

No. 1-16-0508

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 25634
)	
CARNELL JACKSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* First-stage dismissal of postconviction petition is reversed, and this matter is remanded for second-stage postconviction proceedings, where one of defendant's claims of ineffective assistance of trial counsel was not frivolous or patently without merit.

¶ 2 Defendant-appellant, Carnell Jackson, appeals from the first-stage dismissal of his postconviction petition. For the following reasons, we reverse the dismissal of defendant's postconviction petition and remand for further proceedings with respect thereto.¹

¶ 3 I. BACKGROUND

¹In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

¶ 4 Defendant was charged by indictment with—*inter alia*—multiple counts of first-degree murder, all of which generally alleged that defendant shot and killed Antonio Stroud on or about October 8, 2003. Prior to trial, defendant's trial counsel filed a motion to suppress all of defendant's statements to the police, including his videotaped confession to the murder. The motion to suppress was ultimately denied, and this matter proceeded to a jury trial in July of 2005.

¶ 5 The trial proceedings and the evidence presented at trial need not be set out in detail for purposes of resolving this appeal. It is sufficient to note that the evidence at trial included defendant's videotaped statement implicating himself in the murder of the victim. The State also presented evidence that three eyewitnesses identified defendant as the shooter. In contrast, at trial defendant denied shooting the victim and provided testimony implicating the victim's cousin, Angelo Stroud, in the murder. At the conclusion of the trial, defendant was found guilty of first-degree murder.

¶ 6 Defendant's trial counsel then filed a posttrial motion which argued—*inter alia*—that the circuit court erred in denying the motion to suppress. Defendant himself then filed a *pro se* posttrial motion that asserted his trial counsel—Mr. Moffett—was ineffective for failing to interview and/or present certain witnesses at trial. Thereafter, defendant obtained new counsel. Defendant's posttrial counsel filed an amended posttrial motion that also asserted—*inter alia*—that Mr. Moffett was ineffective for failing to interview and present certain witnesses at trial. Defendant was denied any posttrial relief, and he was then sentenced to a term of 45 years' imprisonment.

¶ 7 A timely direct appeal was filed by defendant's posttrial counsel. However, on April 28, 2011, defendant's appeal was dismissed for want of prosecution after no timely appellant's brief

was filed. While defendant's posttrial defense counsel attempted to have this order vacated, and in doing so admitted that the failure to file a timely appellant's brief was due solely to his own inadvertence, that effort was rejected by this court on May 25, 2011. Defendant thereafter filed a *pro se* "notice of appeal" from the dismissal of his appeal in the circuit court, but that effort was rejected by an order of the circuit court entered on November 23, 2011.

¶ 8 On April 4, 2012, defendant filed a previous postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2016)). Therein, defendant contended—*inter alia*—that he was denied effective assistance of appellate counsel because his direct appeal had been dismissed due solely to the neglect of defendant's posttrial counsel. Counsel was appointed to represent defendant in the postconviction proceedings, and the State conceded this issue. Therefore, on June 27, 2012, the circuit court entered an order—by agreement—granting defendant leave to file a late notice of appeal, pursuant to *People v. Ross*, 229 Ill. 2d 255, 262-71 (2008) (recognizing that the circuit court has authority to grant late notices of appeal in postconviction proceedings involving claims that a direct appeal was unperfected due to ineffectiveness of appellate counsel, and noting that "an appeal is perfected by filing a notice of appeal, and later filing a docketing statement, the record, and an appellant's brief.").² That late notice of appeal was filed the same day.

¶ 9 On direct appeal, defendant contended solely that Mr. Moffett provided ineffective assistance of counsel by failing to support the motion to suppress his videotaped confession with a citation to section 103-2.1 of the Code of Civil Procedure (Code) (725 ILCS 5/103-2.1 (West

²See also, *People v. Moore*, 133 Ill. 2d 331, 337 (1990) (noting that "either a motion to reinstate an appeal, addressed to the appellate court, or a post-conviction attack, addressed in the first instance to the trial court, can be utilized to obtain relief where a direct appeal has been dismissed due to the neglect of defendant's attorney.").

2004)), a statute that defendant contended would have made that confession presumptively inadmissible due to the failure to electronically record the pre-confession interrogations. He further contended that the attorney representing him in the posttrial proceedings provided ineffective assistance when, in challenging Mr. Moffett's competence, he did not note this failure on the part of trial counsel. Defendant, therefore, asked this court to reverse his conviction and remand for a new trial. In an order entered on December 5, 2014, we rejected defendant's arguments and affirmed his conviction and sentence. *People v. Jackson*, 2014 IL App (1st) 122005 ((unpublished order under Supreme Court Rule 23).

