2019 IL App (1st) 17-1481-U

SECOND DIVISION
September 17, 2019

No. 1-17-1481

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division.
	)	
LARRY AUSTIN,	)	No. 08 CR 22079
	)	
Petitioner-Appellant.	)	The Honorable
	)	Alfredo Maldonado,
	)	Judge Presiding.
	)	
	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in summarily dismissing the petitioner's *pro se* postconviction petition where the petition presented an arguable constitutional claim of ineffective assistance of trial counsel.

¶ 2 The petitioner, Larry Austin, appeals from the circuit court's summary dismissal of his *pro se*

petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2016)). The petitioner contends that the circuit court erred in dismissing his *pro se* postconviction petition where that petition, supported by a signed and notarized affidavit of an alleged witness, presented an arguable constitutional claim of ineffective assistance of trial counsel. Specifically, the petitioner argues that counsel was ineffective for failing to investigate and present that witness at trial, because the witness would have corroborated the petitioner's theory of self-defense, or in the very least, a conviction for second degree murder. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Because the record before us is voluminous, we set forth only those facts relevant for the determination of the issues raised in this appeal. A detailed record of everything that transpired in the trial court has already been set forth in the petitioner's direct appeal of his conviction and sentence (see *People v. Austin*, 2016 IL App (1st) 121446-U)), and we need not restate it here.

¶ 5 After being charged with multiple counts of first degree murder for shooting the victim, Ranus Hall, outside of the Kings and Queens Social Club (the club) in the early morning hours of October 25, 2008, the petitioner proceeded with a bench trial. At that trial, the State presented the testimony of three eyewitnesses, Devell Riley, Nyrelee Tate, and Terrance Conner, who identified the petitioner as the shooter both in lineups and in court, and who testified about their recollections of the incident.

¶ 6 All three eyewitnesses testified with the use of a video clip obtained from a nearby portable observation device camera. The video clip contains no sound, and is very murky. All of the individuals depicted in the video are seen from a distance, and are unidentifiable. The video shows about ten individuals standing or walking near the entrance of the club. The video further

shows a man in a white jacket (identified in court by the eyewitnesses as the petitioner) shooting a man in a dark jacket (identified in court by the eyewitnesses as the victim). The man in the dark jacket then runs away, out of the view of the camera. From the video it is impossible to tell what transpired immediately before the shooting, because the men in the black and white jackets are too close to each other, and surrounded by other individuals.

¶ 7 With the use of this video clip, at trial, the victim's cousin, Riley, testified that he was smoking a cigar outside the front door of the club with Tate, Conner and the victim, when the petitioner approached them and asked for a "hit" of Riley's cigar. Even though the petitioner was not familiar to anyone in the group, Riley gave him the cigar. The petitioner "took two puffs off it" and then dropped the cigar on the ground and walked away. Riley testified that Tate then picked up the cigar and offered it back to the petitioner. The petitioner turned around and asked the victim, who stood about a foot away, "what he was on." Riley averred that when the victim answered that "he wasn't on nothing," the petitioner took out a chrome-colored gun from his pocket, pointed it at the victim, who had placed his hands in the air, and started shooting. Riley ran, but later saw the victim "lying face down in the street." He averred that neither he nor any of his friends were armed at the time of the shooting.

¶ 8 On cross-examination, Riley admitted that he heard shots being fired from another gun within seconds after the petitioner shot the victim. Riley further acknowledged that during his interview at the police station, he did not mention the cigar altercation that occurred just before the shooting. Nonetheless, he maintained that he did tell a police detective about this incident at the hospital.

¶ 9 The second eyewitness, and also a cousin of the victim, Conner, similarly testified that he

was standing outside of the club when the petitioner approached Riley and took "a hit off" his cigar before dropping it on the ground. According to Conner, when Tate picked up the cigar and started smoking it, the petitioner asked "Where did my black go?" Tate then handed the cigar back to the petitioner, to which the petitioner asked "what we [was] on?" Conner testified that the victim responded "we're not on that, we're tired, we just came from the club." According to Conner, the petitioner then just pulled out his gun and started shooting. The victim tried to knock the gun out of the petitioner's hand, and then ran away, but the petitioner followed him and continued to shoot. Conner testified that after hearing a few shots, he saw the victim standing, and the petitioner getting into a white four-door vehicle in the club's parking lot. At that point, he heard more gunshots. He affirmatively stated that these gunshots did not come from the petitioner, but claimed that he did not know where they came from.

