

No. 1-16-2291

**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
Respondent-Appellee,	)	Circuit Court of Cook County.
	)	
v.	)	07 CR 15241
	)	
DARRIAN DANIELS,	)	
	)	
	)	Honorable Neera Walsh,
Petitioner-Appellant.	)	Judge Presiding.

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

**ORDER**

- ¶ 1 *Held:* Petitioner alleged the gist of a constitutional claim for ineffective assistance of trial and appellate counsel where he claimed trial counsel lost a potentially exculpatory audiotape and appellate counsel failed to raise the issue on appeal.
- ¶ 2 Following a jury trial, petitioner, Darrian Daniels, was convicted of two counts of first degree murder and sentenced to natural life in prison. This case is currently before this court on petitioner’s appeal from the trial court’s dismissal of his postconviction petition. Petitioner contends that his postconviction petition stated the gist of a constitutional claim where he argued

that he received ineffective assistance of both trial and appellate counsel. We originally dismissed this appeal for lack of jurisdiction, but have been directed by the Illinois Supreme Court to treat this appeal as a properly perfected appeal. Accordingly, we now address the merits of this case.

¶ 3 Because the facts of the underlying case have been set forth in detail in *People v. Daniels*, 2015 IL App (1st) 131301-U, this court's decision on defendant's direct appeal of his convictions and sentence, we only discuss those facts pertinent to petitioner's postconviction petition. Petitioner was arrested in connection with the shooting death of two men: Cordero Diggs and Michael Smith. The victims were shot while standing on a back porch at 832 West 53rd Street in Chicago, at approximately 10:30 p.m. on the night in question. James Washup testified that he was standing on the back porch next door and saw someone he knew as "Wiener" walking through the alley towards the victims. James identified petitioner as the person he knew as Wiener. James testified that he saw petitioner draw his gun and then heard shots as he ran into his house.

¶ 4 Tina Washup, James's sister, testified that she was upstairs in her bedroom of the house she shared with James. Tina testified that she was cleaning her room when she heard footsteps in the gangway, and that she looked out her window, but did not see anyone. She then heard several gunshots and when she looked out the window again, she saw "Wiener" running through the gangway with a gun in his hand. Tina identified petitioner as Wiener.

¶ 5 Rodney Jones, the brother of victim Smith, testified that he had been standing outside on the porch with the two victims before the shooting. He went inside to use the bathroom, and then heard gunshots. Jones testified that he ran to the front of the house and looked out the window. He saw somebody he knew as "Wiener" getting in a car. Jones identified petitioner as Wiener.

¶ 6 Kwame Tate testified for the defense. He testified that he knew the victims and Tina Washup. Tate testified that he had a conversation with Tina Washup during the summer of 2007, at which time she told Tate that she did not see petitioner shoot anybody, but that Jones had told her to say petitioner was the shooter. Tina Washup denied this on the witness stand.

¶ 7 The jury found petitioner guilty of both counts of first degree murder and the court imposed a mandatory sentence of natural life in prison. On direct appeal, petitioner argued that his trial counsel was ineffective for failing to object to the introduction of inadmissible prior consistent statements and eliciting prior consistent statements from certain witnesses, calling a witness on petitioner's behalf that damaged his case, and failing to perfect impeachment of a State witness. This court affirmed petitioner's convictions and sentence on February 17, 2015.

¶ 8 Petitioner filed a *pro se* postconviction petition in the circuit court on March 30, 2016, alleging ineffective assistance of both trial and appellate counsel. Petitioner argued that his trial counsel was ineffective for misplacing an audiotape recording of Tina Washup, and that appellate counsel was ineffective for failing to raise this same issue on appeal. Petitioner claimed that the audiotape contained a recorded conversation between Tate and Tina Washup, in which Tina admitted that she did not see petitioner on the night of the murders. Petitioner claimed that the recording reflected that Tina told Tate that Jones, the brother of one of the victims, directed her to lie about what she saw on the night of the shooting. Petitioner argued that the tape recording would have destroyed Tina's credibility at trial and corroborated Tate's trial testimony.

