notarized, except Quevedo's. In Quevedo's affidavit, he attested that defendant's attorney never contacted him or asked him to testify but that if the attorney had, he would have testified to the events of the day of the shooting.

¶ 15 In the affidavit from defendant's mother, Castillo, she attested that she was in court when the State offered defendant an eight-and-a-half year plea deal, which was on the same day that Quevedo accepted his plea. Castillo also stated that defendant told her that his trial counsel "told him he could beat the case and it would be a real bad mistake to take a plea and lose [eight-and-a-half] years of [defendant's] life when [trial counsel] knew that with a bench trial [defendant] could be home in a few months." Further, Castillo averred that she spoke directly with defendant's trial counsel and told him that she wanted defendant to take the plea, but that trial counsel responded, " '[A]s long as [defendant] takes my advice and takes a bench trial and doesn't get on the stand to testify like I know he wants to, he will be home before he's 19.' "

¶ 16 Defendant's aunt, Carcione, attested in her affidavit that she was present when defendant's trial counsel "informed us that [defendant] can beat the case so he shouldn't take the

[eight] years offered." She also stated, "the attorney kept saying there wasn't a case since [defendant] didn't hit or injury [*sic*] anyone."

¶ 17 On September 27, 2013, in a 28-page written order, the trial court summarily dismissed defendant's *pro se* postconviction petition.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant contends that his postconviction petition was improperly dismissed by the trial court because it raised arguable claims of actual innocence, ineffective assistance of counsel, and unconstitutional sentencing. The Act provides a postconviction remedy to petitioners who claim that substantial violations of their constitutional rights occurred during trial. *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991). A postconviction proceeding is a collateral attack upon a final judgment and its purpose is not to determine guilt or innocence, but to inquire into constitutional issues that have not been adjudicated. *Id.* The Act sets out a three-stage process for adjudicating petitions for postconviction relief. At the first stage, the trial court considers the petition without input from the State or further pleadings from the defendant in order to determine if it is frivolous and patently without merit. 725 ILCS 5/122-2.1 (West 2012). To survive dismissal at the initial stage of a postconviction proceeding, a petition need only present the gist of a meritorious constitutional claim. *People v. Seaberg*, 262 Ill. App. 3d 79, 82 (1994). Any other substantive questions relating to the issues raised in the petition are not to be addressed at the preliminary stage. *Id.* at 83. This court reviews a first stage summary dismissal *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 20 After review of all of defendant's arguments and evidence in support thereof, we find it most efficient to first address defendant's claims of ineffective assistance of counsel. On appeal, defendant argues that his trial counsel was ineffective where: (1) counsel erroneously told

defendant that his juvenile adjudications were admissible against him, which caused defendant to give up his right to testify; (2) counsel failed to interview Quevedo, whose testimony would have helped the defense; and (3) defendant rejected the State's plea offer due to counsel's erroneous advice that defendant would not be convicted of attempted murder if he went to trial.

¶ 21 We first address defendant's contention that he waived his right to testify based on his counsel's erroneous advice. The right of a criminal defendant to testify on his own behalf at trial is a fundamental constitutional right. *People v. Piper*, 272 Ill. App. 3d 843, 846 (1995). "The denial of a defendant's right to testify can be a constitutional violation in and of itself, since a criminal defendant's prerogative to testify is a fundamental right which only the defendant may waive, and the question of the exercise of that right is not a matter of a strategic or tactical decision best left to trial counsel." *Id.* (citing *People v. Powers*, 260 Ill. App. 3d 163 (1994)).

¶ 22 In evaluating a claim of ineffective assistance of counsel, we look to *Strickland v. Washington*, 466 U.S. 668 (1984), in which the Supreme Court held that to prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's assistance fell below a standard of reasonableness and that the deficient performance prejudiced him. *Id.* at 687-88. Here, we must apply the standard in *Strickland* to a first stage postconviction petition. See *People v. Tate*, 2012 IL 112214, ¶¶ 18-20. Illinois courts have consistently recognized a petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis in either law or fact. *Id.* ¶ 9 (citing *People v. Hodges*, 234 Ill. 2d 1, 9 (2009)). Therefore, " '[a]t the first stage of [*sic*] postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below and objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphasis in original.) *Id.* ¶ 19 (quoting *Hodges*, 234 Ill.

2d at 18). At the first stage, the trial court must take the allegations in the petition and accompanying documentation as true, so long as they are not affirmatively rebutted by the record. *People v. White*, 2014 IL App (1st) 130007, ¶ 19.

¶ 23 In its order of September 27, 2013, that dismissed defendant's *pro se* postconviction petition, the trial court found that "[defendant] has failed to show that his counsel provided objectively unreasonable advice, because juvenile adjudications may be admissible against testifying defendant under certain *** circumstances." The trial court also found that defendant could not show that his counsel's advice prejudiced him. We disagree.

