

NOTICE
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2016 IL App (4th) 140322-U

NO. 4-14-0322

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 30, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DEREK RIGGS,)	No. 11CF81
Defendant-Appellant.)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The appellate court reversed, concluding the trial court erred in summarily dismissing defendant's postconviction petition, which stated the gist of a constitutional claim.

¶ 2 In December 2013, defendant, Derek Riggs, filed a petition for postconviction relief, alleging, in part, his defense counsel was ineffective for failing to challenge his identification as the person who robbed a bank. In March 2014, the trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 3 Defendant appeals, asserting the trial court erred in dismissing his petition at the first stage of postconviction proceedings because the petition stated the gist of a constitutional claim. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In January 2011, defendant was indicted on six counts of armed robbery. 720 ILCS 5/18-2(a)(2) (West 2010). In September 2011, a jury found defendant guilty of five counts of armed robbery. At the sentencing hearing, the trial court found the guilty verdicts rested on three separate acts: a robbery from a retail store on January 25, 2011, and robberies from two bank tellers on January 14, 2011. Accordingly, the court entered judgment on three counts of armed robbery and sentenced defendant to three consecutive terms of 45 years' imprisonment (30 years' imprisonment plus a 15-year firearm enhancement). 720 ILCS 5/18-2(b) (West 2010). In May 2013, this court affirmed defendant's conviction and the trial court's judgment. *People v. Riggs*, No. 4-12-0301, order at 3 (May 20, 2013) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 6 In December 2013, defendant filed a *pro se* postconviction petition, alleging, in part, he received ineffective assistance of counsel. Specifically, he alleged counsel was ineffective for failing to "investigate" evidence regarding defendant's physical appearance at the time of the bank robberies. Essentially, defendant argued counsel was ineffective for failing to investigate and present evidence to the jury which would have suggested the bank eyewitnesses misidentified him as the robber. In support, defendant pointed out the eyewitnesses' descriptions made no mention of defendant's six gold front teeth or the tattoo of a star on his face. Further, only one of the six eyewitnesses picked defendant out of a photo lineup. Defendant asserted this was significant given the eyewitnesses identifying him in the unrelated retail-store robbery specifically mentioned both the star tattoo and the gold teeth.

¶ 7 The trial court dismissed the postconviction petition as frivolous and patently without merit. In pertinent part, the court found any investigation into whether defendant had gold teeth prior to the bank robbery would have resulted in cumulative evidence because the jury

heard testimony defendant had gold teeth and, thus, the court concluded there was no deficient performance.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Defendant appeals the first-stage dismissal of his postconviction petition. The *pro se* petition, in part, asserted trial counsel provided ineffective assistance of counsel because he failed to investigate evidence that defendant had gold teeth at the time of the bank robbery. In his brief on appeal, defendant argues the gist of the claim is trial counsel "failed to develop the evidence concerning the bank witnesses's [*sic*] omission of any mention of the gold teeth, failing to say one word about it in his closing argument to the jury."

¶ 11 A. Forfeiture

¶ 12 The State contends the underlying claim regarding trial counsel's deficient performance is forfeited because it was not raised on direct appeal. "Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal." *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002). Defendant asserts that due to the nature of the ineffective-assistance-of-counsel claim in this matter, the issue is not forfeited.

¶ 13 This court has routinely held claims of ineffective assistance of counsel are more appropriately pursued in postconviction proceedings rather than on direct appeal. See, e.g., *People v. Calvert*, 326 Ill. App. 3d 414, 421-22, 760 N.E.2d 1024, 1030 (2001). Defendant's claim is based on what his trial counsel should have done, not on what counsel actually did. Claims based on what ought to have been done might require proof of matters not within the

record because of the allegedly ineffective assistance of counsel. *People v. Tate*, 2012 IL 112214, ¶ 14, 980 N.E.2d 1100. Forfeiture "may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense." *People v. West*, 187 Ill. 2d 418, 427, 719 N.E.2d 664, 670 (1999).

