2019 IL App (1st) 160456-U

No. 1-16-0456

Order filed on August 6, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 12994
	)	
CHARLES SIMS,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction petition was not frivolous or patently without merit and therefore should not have been dismissed at the first stage of postconviction proceedings. This court reversed and remanded the case.

¶ 2 Following a jury trial, defendant Charles Sims was found guilty of first-degree murder, then sentenced to a prison term totaling 50 years for murder with a firearm. Defendant subsequently filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), which the trial court summarily dismissed. He now appeals from

the dismissal contending his trial counsel was constitutionally ineffective for failing to investigate medical evidence, present live forensic testimony, request alternative jury instructions, and investigate and present a pretrial motion to suppress. We reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 The combined testimony of the State's four occurrence witnesses revealed that around 2 a.m. on June 2, 2011, defendant and the victim, Jimmy Parker, were arguing outside an apartment building. Defendant (also known as "Stank") was angry because he thought Parker ("Paggy") threw water on his sister. A group, including Willie Bug, Melicor, and Boo, stood to the side. Defendant and Parker entered into a physical altercation, with Parker eventually punching defendant. Defendant stumbled back, but then pulled out a gun and yelled, "you think this a game?" Defendant, apparently the only one armed at the time, fired at the ground. Parker backed up and begged defendant not to kill him. Defendant shot Parker in the leg as Parker ran to the street. Three witnesses testified that Parker then ran to the corner and fell on his stomach, but defendant stood over Parker and shot him four to six times while stating, "you think it's a joke now." The parties stipulated that five fired cartridge cases were recovered from the corner where Parker was shot; two from the sidewalk by the apartment building; and one from the street. The medical examiner testified that Parker suffered from some nine gunshot wounds, including to his back, thigh, buttox, knee, and scrotum, with at least five shots entering via Parker's backside and several entering via Parker's front or side. The medical examiner further opined that the cause of Parker's death was multiple gunshot wounds and the manner of death was a homicide.

¶ 5 Defendant testified on his own behalf that one person among a group of about five men standing outside his apartment threatened to kill his sister. Defendant exited and confronted

Parker, asking why he was threatening to hurt his family. Parker then punched defendant in the face. Parker's friends surrounded defendant. Defendant took a step back and "showed them" he had a gun, but Parker charged defendant grabbing at the barrel of the gun. As Parker yanked at the gun, it discharged, but defendant would not let it go. They "tussled," with Parker attempting to grab the gun and his friends punching defendant, as the group moved to the curb. Parker eventually twisted defendant's wrist to extract the gun, defendant panicked, then fired a shot as Parker again grabbed at the gun, "yanking like crazy," and his friends resumed punching defendant. Defendant told himself, " 'I have got to get this gun. If he get it, I am dead, and my family, too.' " Defendant eventually gained control of the gun, but was then hit in the head, he fell to his knees, and his vision was blurred. Thereafter, he "started shooting" because he thought, " 'If I lose this gun, I know I am dead." He never meant to kill Parker. Defendant's sister testified to a similar occurrence, adding that water had been poured on her out of the apartment window earlier, but she did not know who had done it.

¶ 6 In closing arguments, the State emphasized that defendant killed Parker execution-style by shooting Parker in the back, while the defense argued defendant was acting in self-defense. The defense argued the majority of shots at Parker were below the waist, which corresponded with defendant's account that he fell to his knees and pulled the trigger. The defense argued that had defendant wanted the victim dead, he would have shot him in the head. During rebuttal, the State questioned defendant's claim of self-defense when "the majority of bullet wounds are exit wounds. They are exit wounds, which means he was shot in the back whether it is the back of his abdomen, his butt, in the rear of his thighs, in the back of his back. The exit wounds are in the front. He was running away. He was laying [*sic*] on his face on the ground." The State again later asserted "Ten gunshots, wounds, most of them to the back, not self-defense. We know it is not

self-defense," then emphasized that the medical examiner's report stated all the exit wounds were in the front of the body.