¶ 24 Defendant asserts that it is arguable that his trial counsel was ineffective because defendant would have testified at trial had it not been for counsel's erroneous advice that if defendant testified, his juvenile adjudications would be used against him. In response, the State contends that trial counsel's advice was not erroneous because according to *People v. Villa*, 2011 IL 110777, ¶ 53, juvenile adjudications may be admitted against a testifying defendant if the defendant "opens the door" by attempting to mislead the trier of fact about his criminal background while testifying. The State further argues that defendant cannot make out a claim of deprivation of the right to testify because he has not alleged that when it came time to testify, he told his counsel, despite his advice to the contrary, he wanted to testify. The State points to the admonishments given by the trial court that advised defendant of his right to testify as evidence in the record that rebuts defendant's arguments and shows that defendant chose not to testify in a knowing, voluntary, and intelligent manner.

¶ 25 The State further contends that the record contradicts defendant's argument that counsel exerted undue influence on his right to testify. The State cites to *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994), and *People v. Brown*, 54 Ill. 2d 21, 24 (1973), for the proposition that in

order to sustain a claim of deprivation of the right to testify, a defendant must allege that when the time came to testify, he told his counsel that he wanted to testify despite counsel's advice to the contrary. In *Thompkins*, the defendant, who had been sentenced to death for two underlying murder convictions, appealed an order from the circuit court that dismissed his postconviction petition without an evidentiary hearing. *Thompkins*, 161 Ill. 2d at 154. The defendant contended, *inter alia*, that his counsel improperly denied his right to testify. *Id.* at 177. The defendant asserted that before trial he told his counsel that he wanted to testify on his own behalf, and that at one meeting, his attorney said he would prepare the defendant to testify, but never did. *Id.* The court found the defendant's arguments to be unconvincing because the defendant's affidavit only showed that he had told his lawyer *sometime before trial* that he wished to take the stand and nothing in the record showed that the defendant reaffirmed his wishes when it came time for him to testify. (Emphasis added.) *Id.* Ultimately, the court held that the defendant's waiver of the right to testify was valid because "the trial judge reviewed with the defendant the nature of the sentencing hearing and the procedures that would be followed at that stage of the proceedings" and he had made that decision "after considerable discussion" with his counsel. *Id.* at 178.

¶ 26 In *Brown*, the defendant was found guilty of manslaughter of a three-year-old boy. *Brown*, 54 Ill. 2d at 22. The defendant filed a petition seeking postconviction relief, which was subsequently dismissed upon the State's motion. *Id.* In his postconviction petition, the defendant alleged that his constitutional rights were violated either due to his counsel's ineffectiveness or because counsel refused to permit him to testify. *Id.* The defendant presented an affidavit executed by his brother-in-law and brother-in-law's wife who attested that the defendant's attorney would not put the defendant on the stand even though the defendant insisted on

testifying. *Id.* at 23. The court affirmed the dismissal of the defendant's petition, finding that there was no statement in the record that the defendant, when the time came for him to testify, told his counsel that we wanted to take the stand despite advice to the contrary. *Id.* at 24.

¶ 27 Here, like the State, the trial court also relied on the *Thompkins* and *Brown* cases. Specifically, the trial court's order read, "[t]o warrant an evidentiary hearing under the Act on a claim of deprivation of the right to testify on one's own behalf, a petitioner must allege that 'when the time came for [the petitioner] to testify, [he] told his lawyer he wanted to despite advice to the contrary. *People v. Brown*, 54 Ill. 2d 21, 24 (1973); accord *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994)."

¶ 28 We find the State's and the trial court's reliance on *Thompkins* and *Brown* to be misplaced. The *Thompkins* court was faced with determining whether the defendant's petition merited an evidentiary hearing. *Thompkins*, 161 Ill. 2d at 154. Likewise, although the court's decision in *Brown* does not specifically state that it was examining the defendant's petition at the second stage of postconviction review, we can adduce that a posture similar to second stage review was at issue due to the fact that the defendant's petition was "dismissed upon motion." *Brown*, 54 Ill. 2d at 22. See 725 ILCS 5/122-5 (West 2012) (At the second stage, the State has the opportunity to either answer or move to dismiss the petition).

¶ 29 In the case at bar, defendant's petition was merely at the first stage of post conviction proceedings, where the threshold for survival is low. *Tate*, 2012 IL 112214, ¶ 9. Yet, the trial court's use of the words "[t]o warrant and evidentiary hearing" in its September 27, 2013, dismissal order clearly reflects that the trial court analyzed defendant's petition under parameters that are appropriate at the second stage. This was not the proper lens through which to view defendant's petition at the first stage. At this stage, rather than show that he was due an

evidentiary hearing, which would be appropriate at the second stage, defendant only needed to allege a gist of a constitutional deprivation by meeting the "arguable" *Strickland* test. *Tate*, 2012 IL 112214, ¶ 19. That is, defendant is only required to show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable that he was prejudiced. *Id*.