¶ 10 On November 13, 2015, defendant filed the instant *pro se* postconviction petition, in which he raised a host of arguments. Of relevance to this appeal, defendant's petition asserted that Mr. Moffett provided ineffective assistance by failing to: (1) interview and/or present certain witnesses at trial, including Tyshawn³ Wallace; and (2) request jury instructions on the issues of accountability and withdrawal. He also contended that he was denied effective assistance of appellate counsel because these issues were not raised on direct appeal. Attached as an exhibit in support of the petition was—*inter alia*—a written report prepared by an independent investigator. That report memorialized an August 20, 2015, interview with Tyshawn, in which he “noted many times ***that Carnell Jackson did not shoot Antonio Stroud ***. Tyshawn was never interviewed by Carnell Jackson's defense lawyer nor asked to testify in court.” Also attached to the petition was defendant's own affidavit, in which he averred that the petition's contents were true and correct and also averred that “other substantial affidavits are not obtainable at the present time” due to the fact that he was an “indigent person, incarcerated and is unable to hire an attorney or investigator to represent this cause.”

³While Mr. Wallace's first name is spelled in a variety of ways in the record, we will utilize this spelling in this order.

¶ 11 On December 7, 2015, the circuit court summarily dismissed the petition at the first stage, after finding it to be “without merit.”

¶ 12 II. ANALYSIS

¶ 13 Defendant appeals from the first-stage dismissal of his postconviction petition, and for the following reasons we reverse and remand for further proceedings.

¶ 14 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122–1 (West 2016). At the first stage of a postconviction proceeding, the circuit court independently reviews the defendant's petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it “has no arguable basis in either fact or law.” *Id.* at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 (“the threshold for survival [is] low”). A petition lacks an arguable basis in fact or law when it “is based on an indisputably meritless legal theory or a fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are “fantastic or delusional” and an indisputably meritless legal theory is one that is “completely contradicted by the record.” *Id.* at 16–17.

¶ 15 To state a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-prong, deficiency and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant alleging ineffective assistance of counsel at the first stage of postconviction proceedings must show only that it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and *arguable* that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (citing *Hodges*, 234 Ill. 2d at 17).

¶ 16 We find that this appeal may be resolved solely on the basis of defendant's argument that Mr. Moffett was ineffective for failing to investigate or present Tyshawn's testimony at trial. Before proceeding further, however, we pause to briefly address the current viability of this claim.

¶ 17 As noted above, this issue was first addressed during the posttrial proceedings but was not raised on direct appeal. Arguably, this issue has therefore been forfeited and cannot be the subject of a valid postconviction claim. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005) (noting that issues that could have been raised on direct appeal, but were not, are forfeited and are therefore barred from consideration in subsequent postconviction proceedings). However, "the doctrines of *res judicata* and [forfeiture] are relaxed in three situations: where fundamental fairness so requires; where the alleged [forfeiture] stems from a claim of ineffective assistance of appellate counsel; or where the facts relating to the postconviction claim do not appear on the face of the original record." *People v. Hanks*, 335 Ill. App. 3d 894, 900 (citing *People v. Mahaffey*, 194 Ill. 2d 154, 171 (2000)). Here, defendant's *pro se* petition included a contention that he was denied effective assistance of appellate counsel because this issue was not raised on direct appeal. In addition, defendant's argument with respect to Tyshawn was supported by new facts not contained in the original trial record, in the form of the investigator's report. Thus, the latter two situations calling for relaxation of the doctrine of forfeiture cited above are present here.

¶ 18 Indeed, contrary to the State's assertion on appeal, defendant's brief did raise the issue of ineffectiveness of appellate counsel, where defendant specifically contended that "[a]ppellate counsel committed ineffective assistance of counsel in representing Jackson on appeal, by raising only one clearly unmeritorious legal theory and failing to raise other viable and important

appellate issues, including those raised in this appeal.” While defendant’s argument with respect to this issue may have been brief, we find it sufficient to have preserved the issue of Mr. Moffett’s alleged ineffectiveness for appellate review.

¶ 19 Where a defendant alleges in his petition that trial counsel was ineffective for failing to investigate or present evidence at trial, the petition must include affidavits, records, or other evidence identifying, with reasonable certainty, the sources, character, and availability of the alleged evidence supporting the defendant's allegations. 725 ILCS 5/122-2 (West 2016); *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Although a defendant is not required to present a notarized affidavit at the first stage, some form of evidence demonstrating that the defendant's allegations are capable of corroboration, must be attached to the petition. *People v. Allen*, 2015 IL 113135, ¶ 34.