¶ 10 On cross-examination, Conner acknowledged that he did not tell the police or the assistant State's attorney (ASA) who took his statement that the victim had tried to knock the gun out of the petitioner's hand. The parties also stipulated that the grand jury hearing transcript did not reflect testimony by Conner that the victim had put his arms up in the air in defense before the petitioner shot him.

¶ 11 The victim's friend, Tate, next testified similarly to Riley and Conner. Tate stated that when the petitioner first approached his friends in front of the club he was "talking crazy to himself," so Tate asked him if he was "okay." The petitioner retorted "Who the f*** is you?" and asked for a "hit" of Riley's cigar. After Riley gave the petitioner his cigar, the petitioner walked away with it and then dropped it on the ground. Tate picked up the cigar and took a few puffs before giving it back to Riley. Tate testified that at this point he walked away from the group to talk to a girl. As he was walking away, however, he heard a gunshot form behind. He turned around

and saw the victim running towards him, and the petitioner directly behind the victim shooting. When the shots stopped, Tate saw the victim lying face-down on the ground.

¶ 12 On cross-examination, Tate admitted that he did not see or hear what the petitioner and the victim did or said to each other immediately prior to the shooting because he had walked away to talk to the girl. Tate further admitted that in his grand jury testimony he stated that after hearing the first shot, he took off running and heard more gunshots being fired from "the other side." He also acknowledged that in his statement to the ASA, he had stated that after running away, he heard about five or six gunshots.

¶ 13 On cross-examination, Tate also acknowledged that the statement he gave to the police on the night of the shooting makes no mention of either the petitioner "talking crazy" or responding to Tate with "Who the f*** is you?"

¶ 14 At trial, the State also presented the evidence of the petitioner's cousin Cassandra Austin and his aunt, Catherine Austin, both of who were at the club on the night of the shooting, but neither of whom observed what happened.

¶ 15 Cassandra testified that her friend Marcus drove her and Catherine to the club. Upon arriving, Cassandra saw the petitioner leaving the club. Later, she heard gunshots but did not see who was firing. Upon hearing the shots, she ran to Marcus's car where she was met by Catherine and Marcus. Cassandra heard Catherine yelling at the petitioner to get inside the car, and heard her saying "that was him had a gun." Cassandra asked her aunt, "If he got a gun and he's shooting, what he getting in the car with us for?" When Cassandra saw the petitioner nearing the vehicle, she jumped out of the car and "ran home."

¶ 16 At trial, Cassandra was presented with a statement prepared by ASA Robert Holland that she

signed the day after the shooting. According to that statement, Cassandra reported that prior to getting out of Marcus's car, she saw the petitioner standing over a young black male with a gun pointed at him, yelling "I'll shoot you in the head if you don't shut the f*** up." At trial, Cassandra acknowledged that the signature and initials contained in the statement were hers, but denied ever telling anyone that she saw the petitioner standing over a male threatening to shoot him. Cassandra explained that during her interview with the police, she "was kind of tired" and initialed "a lot of stuff without going over it" because it was "frustrating."

¶ 17 ASA Robert Holland and Sergeant Daniel Gallagher both testified at trial that before her statement was memorialized, Cassandra had, in fact, told them that she had observed the petitioner standing over a man pointing a gun to his head and threatening to shoot him.

¶ 18 The petitioner's aunt, Catherine, next testified that she was standing with Marcus next to his car, waiting for Cassandra, when she heard gunshots. Catherine and Marcus jumped into Marcus's car, and saw the petitioner at the back entrance of the club. Catherine yelled at the petitioner to get inside the car. The petitioner jumped into the vehicle, but as he did so, Cassandra jumped out. Catherine testified that she heard more gunshots after the petitioner was inside the car. Marcus drove off, and when they arrived at Catherine's house, Catherine had a "little confrontation" with the petitioner whereupon she called the police. Catherine testified that she could not recall what she told the police because she was drunk at the time.