¶ 14 In the present case, the record does not reveal why counsel did not question the bank eyewitnesses regarding defendant's notable characteristics. The record also does not reflect what response such questioning would have garnered. Perhaps the witnesses would have remembered the gold teeth and the star tattoo. Perhaps trial counsel knew that, and therefore the lack of questioning was a reasonable trial strategy. Where, as here, proof of matters outside of the record are needed to evaluate a claim of ineffective assistance of counsel, forfeiture will not bar a claim not raised on direct appeal. *People v. Munson*, 206 Ill. 2d 104, 118, 794 N.E.2d 155, 163 (2002).

¶ 15 B. Ineffective Assistance of Counsel

¶ 16 The Post-Conviction Hearing Act allows a criminal defendant to raise a claim his conviction resulted from a substantial violation of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010). At the first stage of proceedings on a postconviction petition, dismissal is warranted "only if [the claims] have 'no arguable basis either in law or in fact.'" *Tate*, 2012 IL 112214, ¶ 20, 980 N.E.2d 1100 (quoting *People v. Hodges*, 234 Ill. 2d 1, 12, 912 N.E.2d 1204, 1209 (2009)). We accept as true all factual allegations not positively rebutted by the record. *People v. Childress*, 191 Ill. 2d 168, 174, 730 N.E.2d 32, 35 (2000). We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 17 Generally, we evaluate a defendant's claims of ineffective assistance of counsel under the two-part test the United States Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The defendant must show a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient representation. *Strickland*, 466 U.S. at 694. However, "[a]t the first stage of 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 an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. At this stage, the defendant need not " 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Tate*, 2012 IL 112214, ¶ 19, 980 N.E.2d 1100.

¶ 18 The State contends counsel's performance is not arguably unreasonable because it pertains to a matter of trial strategy. The State limits its consideration of counsel's performance solely to his choice not to mention the gold teeth in his closing argument. We think this consideration is too limited. The gist of the constitutional claim here is defense counsel provided ineffective assistance by failing to challenge the identification of defendant as the bank robber. It is not limited to what counsel chose to bring up during closing argument, as suggested by the State. Nor is it limited to an investigation into whether defendant had gold teeth at the time of the bank robbery, resulting in cumulative evidence, as suggested by the trial court in its written order. Rather, the claim is trial counsel provided ineffective assistance by failing to ask the bank-robbery witnesses whether they remembered the robber having gold teeth or to somehow

otherwise highlight the fact that their descriptions of the bank robber omitted a glaring, obvious, and unusual aspect of defendant's appearance.

¶ 19 As stated before, the record does not reveal *why* defense counsel did not inquire into this omission. Perhaps, as the State argues, he had sound trial strategy, which would defeat the claim of ineffective assistance of counsel. However, this failure is *arguably* unreasonable and *arguably* could have prejudiced defendant. Thus, "[t]his argument is more appropriate to the second stage of postconviction proceedings, where both parties are represented by counsel, and where the petitioner's burden is to make a substantial showing of a constitutional violation. The State's strategy argument is inappropriate for the first stage." *Tate*, 2012 IL 112214, ¶ 22, 980 N.E.2d 1100.

¶ 20 Accordingly, we conclude defendant's postconviction petition stated the gist of a constitutional claim for ineffective assistance of counsel under *Strickland*, meeting the lenient pleading standard to survive the first stage of postconviction proceedings. *Tate*, 2012 IL 112214, ¶ 20, 980 N.E.2d 1100. We decline to reach any other issues raised by the parties on appeal. At the second stage of postconviction proceedings, defendant is entitled to counsel and counsel will have the opportunity to amend the petition. Because counsel has not had an opportunity to amend defendant's postconviction petition, and because the State and the trial court have not had the benefit of considering an amended petition, it would be inappropriate for this court to consider other issues raised in the parties' briefs at this time. In reaching this conclusion, we render no opinion on the appropriate outcome of defendant's petition following remand.

¶ 21 **III. CONCLUSION**

¶ 22 For the reasons stated, we reverse the trial court's judgment and remand for second-stage postconviction proceedings.

¶ 23

Reversed and remanded.