¶ 20 We review the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10. Thus, we review the circuit court's judgment rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 21 Here, the record reflects that the issue of Tyshawn’s potential as a defense witness first arose in the context of the proceedings on defendant’s posttrial motion. As noted above, the posttrial motion included a claim that Mr. Moffett was ineffective for failing to interview and present certain witnesses at trial. With respect to Tyshawn, Mr. Moffett testified that he was aware that Tyshawn had been interviewed by the police after the shooting and had stated that it was Angelo that had shot the victim. In explaining why he did not attempt to further investigate Tyshawn as a potential witness, interview him, or present his testimony at trial, Mr. Moffett contended that he made this decision as a matter of trial strategy due to the fact that Tyshawn would be subject to impeachment at trial. As Mr. Moffett explained, while Tyshawn did tell the

police that Angelo shot the victim, he had previously told the police that he could not identify the shooter and had subsequently testified to the grand jury that he was not sure who the shooter was and could not say that Angelo shot a gun on the night of the murder.

¶ 22 On appeal, defendant contends that despite any possibility for impeachment, in light of the investigator's report attached to the petition, "[i]t is arguable that had the jury heard at least one witness corroborate [defendant's] version of what occurred, the outcome of this trial would have been different. [Defendant] could have been found not guilty based upon the testimony of [Tyshawn]." In contrast, the State contends on appeal that neither the record of the proceedings below nor the interview report attached to defendant's petition supports his claim of ineffective assistance of trial counsel. The State asserts that Mr. Moffett more than adequately explained his reasons for not pursuing Tyshawn's testimony below, and the "the report [defendant] cites does not support his claim of prejudice. It simply reiterates the second version of events [Tyshawn] told police after initially saying he could not identify the shooter," an inconsistency that "trial counsel specifically testified made [Tyshawn] an incredible witness subject to damaging impeachment on cross-examination."

¶ 23 We reiterate that at the first stage of postconviction proceedings, we must take as true and liberally construe the allegations in the petition, and that the threshold for a petition to survive the first stage of review is low. *Allen*, 2015 IL 113135, ¶¶ 24-25. Furthermore, while the State contends that the actions defendant complains about with respect to Tyshawn amount to nothing more than virtually unassailable trial strategy, and while defendant must ultimately overcome the presumption that his counsel's actions were the product of sound trial strategy (*People v. Manning*, 241 Ill. 2d 319, 327 (2011)), we are not to consider arguments related to trial strategy when reviewing first-stage postconviction petitions (*Tate*, 2012 IL 112214, ¶ 22). In addition,

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while on appeal, the State essentially argues that defendant cannot demonstrate any prejudice in light of the overwhelming evidence presented at trial and the apparent inconsistencies in Tyshawn's various statements regarding the shooting, we note that fact finding and credibility determinations are not allowed at the first stage of postconviction proceedings. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 23

¶ 24 Again, a defendant alleging ineffective assistance of counsel at the first stage of postconviction proceedings must show only that it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and *arguable* that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (citing *Hodges*, 234 Ill. 2d at 17). Applying this standard to the allegations and accompanying documents here, we find that defendant raised an arguable claim that Mr. Moffett was ineffective for failing to investigate Tyshawn and present his testimony at trial. The arguments raised by the State on appeal are "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. *Tate*, 2012 IL 112214, ¶ 22.

¶ 25 In light of our finding that at least one of defendant's claims of ineffective assistance of trial counsel has arguable merit, the entire petition must be remanded for second-stage proceedings. See *People v. Cathey*, 2012 IL 111746, ¶ 34 (partial summary dismissals not permitted under the Act, and entire petition must be remanded for second-stage proceedings if petition sets forth a single claim of ineffective assistance of counsel which survives summary dismissal). Thus, we need not address defendant's remaining arguments as to why his petition sufficiently set forth other claims of ineffectiveness of counsel.

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¶ 26 Furthermore, because we resolve this appeal based solely upon the contents of defendant's *pro se* petition and the documents attached thereto, we need not address an additional argument raised by the State on appeal; *i.e.*, that defendant improperly supplemented the appellate record with additional affidavits that were never presented to the circuit court below, and that defendant improperly sought to rely upon these affidavits to support his arguments on appeal.

¶ 27 Finally, we note that our finding in no way expresses an opinion on the ultimate merits of the assertions contained in defendant's postconviction petition, or on whether defendant will ultimately prevail on his postconviction claims. See *Hodges*, 234 Ill. 2d at 22.

¶ 28 **III. CONCLUSION**

¶ 29 For the foregoing reasons, we reverse the dismissal of defendant's postconviction petition and remand for second-stage proceedings.

¶ 30 Reversed and remanded.