¶ 19 Two Chicago police officers Nicholas Garcia and Victor Perez, each testified that when they arrived at Catherine's house, Catherine told them that the petitioner "had a gun and that he was the person shooting at the club after an altercation." The officers further averred that when they arrested the petitioner, he had no weapons on his person. They stated, however, that once at the police station, they recovered a bullet from the petitioner's pants' pocket.

¶ 20 The pathologist testified at trial that the victim died as a result of two gunshot wounds: one entering his abdomen, and the other his buttocks.

¶ 21 A forensic investigator testified that he found three .38-caliber cartridge cases and one fired bullet near the front of the club. He also recovered several .40-caliber cartridge cases nearby. He admitted that no one recovered a cigar anywhere from the crime scene.

¶ 22 A firearms identification expert testified that he compared two fired .38-caliber bullets (one retrieved from the victim's body and the other found at the crime scene) and the three .38-caliber cartridge cases, and concluded that they had been fired from the same weapon.

¶ 23 Chicago police Detective Gregory Jacobson next testified that during his interview of the petitioner in the police station, the petitioner repeatedly claimed that he was never at the club, but rather at home. Over defense counsel's objection, and an oral motion to suppress further statements made by the petitioner on the basis that he invoked his right to counsel, the trial court permitted Detective Jacobson to testify that the petitioner told the police that they could check his alibi because he was on electronic monitoring. The detective further testified that even after being confronted with the fact that his electronic monitoring bracelet did not corroborate his statements about being at home, the petitioner continued to lie to the police about his whereabouts.

¶ 24 After the State's case-in-chief, the petitioner testified in his own defense. While admitting that he shot the victim, the petitioner insisted that he did so because the victim "had a gun," and because he "was scared for [his] life." The petitioner averred that he went to the club to find his girlfriend, Alexis. He brought a gun with him for protection because the club was in a different neighborhood than the one in which he lived and he was worried about "gangs and violence." He explained that if you were a stranger in that neighborhood "people there could consider you

an enemy." The gun did not belong to the petitioner, and instead, he took it from Catherine's back yard. According to the petitioner, the gun was already loaded, but he put an additional bullet in his pants' pocket.

¶ 25 After being unable to locate Alexis in the club, the petitioner went outside. He was standing in front of the club when he saw four or five men standing nearby. One of them asked the petitioner "what's up," and "where [he] was from." The petitioner explained that, from past experience, he understood these questions to mean "a person was getting hostile." Previously, in 1996, during a visit to his grandmother, a group of males had "walked up" to him and "asked [him] the same question[s]." During that incident, after the petitioner told them where he was from, the men "jumped" him and "put [him] in the hospital for two weeks"

¶ 26 The petitioner explained that, as a result, he was nervous having this exchange with a group of strangers in front of the club. The petitioner responded to the men that he was from "the village." When he "turned back round, the guy in the black hoodie," whom he later identified as the victim, was "reaching out with his left hand to grab" him, and pulling up a "black handgun out of his pocket." The victim made contact with the petitioner, and the petitioner was convinced that the victim was about to hurt him. The petitioner tried to push the victim off with his left hand, and then pulled out his gun from his right pocket and fired one shot at the victim.

¶ 27 According to the petitioner, after this first shot, the victim walked off at a fast pace. When the victim turned back towards the petitioner, the petitioner thought he was "fittin' to turn back on me and fire back at me," so he fired at the victim, first, about "two or three more times." The petitioner testified that he then saw the victim run down the block.

¶ 28 At this point, the petitioner stopped shooting and stood on the street for a while, trying to

figure out how to get out of the neighborhood. As he stood there, two of the men that had been with the victim, started walking towards him. The petitioner was anxious because he did not want to use his gun again and just wanted to get away. Luckily, at that moment, he heard his aunt, Catherine, calling to him, so he ran to her car and got inside. The petitioner then heard gunshots, but did not see who was firing them.

