

No. 1-13-4003

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

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 14691
	)	
CURTIS McCOY,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Where defendant's first stage postconviction petition, which is reviewed with a lower pleading standard, raised an arguable claim of ineffective assistance of trial counsel, the circuit court's summary dismissal of the first stage petition was improper, thus we reverse the case and remand it for second-stage postconviction proceedings.

¶ 2 Defendant Curtis McCoy appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the circuit court erred in dismissing his petition because he presented an arguable claim that his trial counsel rendered ineffective assistance. We find that defendant's first stage postconviction petition has raised an arguable claim of ineffective assistance of counsel, therefore, the case is remanded for second stage postconviction proceedings.

¶ 3 **BACKGROUND**

¶ 4 Following a 2011 bench trial, defendant was convicted of heinous battery and aggravated domestic battery for pouring a bottle of nail polish remover over his wife, Raven Brown McCoy, and setting her on fire with a lighter. At sentencing, the trial court merged the aggravated domestic battery conviction into the heinous battery conviction and sentenced defendant to 19 years' imprisonment.

¶ 5 On direct appeal, defendant argued that his sentencing hearing was unfair and violated due process because the prosecutor referred to evidence outside the record while arguing in aggravation, and that he was not advised of his right to elect the statute under which he would be sentenced. This court found that defendant had failed to properly preserve these issues for appeal and that no plain error occurred, and therefore, honored his forfeiture of the issues and affirmed his conviction and sentence. *People v. McCoy*, 2013 IL App (1st) 113000-U.

¶ 6 On August 9, 2013, while his direct appeal was pending, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2012)), prepared with the assistance of a law student, alleging that his trial counsel rendered ineffective assistance on three bases. First, defendant argued, in general, that the cumulative effect of trial counsel's "multitude of errors," none of which were specified, rendered counsel ineffective. Second, defendant argued that counsel failed to investigate his claims and present evidence that Raven had three prior arrests for committing domestic violence against him, and that such evidence would have corroborated his trial testimony that Raven was the aggressor on the night of the incident, impeached her credibility, and supported a theory of self-defense. Finally, defendant argued that counsel was ineffective for failing to interview and call his mother to testify about Raven's abusive character and her prior violent acts against him, and that her testimony would have corroborated his theory of self-defense.

¶ 7 Defendant attached to his petition an affidavit from his mother, Katherine McCoy, in which she stated that Raven was known for her violent and sometimes explosive temper, and that she observed Raven always being loud and abusive towards defendant. She stated that on several occasions, Raven physically abused defendant at family functions by punching him and hitting him in the face. Katherine further stated that on the night of the incident, defendant came to her house and she treated the severe wounds to his arms, back and chest inflicted by Raven. Katherine also stated that she was willing to testify at trial about Raven's violent character, but counsel never contacted her.

¶ 8 Defendant also attached his own affidavit in which he averred that he asked counsel to investigate Raven's three prior arrests for domestic violence against him in Memphis, Tennessee, Cameron, North Carolina and Chicago, but counsel failed to do so. Defendant also stated that he

informed counsel on several occasions that his mother, Katherine McCoy, was willing to testify about Raven's violent and abusive character, and about prior specific acts of aggression against him. Counsel told defendant that she was going to call Katherine to testify, but she did not, and after the trial, counsel said that she changed her mind because she thought that they had won the case. Defendant also attached copies of several pages of his direct examination trial testimony.

¶ 9 The circuit court found that defendant's allegation that counsel failed to investigate Raven's prior arrests was conclusory and speculative, and noted that defendant failed to attach any documentation showing that Raven was previously arrested for domestic violence. The court further stated that it had rejected defendant's trial testimony that he acted in self-defense and that Raven was the initial aggressor on the night of the incident, and instead, had found Raven's testimony credible, and thus, defendant was not prejudiced by counsel's allegedly deficient performance. The court also found that Katherine's affidavit provided the same evidence that defendant could have testified to, and, in fact, that defendant and Raven had both testified at trial about their abusive relationship. The court pointed out that Katherine was not present and had no personal knowledge about the events of the night in question, and thus, her testimony that Raven caused defendant's wounds would have been inadmissible hearsay. In addition, the court found that defendant could have raised the issue of trial counsel's ineffectiveness for failing to call his mother as a witness on direct appeal, and because he did not do so, the issue was waived. Based on these findings, the circuit court found defendant's allegations frivolous and patently without merit, and summarily dismissed his postconviction petition.