¶ 30 Based on our determination that the trial court applied an incorrect standard when reviewing defendant's petition, and because we review this matter *de novo*, we next determine whether defendant's petition sufficiently sets forth the gist of a constitutional claim that is not rebutted by the record. To support his position that his petition sufficiently showed that his counsel was arguably ineffective, defendant cites to *People v. Smith*, 326 Ill. App. 3d 831 (2001). In *Smith*, the defendant was convicted of first degree murder and sentenced to 20 years in prison following a bench trial. *Id.* His conviction was affirmed on direct appeal. *Id.* The defendant sought post conviction relief, but the trial court dismissed his petition as frivolous and patently without merit. *Id.* On appeal, the defendant argued that his trial counsel was ineffective when he gave him incorrect legal advice that persuaded him not to testify. *Id.* at 838. Specifically, in his affidavit, the defendant asserted that his trial counsel had incorrectly advised him that if he testified, evidence of his gang involvement would be presented, but that it would not if he did not testify. *Id.* at 845. At the defendant's trial, he waived his right to testify, but evidence of his gang involvement was presented anyway; thus, the court found that trial counsel's advice to the contrary was erroneous. *Id.* The *Smith* court stated, "[a]t this point, we need not determine whether defendant would be entitled to relief on this claim. Instead, the question is whether the allegation that defendant's trial counsel was constitutionally ineffective for advising him not to testify based on erroneous legal analysis was frivolous, patently without merit, and rebutted by

the record." *Id.* at 846. Ultimately, the court found that the defendant's allegations of ineffective assistance regarding his right to testify were not rebutted by the record, and as a result, the defendant's petition advanced to the second stage. *Id.* at 846-47.

¶ 31 Here, defendant, like the defendant in *Smith*, is seeking review of the dismissal of his postconviction petition at the first stage; thus we need not determine whether defendant is entitled to the relief sought in his petition, but rather, whether his allegations are rebutted by the record. *Id.* at 846. Defendant provided his own affidavit in support of his ineffective assistance of counsel claim. In his affidavit, defendant attested,

> "Once it was decided I would take a [b]ench [t]rial I told my [a]ttorney I wanted to testify so that I could explain to the [j]udge exactly what I had told the [p]olice when I was arrested and so that I could tell the [j]udge what happened and that I never had the intention of killing or harming either of the Villagomez brothers. My attorney told me that if I testified[,] the shooting I took part in as a [j]uvenile would be used against me by the State and the [j]udge would end up ignoring anything I said because of it. So I didn't testify."

Defendant argues that but for his counsel's erroneous advice, he would have testified. The State points to the admonishments that the trial court gave to defendant as positive evidence in the record that rebuts defendant's claims. We believe the State mischaracterizes this evidence. The record shows that prior to trial, defendant stated that it was his decision not to testify in this case and that said decision was made of his own free will. However, what the State overlooks is the accuracy of the advice that counsel gave defendant that arguably caused him not to testify. In defendant's affidavit, he stated, "[m]y attorney told me that if I testified[,] the shooting I took part in as a [j]uvenile would be used against me by the State *and the [j]udge would end up ignoring*

anything I said because of it. So I didn't testify." (Emphasis added.) We reiterate that at the first stage of postconviction proceedings, the trial court must take the allegations in the petition and accompanying documentation as true, so long as they are not affirmatively rebutted by the record. *White*, 2014 IL App (1st) 130007, ¶ 19. We acknowledge that there is a possibility that defendant's juvenile adjudications could have been used against him under certain circumstances set forth in *Villa*. *Villa*, 2011 IL 110777, ¶ 53 (holding juvenile adjudications may be admitted against a testifying defendant if the defendant "opens the door" by attempting to mislead the trier of fact about his criminal background while testifying.) However, defendant's counsel informed him that his involvement in the shooting as a juvenile *would* be used against him, as if it were a foregone conclusion. This is not correct. If defendant had testified, he may not have misled the judge regarding his juvenile record, thus preventing such evidence from being used against him for impeachment purposes. Similar to the advice given by the defense counsel in *Smith*, so too does defendant's counsel's advice here fall below and objective standard of reasonableness. It is arguable that counsel's advice misled defendant into thinking that, no matter what, his juvenile adjudication would be used against him.