¶ 29 The petitioner testified that he did not plan on shooting the victim when he took the gun with him to the club. He did not know the victim before the shooting and did not have any "beef" with him. In addition, the petitioner denied smoking or dropping anyone's cigar in front of the club prior to the shooting.

¶ 30 The petitioner further averred that he did not "get rid of his gun" after the shooting. As far as he knew the gun was in his jacket pocket when he dropped that jacket on the ground at Catherine's house, immediately prior to his arrest.

¶ 31 The petitioner admitted that while he was at the police station, he lied to the police about his whereabouts during the shooting. He further acknowledged that when the police confronted him with the records of his electronic monitoring bracelet, which showed, contrary to what he had told them, that he was not at home during the shooting, he continued to lie and insisted that the electronic monitoring bracelet was broken. The petitioner explained, however, that he lied because he did not "want to go to jail for something" he felt that he "didn't initiate."

¶ 32 Based on the aforementioned evidence, the jury was instructed on self-defense and second degree murder. After deliberations, the jury found the petitioner guilty of first degree murder. The petitioner was subsequently sentenced to 45 years' imprisonment.

¶ 33 The petitioner appealed his conviction and sentence contending that: (1) the trial court erred

when it failed to suppress his false alibi statements to police in violation of his right to counsel; (2) the jury was improperly presented with an instruction to consider Catherine's entire grand jury testimony as substantive evidence, which included inadmissible other crimes evidence; (3) the State misstated the law and engaged in burden shifting during closing argument; and (4) the *mittimus* needed to be corrected to reflect the proper presentence custody credit. See *Austin*, 2016 IL App (1st) 121446-U.

¶ 34 The appellate court acknowledged that all three of the petitioner's claimed trial errors were in fact errors, but nonetheless found that they were harmless in light of the evidence presented at the petitioner's trial. *Austin*, 2016 IL App (1st) 121446-U, ¶¶ 84, 98, 110. The appellate court also ordered that the *mittimus* be corrected to reflect the proper amount of the petitioner's presentence custody credit. *Austin*, 2016 IL App (1st) 121446-U, ¶ 114.

¶ 35 On January 31, 2018, the petitioner filed the instant *pro se* postconviction petition, alleging multiple constitutional violations, including relevant to this appeal, the denial of his right to effective assistance of trial counsel. Specifically, the petitioner alleged that his trial counsel was ineffective for failing to investigate and call Quentin Davis as a witness. The petitioner alleged that Davis would have corroborated his theory of defense and severely undermined the State's case, so as to change the outcome of his trial.

¶ 36 In support, the petitioner attached a signed and notarized affidavit from Davis. In his affidavit, Davis attested that he was present in front of the club immediately prior to the shooting. He saw the victim, who was standing with Tate, Riley, and Conner, get into a verbal exchange with "some guy" who he did not know. According to Davis, the victim or Tate asked this stranger "What's up?" and where he was from. The stranger responded that he was from the village. Davis attested that the victim, who was only a couple of feet away from the stranger,

then reached out to grab the stranger with his left hand, while simultaneously pulling a gun out of his pocket with his right hand. According to Davis, however, the stranger "upped his own gun and shot one time at the victim." The victim walked away fast but then turned back to look at the stranger while "swinging his arm around." The stranger then shot at the victim two or more times. The victim turned to run down the block but fell. Davis further attested that he heard a female yelling for the stranger to get into the car, and he obliged. As they were trying to get away, Tate picked up the victim's gun and shot five or six times at the car. Tate left with the gun and Davis did not see him afterwards.

¶ 37 In his affidavit, Davis further attested that once the police and ambulance arrived, he was directed by a police officer to speak with a plain clothes detective. Davis gave the detective a handwritten statement of what he had seen, and was told he would later be contacted by another detective or ASA to identify the shooter. Davis gave his address and phone number to the detective, but was never contacted by anyone.

¶ 38 Davis further averred that he was recently approached by a friend of the stranger, who knew he had dated the victim's cousin at the time of the shooting and wondered whether Davis had been at the club and had seen anything that night. Davis attested that he would testify to what was in his affidavit and what he told the police on the night of the shooting.