¶ 7 As set forth, the jury found defendant guilty of first-degree murder, and he was then sentenced to a total of 50 years' imprisonment. Defendant filed a direct appeal contending his conviction should be reduced to second-degree murder. This court roundly rejected his claim, concluding:

> "the facts showing that defendant committed first degree murder, that his actions were not justified, and that he was not acting in self-defense were quite simply overwhelming. Defendant first shot an unarmed Parker in the leg as he was fleeing. When Parker was face down on the ground, defendant subsequently shot him not once but some five times from behind. While defendant claimed he feared for his life, the competent testimony of the State's witnesses and corroborating physical evidence, proved otherwise. We will not disturb credibility findings of the jury or reweigh evidence. *** A rational trier of fact easily could have found there were no mitigating factors supporting a second-degree murder conviction. ***." (citations omitted). *People v. Sims*, 2014 IL App (1st) 130840-U, ¶ 9.

This court therefore upheld defendant's conviction.[1]

¶ 8 Defendant subsequently filed the present *pro se* postconviction petition. In relevant part, defendant alleged his trial counsel was constitutionally ineffective for failing "to investigate, interview, and subpoena for trial" Dr. Slater who pronounced Parker dead at the hospital. In support, defendant attached a police report, dated the same day as the shooting, which stated that after Parker was transported by ambulance to the hospital, "he was pronounced deceased by Dr. Slater at 0235 hrs. Victim sustained 6 gunshot wounds to the front mid section of the body and 1

[1]We also ordered the mittimus to be corrected to reflect one conviction for first-degree murder.

to the back area." Defendant alleged it was Dr. Slater who identified the wounds, and further, that Dr. Slater's testimony would have rebutted, discredited, contradicted, and disproved the medical examiner's testimony that Parker suffered from gunshot entrance wounds to the backside of his body. Defendant alleged there was a "very strong possibility" that the gunshot wounds in Parker's back were in fact exit wounds. The fact that Parker was shot from the frontside, defendant argued, would have supported his self-defense claim at trial. As a result, he argued defense counsel was also constitutionally ineffective for failing to cross-examine the medical examiner in that regard, as well. Not only was trial counsel's performance unreasonable, defendant asserted, but it also caused him prejudice. Defendant additionally argued that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 9 The postconviction court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals.

¶ 10 ANALYSIS

¶ 11 The Act provides a method by which persons under criminal sentence in this State can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq*. (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act requires the defendant to clearly set forth "the respects in which petitioner's constitutional rights were violated" and also to attach to his petition affidavits, records, or other evidence supporting the allegations or to state why they are not attached. 725 ILCS 5/122-2 (West 2014); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). The purpose of providing factual documentation is to establish that a petition's allegations are capable of "objective or independent corroboration." *Delton*, 227 Ill. 2d at 254, quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005).

¶ 12 The threshold inquiry at the first-stage of proceedings is whether the allegations contained in the petition are frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2014); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition is frivolous or patently without merit if the allegations contained therein, taken as true and liberally construed in favor of the petitioner, have no arguable basis in law or fact, *i.e.* they are based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-13, 16; *Edwards*, 197 Ill. 2d at 244. An indisputably meritless legal theory, for example, is one which is completely contradicted by the record, while fanciful factual allegations include those which are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. Further, a petition alleging nonfactual and nonspecific assertions that merely amount to conclusions will not survive summary dismissal under the act. *People v. Morris*, 236 Ill. 2d 345, 354 (2010).