¶ 32 Further, it was arguably an erroneous recitation of the law for counsel to advise defendant that the trial judge would "ignore anything [defendant] said" due to his juvenile adjudication. "In a bench trial, it is for the trial judge to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Bailey*, 265 Ill. App. 3d 262, 271-72 (1994). Simply put, defense counsel did not know what evidence the trial court would or would not have considered or what inferences would have been drawn therefrom. Thus, to inform defendant that anything he said would be ignored was arguably erroneous advice.

¶ 33 We, likewise, find that defendant can satisfy the second prong of *Strickland* because it is arguable that defendant was prejudiced by counsel's erroneous advice. *Tate*, 2012 IL 112214, ¶ 24. According to his affidavit, which must be taken as true at this stage, defendant wanted to testify but did not because of what his attorney told him. This shows that counsel's inaccurate advice prevented defendant from testifying, which arguably prejudiced him since we do not know what defendant's testimony would have been or how the court would have viewed it. Therefore, we find that defendant's petition adequately sets forth allegations which show that his counsel's performance arguably fell below an objective standard of reasonableness and that he was arguably prejudiced. We do not, by our ruling, suggest that defendant's argument will ultimately prevail. Rather, we are following long established legal precedent regarding the procedural process which must be applied to a postconviction petition. In the instant case, the record suggests the trial judge either conflated the first and second stages, or he went directly to the second stage when ruling on defendant's petition. We voice no opinion on the ultimate ruling which will result from allowing defendant's petition to advance in the proper procedural sequence. However, as a court of review, the instant case aside, we cannot overlook the trial court's procedural misstep in failing to apply the appropriate standard to defendant's first stage postconviction petition.

¶ 34 As a final matter, we note that, like the court in *People v. Plummer*, 344 Ill. App. 3d 1016 (2003), we, too, "are prepared to individually address the remaining allegations raised in defendant's *pro se* petition. However, we believe the *Rivera* case precludes us from doing so." *Plummer*, 344 Ill. App. 3d at 1024 (citing *People v. Rivera*, 198 Ill. 2d 364, 373-74 (2001) (holding that partial summary dismissals made during the first stage of a postconviction proceeding are not allowable under the Act)). Because one of defendant's allegations raises the

gist of a constitutional deprivation and said allegation is not positively rebutted by the record, we reverse and remand to the trial court for further proceedings without addressing all of defendant's appellate arguments.

¶ 35 We will, however, address defendant's assertion that on remand this case should be reassigned to a trial judge other than the one who presided over the dismissal of his petition. A postconviction defendant is entitled to have his case remanded to a different judge if he would be substantially prejudiced by having to appear before the judge who presided over his trial. *People v. Hall*, 157 Ill. 2d 324, 331 (1993). However, there is no absolute right to substitution of judge at a postconviction proceeding. *Id.* To obtain a remand to a different judge, a defendant must show "something more" than the mere fact that the trial judge ruled against him or made erroneous rulings. *People v. Tally*, 2014 IL App (5th) 120349, ¶ 44. A defendant can show "something more" by demonstrating "animosity, hostility, ill will, or distrust" (*People v. Vance*, 76 Ill. 2d 171, 181 (1979)), or "prejudice, predilections or arbitrariness" (*People v. McAndrew*, 96 Ill. App. 2d 441, 452 (1968)). *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006).

¶ 36 In this case, defendant argues that this matter should be remanded to a different judge because the trial judge made improper credibility and factual determinations when ruling on defendant's postconviction petition that prejudiced the merits of defendant's claims. In response, the State asserts that the trial court properly analyzed each of defendant's claims. The State also contends that defendant has not presented any evidence that demonstrates "animosity, hostility, ill will, or distrust" or "prejudice, predilections or arbitrariness." We agree. Defendant has neither presented any evidence of any "animosity, hostility, ill will or distrust," nor "prejudice, predilections or arbitrariness." We find nothing in the record to suggest that the trial judge acted in anything but a fair, nonprejudicial manner. The fact the trial court ruled against defendant is

not enough. See *Tally*, 2014 IL App (5th) 120349, ¶44. Likewise, "[e]rroneous rulings by the trial court are 'insufficient reasons to believe that the court has a personal bias for or against a litigant.' " *Id.* (quoting *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002)). The mere fact that the trial court here made an erroneous ruling that required reversal does not evidence that defendant was prejudiced. As such, we remand this matter to the trial judge who presided over defendant's trial and postconviction proceedings thus far.

¶ 37 CONCLUSION

¶ 38 We find that defendant's petition was improperly dismissed at the first stage of postconviction proceedings because the record does not positively rebut defendant's arguable claims of ineffective assistance of counsel. Therefore, consistent with the court's holding in *Rivera*, and based on our finding that the trial judge should not be disqualified, defendant's entire postconviction petition shall advance to the second stage and proceed before the same trial judge.

¶ 39 Reversed and remanded with directions.