¶ 39 On May 1, 2017, the trial court summarily dismissed the *pro se* postconviction petition, finding that Davis' affidavit contradicted the petitioner's testimony at trial. The petitioner now appeals.

¶ 40 II. ANALYSIS

¶ 41 On appeal, the petitioner contends that the trial court erred in summarily dismissing his *pro*

se postconviction petition at the first stage of postconviction proceedings. He argues that contrary to the trial court's findings, his petition presented an arguable constitutional claim of ineffective assistance of trial counsel, where counsel failed to interview and call Davis, as a witness. The petitioner contends that Davis would have corroborated his theory of defense and seriously undermined the State's case, thereby changing the outcome of his trial. For the reasons that follow, we agree.

¶ 42 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) provides a three-step process by which a convicted defendant may assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21; *People v. Tate*, 2012 IL 112214, ¶ 8; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); see *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, any issues that were decided on direct appeal are *res judicata*, and any issues that could have been presented on direct appeal, but were not, are waived. *Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006).

¶ 43 At the first stage of a postconviction proceeding, such as here, the trial court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)); see also *Tate*, 2012 IL 112214, ¶ 9. At this stage of postconviction proceedings, the court may not engage in any factual determinations or credibility findings. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois

Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing ***.") Instead, the court may summarily dismiss the petition only if it finds the petition to be frivolous or patently without merit. See *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30; see also *Hodges*, 234 Ill. 2d at 10. A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Tate*, 2012 IL 112214, ¶ 9. Our supreme court has explained that a petition lacks an arguable basis where it "is based on an indisputably meritless legal theory or a fanciful factual allegation"—in other words, an allegation that is "fantastic or delusional," or is "completely contradicted by the record." (Internal quotation marks omitted.) *Hodges*, 234 Ill. 2d at 13, 16; *People v. Brown*, 236 Ill. 2d 175, 185 (2010); see also *Ross*, 2015 IL App (1st) 120089, ¶ 31. We review the summary dismissal of a petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 44 Claims of ineffective assistance of counsel, such as the one raised here by the petitioner, are resolved under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, the petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced as a result of counsel's conduct. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94)).

¶ 45 Under the first prong of *Strickland*, the petitioner must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Lacy*, 407 Ill. App. 3d at 456-57.

¶ 46 Under the second prong of *Strickland*, the petitioner must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Lacy*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill. 2d at 135. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004); see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694)).

¶ 47 In the context of a first stage postconviction proceeding, such as the one here, a petitioner need only show that he can arguably meet these two standards, *i.e.*, (1) it is *arguable* that counsel's performance was deficient and (2) it is *arguable* that the outcome of his case would have been different absent the deficient representation. See *People v. Wilson*, 2013 IL (1st) 112303, ¶ 20; see also *Hodges*, 234 Ill. 2d at 17.

¶ 48 For the reasons that follow, in the present case, we find that the *pro se* petition sufficiently alleged that counsel was arguably both deficient and that this deficient performance prejudiced the petitioner, so as to permit the petition to proceed to the second stage of postconviction review.

¶ 49 At trial, the petitioner pursued a theory of self-defense, and as such needed to present some evidence of each of the following elements: (1) that unlawful force was threatened against him; (2) that he was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that he actually and subjectively believed a danger existed that required the use of the force applied; and (6) that his belief was objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004); see also *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 22; 720

ILCS 5/7-1(a) (West 2008). In the alternative, at trial, the petitioner sought a conviction for second degree murder, and, as such, needed to show by a preponderance of the evidence that at the time of the killing he believed the circumstances to be such that they justified the use of deadly force, but that his belief that such circumstances existed was unreasonable. See *People v. Manning*, 2018 IL 122081, ¶18; see also *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995); see also 720 ILCS 5/9-2(a)(2) (West 2008). Accordingly, in the present case, for purposes of both the affirmative defense of self-defense and the second degree murder instruction, it was vital for the petitioner to provide the jury with at least some evidence that would have justified his subjective belief, reasonable or not, that the use of deadly force against the victim was necessary to prevent his own imminent demise or great bodily harm.