¶ 13 Owing to the fact that most petitions are drafted at the first stage by petitioners with little legal knowledge or training, our court views the threshold for first-stage survival to be low. *Delton*, 227 Ill. 2d at 254. If the circuit court does not dismiss the petition at the first stage, it advances to the second, where counsel may be appointed to an indigent defendant and the State, as respondent, enters the litigation aiming to show that there is no substantial showing of a constitutional violation. *People v. Tate*, 2012 IL 112214, ¶ 10. A substantial showing garners a third-stage evidentiary hearing. *Id*. As set forth, in this case the circuit court dismissed the petition at the first stage without any responsive action by the State. Our review of such a dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 14 Defendant first argues against his petition's dismissal, claiming he set forth a meritorious claim that his trial counsel was constitutionally ineffective for failing to interview and present at

trial the physician who attended to Parker after the shooting.[2] Pointing to the police report attached to his postconviction petition, defendant argues that this evidence could have been used to rebut the medical examiner's testimony and corroborate his own testimony that the shooting occurred when defendant was acting in self-defense. In accordance with first-stage standards, we note that a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that trial counsel's performance fell below an objective standard of reasonableness and it is arguable that the defendant was prejudiced as a result. *Tate*, 2012 IL 112214, ¶ 19. At the first stage, we do not consider arguments relating to trial strategy. *Id.* ¶ *22.* In order to demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. House*, 141 Ill. 2d 323, 388 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

¶ 15 The State challenges defendant's ineffectiveness claim as both conclusory and speculative. Specifically, the State argues the police report's notation that Parker "sustained 6 gunshot wounds to the front mid-section of the body and 1 to the back area" lacks any reference to the source of that information. The State maintains that attributing the statement to Dr. Slater amounts to pure speculation, and absent the police report, defendant's ineffectiveness claim results in nothing but a conclusory allegation. The State asserts defendant therefore failed to submit sufficient documentary evidence to withstand a first-stage dismissal. See *People v. Lewis*, 2017 IL App (1st) 150070, ¶ 16. We do not agree.

¶ 16 As our supreme court noted, the legislature contemplated a wide range of documentary evidence would satisfy the evidentiary requirements of the first stage. *People v. Allen*, 2015 IL

[2]Even assuming defendant's claim rested on evidence not outside the record, there can be no issue of waiver/forfeiture since defendant alleged his appellate counsel was ineffective for failing to raise the claim of trial counsel's ineffectiveness. See *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 23.

113135, ¶ 36. The "other evidence" or records used to support an allegation need not be "competent, admissible evidence at the time attached to the petition." *Id*. ¶ 37. Rather, it's enough for first stage purposes that the defendant has provided substantive evidentiary content showing his claims are *capable* of corroboration and independent verification. *Id*.; see also Black's Law Dictionary (11th ed. 2019) (corroborate means "[t]o strengthen or confirm; to make more certain" and "verification" is a "formal declaration *** whereby one swears to the truth of the statements in a document").

¶ 17 At the first stage, we must also take the petition's allegations as true and liberally construe them in favor of the petitioner. *Allen*, 2015 IL 113135, ¶ 41. This means that courts must resolve any conflicts or ambiguities in the attachments in favor of the defendant and draw reasonable inferences in his favor as well. *People v. Hoare*, 2018 IL App (2d) 160727, ¶ 18. Given this standard, we believe it is reasonable at this point to infer that the information as to the number and placement of shots in Parker, which is set forth in the police report, can be attributed to Dr. Slater, where the preceding sentence states that it was Dr. Slater who pronounced Parker dead. See *People v. Burns*, 2015 IL App (1st) 121928, ¶ 28. Indeed, this inference is more reasonable than assuming the authoring police officer counted and identified the shots. Plus, the statement is capable of being verified since at the second stage of proceedings, defendant could procure an affidavit from the authoring police officer or Dr. Slater himself confirming or denying the information. It's also worth noting that such affidavits would not be so easily obtained by an imprisoned defendant. *Cf. Delton*, 227 Ill. 2d at 257 (finding the defendant's first-stage postconviction petition lacked supporting evidence because, among other reasons, obtaining an affidavit from the defendant's wife to support his claim would not have been difficult). Nor was the information within defendant's personal knowledge. *Id*. at 258. We thus credit defendant's

allegation that it was Dr. Slater who stated the victim was shot multiple times in the frontside and once in the backside.