¶ 10

ANALYSIS

¶ 11 On appeal, defendant contends that the circuit court erred when it dismissed his petition because he raised an arguable claim that trial counsel rendered ineffective assistance where she failed to present evidence which would have impeached Raven's credibility and supported his theory of self-defense. Defendant asserts that counsel should have presented evidence that Raven had three prior arrests for committing domestic violence against him, and that counsel should have called his mother to testify about Raven's prior violent acts and the injuries he suffered on the night of the incident. Defendant argues that such evidence would have impeached Raven's credibility, and may have affected the outcome of the case, which was based on the court's credibility assessment of their conflicting versions of the events of that night.

¶ 12 The State responds that defendant's claim is forfeited because it is a matter of trial record that could have been raised on direct appeal. Alternatively, the State argues that counsel's decisions were tactical and matters of trial strategy, and thus, do not constitute ineffective assistance. The State points out that defendant testified about Raven's domestic battery arrests, and that Raven acknowledged their history of domestic violence. The State further argues that the evidence would not have changed the outcome of the trial because defendant would have had to admit that he set Raven on fire to advance the affirmative defense of self-defense, but instead, he testified that she accidentally set herself on fire.

¶ 13 We review the circuit court's order summarily dismissing defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial

denial of his constitutional rights under Constitution of the United States or of the State of Illinois Constitution. 725 ILCS 5/122-1 (West 2012); *Coleman*, 183 Ill. 2d at 378-79. A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 124 (2007).

¶ 14 Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory, such as a theory that is completely contradicted by the record. *Id.*

¶ 15 As a threshold matter, we find that the allegations raised by defendant in his postconviction petition could not have been raised on direct appeal, and therefore, they are not forfeited. The supreme court has held that an ineffective assistance of counsel claim based on conduct that the record shows counsel did, in fact, do is subject to forfeiture, but a claim based on what counsel should have done may rely on proof that is not contained in the record due to counsel's allegedly deficient representation. *People v. Tate*, 2012 IL 112214, ¶ 14. Thus, " 'a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense.' " *Id.*, quoting *People v. West*, 187 Ill. 2d 418, 427 (1999)).

¶ 16 In this case, defendant alleged that trial counsel failed to investigate his claims that Raven had three prior arrests for committing domestic violence against him, and that counsel failed to interview and present testimony from his mother, whose affidavit was attached to his petition.

Since these claims are based on acts defendant alleges that trial counsel should have done, not on what counsel did, they are not forfeited. *Tate*, 2012 IL 112214, ¶ 15.

¶ 17 To determine if defendant's petition had an arguable basis either in law or in fact, we apply the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate whether counsel's assistance was ineffective. *Hodges*, 234 Ill. 2d at 17. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687.

¶ 18 To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). However, at the first stage of postconviction proceedings, allegations of ineffective assistance of counsel are judged by a lower pleading standard, and a petition raising such claims may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. 2d at 17.

¶ 19 Trial counsel has a duty to conduct both factual and legal investigations on behalf of her client. *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). Whether counsel was ineffective for failure to investigate and present evidence is determined by the value of the evidence that was not presented at trial and the closeness of the evidence which was presented. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). Counsel's failure to conduct an investigation, develop a defense, and present available witnesses to corroborate a defense have been found to constitute

ineffective assistance. *Id.* at 107-08. Counsel's failure to impeach a witness has also been found to constitute ineffective assistance where such failure could have affected the credibility assessment made by the trier of fact. See, *e.g.*, *People v. Hobson*, 2014 IL App (1st) 110585, ¶ 27.

¶ 20 Here, the outcome of this case turned on the credibility of two witnesses, the defendant and the victim, and the trial court resolved the credibility issue in favor of the victim. The court commented on defendant's failure to support his motion with documents. While the arrest reports from Raven's prior arrest would have been inadmissible (*People v. Warmack*, 83 Ill. 2d 112, 128 (1980)), the police reports may have been used to corroborate the defendant's testimony about his altercations with Raven and to impeach Raven's testimony.

¶ 21 At this first stage of postconviction proceedings where petitions are judged by a lower pleading standard (*People v. Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. at 17)), and where the credibility of the defendant and victim will determine the outcome of the case, we find that an attorney's failure to conduct an investigation or call witnesses or obtain documents that may corroborate defendant's testimony and impeach the victim's testimony, may be found to constitute ineffective assistance. Therefore, we cannot say that defendant's petition, at the first stage, failed to set forth sufficient facts to establish a constitutional violation for purposes of invoking the Act. *Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. at 17

¶ 22 Accordingly, we reverse the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition and remand this case to that court for second-stage proceedings under the Act.

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¶ 23 Reversed and remanded.