¶ 50 To this end, the petitioner testified at trial that on the night of the incident he went to the club looking for his girlfriend. He stated that when he exited the club, and waited, he was surrounded by a group of men who asked "what's up" and "where [he] was from." From past experience, the petitioner knew those questions to "mean that a person was getting hostile." After the petitioner attempted to answer their questions, one of the men in the group, whom the petitioner later identified as the victim, used his left hand to grab the petitioner and with his right hand pulled out a black handgun and pointed it at the petitioner. The petitioner, in fear of getting hurt, aimed his gun and fired at the victim once. As the victim walked off at a fast pace, he kept turning toward the petitioner, and the petitioner fearing that the victim would shoot back at him, fired his gun two or three more times, before leaving the scene.

¶ 51 Taking as we must at this point in the postconviction proceedings, Davis's statements in his affidavit, as true, we are compelled to conclude that they would have proved vital in supporting the petitioner's claim that he acted in self-defense, or in the very least that he proceeded under an

unreasonable belief that his use of deadly force was justified. Just as the petitioner testified at trial, Davis attested in his affidavit that the men outside of the club were the aggressors, and that the victim aimed a gun at the petitioner before the petitioner shot him. Davis's affidavit also explains why nearly all of the witnesses who testified at trial stated that they heard gunshots after the petitioner fired his gun, but no gun was recovered from the scene. In this regard, Davis explained in his affidavit that he saw Tate pick up the victim's gun after the shooting, and that he shot at the car that the petitioner had jumped into. Davis also attested that he saw Tate take the gun with him as he fled the crime scene. Therefore, Davis's proffered testimony would have corroborated both the petitioner's theory of self-defense and his alternative theory that he had an unreasonable belief that deadly force was necessary for his protection.

¶ 52 Accordingly, there can be no doubt that counsel's failure to investigate and call Davis as a defense witness arguably fell below an objective standard of reasonableness. *Hodges*, 234 Ill. 2d at 17; *Brown*, 236 Ill. 2d at 185; see also *Lacy*, 407 Ill. App. 3d at 456. While typically counsel's decisions regarding which witness to present are considered matters of trial strategy, such strategic decisions "may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.' " *People v. Gibson*, 244 Ill. App. 3d 700, 703-704 (1993). Accordingly, our courts have repeatedly held that trial counsel has a professional duty to conduct "reasonable investigations or to make reasonable decisions that make[] particular investigations unnecessary." *People v. Domagala*, 2013 IL 113688, ¶ 38. As such, our courts have previously held that an attorney's failure to investigate witnesses may constitute objectively unreasonable assistance. See *e.g.*, *People v. Bolden*, 2014 IL App (1st) 123527, ¶ 38 (holding that defense counsel's failure to investigate and contact alibi witnesses constituted objectively unreasonable assistance); *Hodges*, 234 Ill. 2d at 20-21 (holding that counsel's failure to investigate and call

three witnesses who would have testified that they observed an individual take a gun from the victim's body after the defendant shot him, was arguably objectively unreasonable, as it would have supported the defendant's theory of defense, *i.e*. a finding of guilt on second degree murder based on an unreasonable belief that deadly force was necessary).

¶ 53 In the present case, contrary to the State's position, under the record before us, we find that it is in the very least arguable that counsel failed to make reasonable investigations so as to discover Davis and present his testimony at trial. In his affidavit, Davis stated that he was contacted by the petitioner's friends because he was dating the victim's cousin at the time of the incident and was present at the club when the shooting took place. Davis also stated that he spoke with police immediately following the incident and provided them with the same information that was in his affidavit, as well as his address and contact information. Taking, as we must, Davis's statements as true, we conclude that counsel did not conduct a "thorough investigation" of the "facts relevant to plausible options" prior to trial. *Gibson*, 244 Ill. App. 3d at 703-704. As such, the petitioner's claim that counsel was objectively unreasonable is not indisputably meritless. See *Bolden*, 2014 IL App (1st) 123527, ¶ 38; *Hodges*, 234 Ill. 2d at 20-21.