¶ 18 With this documentary evidence, we further conclude that it is at least *arguable* that defense counsel was constitutionally ineffective for failing to investigate, interview, and call as a witness Dr. Slater. See *Burns*, 2015 IL App (1st) 121928, ¶ 30 (noting, first-stage petitions alleging ineffective assistance are judged by a lower pleading standard). Whether defense counsel's failure to investigate amounts to ineffective assistance is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). Had defense counsel in this case presented medical testimony demonstrating that the victim was shot multiple times from the front, this *arguably* could have strengthened defendant's claim that he was being beaten by a mob of individuals, with Parker attempting to take his gun, and that defendant rose up shooting blindly in self-defense. It also would have contradicted the State's testimonial and medical evidence showing that this was an execution-style shooting of an unarmed man in the back. See *People v. Rogers*, 2015 IL App (2d) 130412, ¶ 71 (the failure to use significant impeaching evidence against an important witness is deficient representation).

¶ 19 The allegation is not fantastic, delusional or fanciful, since at this jury trial, the occurrence witnesses' testimony amounted to a "he said, she said" contest. On the prosecution's side, the combined testimony of the four occurrence witnesses verified that there was a fight between Parker and defendant, although there was conflicting testimony as to who threw the initial punch. Notably, the State's witnesses testified that defendant first shot Parker in the leg as he was running away and next shot Parker four to six times in the back while he was lying on the ground on his stomach. However, one of these witnesses was Parker's former girlfriend. Two

others were friends of Parker; "Boo" and "Willie Bug" had known Parker since childhood, and Willie Bug testified that Parker was his best friend and like a brother. In short, these were not exactly disinterested witnesses testifying for the State, thus buttressing defendant's claim that these same friends participated in the brawl, beating him. In addition, Willie Bug had a prior conviction for aggravated unlawful use of a weapon, while defendant had only two drug-related priors. The single independent witness (the building's custodian) verified that he wore glasses for distance but was not wearing them that day. It is thus not fantastic or delusional to say that medical evidence supporting defendant's testimony could have swayed the jury to believe defendant's version of events over the State's version and thus was outcome determinative. See *Montgomery*, 327 Ill. App. 3d at 185-86.

¶ 20 Likewise, the allegation was not based on an indisputably meritless legal theory. With the medical evidence alleged in defendant's petition, showing that the victim sustained wounds to the frontside of his body, a jury at the very least arguably could have found defendant proved by a preponderance of the evidence that he subjectively, but unreasonably, believed a danger existed requiring the use of force. See *People v. Jeffries*, 164 Ill. 2d 104, 129 (1995) (noting, when a defendant is found guilty of second-degree murder, the trier of fact has concluded that the defendant proved by a preponderance of the evidence the existence of a mitigating factor sufficient to reduce the offense of murder to second-degree murder); *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1993) (noting, if the defendant's belief as to the use of force was reasonable, self-defense may apply, while if it was unreasonable, second-degree murder may be appropriate). Thus, the jury arguably could have found defendant guilty of second-degree murder if not determined that he acted in self-defense. See *id*.; see also *People v. Lee*, 213 Ill. 2d 218, 224 (2004) (enumerating the factors for self-defense and noting, self-defense is an affirmative

defense, and once raised, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense, while also proving the elements of the charged offense).[3]

¶ 21 We therefore reject the State's argument as to the lack of prejudice. The State relies primarily on *People v. Bew*, 228 Ill. 2d 122, 135-36 (2008), a direct appeal case wherein the supreme court ruled that the defendant's claim as to *Strickland* prejudice was "entirely speculative" because there was no factual basis in the record to support it. The State similarly relies on *People v. Scott*, 2011 IL App (1st) 100122, ¶ 31, a first-stage postconviction case wherein this court rejected the defendant's claim of *Strickland* prejudice for his counsel's failure to pursue DNA testing on a shirt worn during the crime. *Scott* reasoned that there was never any DNA testing done on the shirt at trial, and contrary to the defendant's argument, there could be no exculpatory results since it wasn't clear if the shirt even harbored any DNA. Regardless, the court noted it had been handled after the crime by many different people. Unlike in *Bew* and *Scott*, in the present case, the defendant's *Strickland* claim remains grounded in the police report attached to his postconviction petition, and the information arguably would impact the trial evidence. Prejudice therefore cannot be framed as speculative.