¶ 9 On June 24, 2016, the circuit court entered a written order dismissing petitioner's postconviction petition as frivolous and patently without merit. The order stated that the information that was allegedly contained in the audiotape "would not change the outcome because there are two more witnesses who identified petitioner as a perpetrator of the crime."

The trial court stated that petitioner did not provide evidence in his petition “sufficient to overcome the presumption that counsel’s failure to present the tape was anything other than sound trial strategy and he has failed to show a reasonable probability that the outcome of the trial would have been different had Tate’s tape been introduced into evidence.” Petitioner now appeals.

¶ 10 On appeal, petitioner contends that he set forth the gist of a constitutional claim by alleging that his trial counsel was ineffective for losing exculpatory evidence, and that appellate counsel was ineffective for failing to raise trial counsel’s ineffectiveness on direct appeal. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)), provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). Under the Act, a postconviction proceeding contains three stages. *Id.* At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine “whether ‘the petition is frivolous or patently without merit.’ ” *Id.* (quoting 725 ILCS 5/122-2.1(a)(2) (West 2016)). A postconviction petition is considered frivolous or patently without merit only if the allegations in the petition, take as true and liberally construed, fail to present the “gist of a constitutional claim.” *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The “gist” standard is “a low threshold.” *Id.* To set forth the “gist” of a constitutional claim, the postconviction petition “need only present a limited amount of detail,” and hence need not set for the claim in its entirety. *Id.* “Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low.” *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). “In fact, we have required only that a *pro se* defendant allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act.” *Id.*

¶ 11 Section 122-2 provides that “[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2016). The purpose of the “affidavits, records, or other evidence” requirement is to “establish that a petition’s allegations are capable of objective or independent corroboration.” *Hodges*, 234 Ill. 2d at 10. “Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.” *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). “[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights maybe summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact.” *Hodges*, 234 Ill. 2d at 11-12. A petition lacking an arguable basis in law or fact is one “based on an indisputably meritless legal theory or a fanciful factual allegation.” *Id.* at 16. A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Id.* Fanciful factual allegations include those that are fantastic or delusional. *Id.* at 17. Our review of the circuit court’s dismissal of petitioner’s postconviction petition is *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 12 Petitioner’s claim of ineffective assistance of counsel is reviewed under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel’s performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 13 Petitioner alleged his constitutional right to effective assistance of counsel was violated because his attorney lost an audiotape that would have impeached Tina Washup and

corroborated Tate's testimony. In support of his claim, petitioner alleged that his trial counsel told the trial court before trial that he had an audiotape recording, but then later admitted that he had lost the tape. Petitioner alleged that this tape was a recording of Tina revealing to Tate that Jones, the brother of one of the victims, told her to lie about who she saw in the alley on the night in question. Petitioner attached his own affidavit, referencing conversations and testimony that are easily corroborated by the record.

¶ 14 On August 10, 2010, defense counsel informed the State in written discovery that "one recording" existed. Defense counsel stated in court, "I have not, in all [honesty] visited the issue of the audiotape in over [two] years. It's a very old case. I will consult with the source of that tape to see if, in fact, it is even usable. But I will tender a copy to [assistant state's attorney]." Defense counsel stated that he "should be able to find out about [the tape] within the next five or six days."

¶ 15 On August 20, 2010, defense counsel told the court that he did not have the audiotape at that time, but that he had explained to the assistant state's attorney that he "might not be able to get access to it for today, but I did promise it to him by early next week, like Monday or Tuesday." On September 9, 2010, defense counsel again stated that he did not have the tape in his possession, but explained, "I made an oral representation to [assistant state's attorney] that the audio tapes, that I will have it to him by Monday."

¶ 16 On October 20, 2010, the parties again discussed the audiotape. The State informed the court that it had still not received a copy of the tape, stating "I was told it was audiotape of Tina Washup. I have not heard it. I have not seen it." Defense counsel then asked for seven more days to tender the tape, stating, "frankly, and it's embarrassing to me to say to my client, I've had difficulty locating it. I know it's not lost, it's just misplaced in my office and I wasn't that

anxious about it frankly because I'm sure of its admissibility, but I will do everything I can to locate that in the next couple days."