¶ 54 The State nonetheless asserts, although inartfully, that counsel was not objectively unreasonable because he could not have learned about Davis even if he had conducted a reasonable investigation. In this respect, the State asserts that the record directly rebuts Davis's statement that he spoke to police because none of the police reports before us contain the handwritten statement that Davis attested to have given them. In addition, the State asserts that according to the police reports in the record the police were unable to speak to any witnesses at the crime scene "due to [a] hostile crowd." In making these arguments, however, the State fails

to acknowledge that police reports may not be relied upon as substantive evidence. See *People v. Stausberger*, 151 Ill. App. 3d 832, 834 (1987) ("The general rule is that police reports are not admissible as substantive evidence"). Since these reports are by their very nature considered hearsay, we may not rely on them as conclusively rebutting anything in Davis's affidavit.

¶ 55 Moreover, even if we were able to consider the substance of these police reports, resolving any discrepancy between them and Davis's affidavit would require us to engage in factual determinations and credibility findings, which we may not do at this stage of the postconviction proceedings. *Tate*, 2012 IL 112214, ¶ 10; see also *Plummer*, 344 Ill. App. 3d at 1020. Our supreme court has repeatedly stated that such analysis is "more appropriate for 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, ¶ 10. Accordingly, under the record before us, and taking as we must, Davis's affidavit as true, we find that it is in the very least arguable that counsel's performance, in failing to investigate Davis and call him as a witness at trial, fell below an objective standard of reasonableness. *Hodges*, 234 Ill. 2d at 17; *Brown*, 236, Ill. 2d at 185; see also *Lacy*, 407 Ill. App. 3d at 456.

¶ 56 The State nonetheless asserts that even if the petitioner can establish that counsel was arguably unreasonable, in light of the evidence presented at trial, he cannot show prejudice. In this respect, the State points out, among other things, that: (1) three eyewitnesses testified that the petitioner was the aggressor; (2) the video clip of the shooting played for the jury showed that the petitioner did not act in self-defense; and (3) the petitioner gave a false alibi to police. We disagree.

¶ 57 Contrary to the State's assertion, only two eyewitnesses, Riley and Conner, testified that the

petitioner was the aggressor and that they observed him fire the first shot. Tate stated at trial that he walked down the block to talk to a girl, and therefore did not witness the events immediately preceding the shooting. In addition, contrary to the State's position, the video clip of the shooting is far from enlightening. As already noted above, because of the video's poor quality, the distance between the camera and the numerous individuals on the scene in front of and surrounding the club, it is impossible to ascertain what transpired immediately prior to the shooting. Contrary to the State's assertion, the video by no means irrefutably establishes that the victim was without a weapon, that the petitioner was the aggressor, or that the petitioner had no reason to fear for his life even after the victim began to run away from him. Accordingly, had Davis testified at the petitioner's trial, the jury would have heard two witnesses stating that the victim was the armed aggressor and two stating that it was the petitioner who initiated the encounter. Under such a balanced credibility contest, it is at least arguable that the outcome of the petitioner's trial would have been different. *Hodges*, 234 Ill. 2d at 20-21. This is particularly true, in light of the numerous other errors that this court has already found were committed during the petitioner's trial. See *Austin*, 2016 IL App (1st) 121446-U, ¶¶ 84, 98, 110. We therefore conclude that the petitioner sufficiently pleaded that it was arguable that counsel's deficient representation resulted in prejudice. *Hodges*, 234 Ill. 2d at 20-21. Since the petitioner has presented an arguable claim of ineffective assistance of counsel, his petition must proceed to the second stage of postconviction review, where counsel may be appointed to aid him. *Id.*

¶ 58 III. CONCLUSION

¶ 59 For all of the aforementioned reasons, we reverse the trial court's summary dismissal of the petitioner's *pro se* postconviction petition and remand for further proceedings under the Act (725 ILCS 5/122-2.1(b) (West 2016).

¶ 60 Reversed and remanded.