¶ 22 The State asserts that even assuming defendant's allegation is true that the victim was shot six times in the frontside and once in the backside, his petition should still be dismissed. The

[3]On direct appeal, we rejected defendant's claim that the jury should have found him guilty of second-degree murder based on his unreasonable belief in the need for self-defense when he shot Parker. See 720 ILCS 5/9-2(a) (West 2010) (noting, a defendant commits second-degree murder when he commits first-degree murder and a mitigating factor exists, such as that the defendant was acting under an unreasonable belief that the killing was justified). In so ruling, we viewed the evidence in the light most favorable to the State, as required, and concluded a rational trier of fact easily could have found there were no mitigating factors supporting a second-degree murder conviction. See *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996) (when a defendant argues he presented sufficient evidence to prove a mitigating factor in a first or second-degree murder case, a reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present). The standard for postconviction review requires almost the opposite, in that we must credit any allegations liberally in favor of the defendant and not the State.

State argues the one shot in the backside defeats any claim of second-degree murder. We disagree. It is arguably consistent with defendant's testimony that Parker initially yanked at the gun, causing it to discharge. It is also consistent with his testimony that he blindly shot in an effort to defend himself. Significantly, six shots to the frontside is very inconsistent with the State's theory that this was an execution-style shooting.

¶ 23 The State also asserts the police report is inaccurate, where at trial, the medical examiner testified that the victim suffered from some nine gunshot wounds rather than the seven stated in the police report. The State argues, defendant's claim that the police report would have contradicted the State's witnesses is therefore speculative. We disagree. Taking Dr. Slater's report as true, as we must, we conclude that any variance in expert medical testimony would be a credibility matter for the jury to determine. See *People v. Bouchard*, 180 Ill. App. 3d 26, 35 (1989) (noting that it is within the sound discretion of the fact finder to resolve all contradictions in the expert testimony presented to it). In other words, the factual allegations in the police report are not positively rebutted by the record, and this simply shows a variance in opinion between two different doctors. Even so, we recognize that the State's expert was a medical examiner who scrutinized the course taken by each bullet in the victim, while Dr. Slater was allegedly the treating physician who simply pronounced Parker dead. This makes Dr. Slater's identification of the entry wounds somewhat doubtful. Nonetheless, as stated, it is not our job at this stage to question the quality and weight of the purported evidence or whether its source is credible. See *People v. White*, 2014 IL App (1st) 130007, ¶¶ 28-29 (noting, a court is not allowed to engage in any credibility determinations or fact-finding at the first stage). It is enough that the defendant's postconviction allegation can possibly be verified and that it arguably has legal merit. Given the

low first-stage standard, we believe it is appropriate to allow borderline cases like the present to proceed. See *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32.

¶ 24 Accordingly, defendant should be provided the opportunity to consult with an attorney regarding his constitutional claim, and he should be given the opportunity to have counsel amend his petition before the State responds.

¶ 25 CONCLUSION

¶ 26 Having found this claim meritorious, we reverse the summary dismissal of defendant's postconviction petition and remand the entire petition for further proceedings, regardless of the merits of any other claims. See *People v. Cathey*, 2012 IL 111746, ¶ 34; *People v. Rivera*, 198 Ill. 2d 364, 372 (2001). We therefore need not consider defendant's remaining contentions. See *id.*

¶ 27 Reversed and remanded.