¶ 17 On November 10, 2010, defense counsel stated that he had been out of town and had not had the opportunity to find the tape. The trial court asked, "Are you telling me you don't have it or you don't know its whereabouts?" The court then stated:

"Here's the thing. We need that audiotape. I'm going to give you a couple days. That audiotape needs to be tendered. That was something that should have been tendered when you filed your answer to discovery, prior to you demanding [a speedy trial]. You demanded and you broke that demand, but the bottom line is you have a discovery obligation. You've known about this audiotape and you have not tendered it. It's not fair to your client and it's certainly not fair to the State to not have this audiotape. I don't know what's on this audiotape but I would tend to think you believe it's probably exculpatory. So my hands are tied, in that we can't go to trial without that audiotape, now that you have presented that there is an audiotape that is exculpatory."

¶ 18 On November 15, 2010, defense counsel told the court that he believed he had the correct tape, but that it was "damaged slightly," and needed to be repaired. He stated that he could have it repaired by Friday and "hopefully determine if it is the correct tape, which I believe it is."

¶ 19 On November 19, 2010, the following exchange occurred:

"THE COURT: Today was the day for [defense counsel] to turn over an audiotape. Do we have that audiotape to turn over today?

[DEFENSE COUNSEL]: No, we don't. That tape I was able to fix, I am unable to locate it. It's hard for me to admit that I am unable to locate it and I don't know if

I will be able to locate it. I haven't seen it. It's probably been over a year that I looked at it. I never listened to the entire tape. I have been unable to locate it. I was able to fix the one. We don't intend to use it. We are pretty sure it was taken without the witness's knowledge and probably an illegal recording, but we do intend to have [Tate] as a witness because we do believe he was present for any statements made at that time."

¶ 20 These excerpts from the record corroborate petitioner's claims in his postconviction petition, which must be taken as true at the first stage of postconviction proceedings if they are not contradicted by the record and are not fantastic or delusional. *Hodges*, 234 Ill. 2d at 16 (a claim completely contradicted by the record is an example of an indisputably meritless legal theory; fanciful factual allegations include those that are fantastic or delusional). Accordingly, taking petitioner's allegations as true, we find that petitioner was able to state the gist of a constitutional claim and that his postconviction petition should have advanced to second-stage postconviction proceedings.

¶ 21 The trial court found that defense counsel's failure to present the audiotape was a matter of trial strategy, and that the information alleged to be on the audiotape would not change the outcome of petitioner's trial if it had been introduced. At this stage in the postconviction process, however, petitioner need only allege enough facts to make out a claim that is arguably constitutional." *Hodges*, 234 Ill. 2d at 9. Here, defense counsel admitted he misplaced the audiotape and that it was hard for him to admit, but that he would call Tate as a witness to testify as to his conversation with Tina Washup. Tate's testimony was refuted by Tina and remained uncorroborated at trial. Accordingly, we find that defense counsel's misplacement of an audiotape which contained potentially exculpatory evidence is certainly arguably deficient and



arguably prejudicial. See *Hodges*, 234 Ill. 2d at 17 (a postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result). We express no opinion at this stage as to whether petitioner will ultimately be able to prevail on his ineffective-assistance claim. Such a decision would be inappropriate where, as here, petitioner's claim of a constitutional violation is arguable on its merits. *Id.* at 22-23. We also find that it follows that petitioner stated the gist of a constitutional claim when he argued that appellate counsel was ineffective for failing to raise this issue on appeal. See *People v. Hanks*, 335 Ill. App. 3d 894, 900 (2002) (appellate counsel is ineffective when counsel fails to raise meritorious issues); *People v. Weninger*, 292 Ill. App. 3d 340, 345 (1997) (appellate counsel's decision not to raise an issue must be objectively reasonable).

¶ 22 We reverse the trial court's summary dismissal of petitioner's petition for postconviction relief as frivolous and patently without merit. The cause is remanded to the circuit court for second-stage postconviction proceedings.

¶ 23 Reversed and remanded.