

No. 1-13-0123

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
)	Cook County.
Respondent-Appellee,)	
)	
v.)	No. 02 CR 16582
)	
GLENN CARTER,)	
)	Honorable Kevin M. Sheehan,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court did not err in summarily dismissing petitioner's postconviction petition at the first stage, because he both forfeited his claim of ineffective assistance of trial counsel and failed to establish that his trial counsel's actions were objectively unreasonable.

¶ 2 Petitioner Glenn Carter appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Petitioner contends that he raised an arguable claim of ineffective assistance of counsel for failing to properly investigate the complaining witness's

psychiatric history and her use of antipsychotic medication at the time of her testimony. We affirm.

¶ 3 BACKGROUND

¶ 4 This court has detailed the underlying facts of this case in an earlier decision. See *People v. Carter*, 2012 IL App (1st) 103134-U. Therefore, we will summarize only those facts pertinent to our discussion of the particular issue on appeal.

¶ 5 Petitioner was found guilty of predatory criminal sexual assault of a child, aggravated criminal sexual abuse, and criminal sexual assault after a bench trial. His convictions merged into two counts of predatory criminal sexual assault of a child, and he was sentenced to concurrent terms of 30 years in prison on each count. The victim in this case was K.L., the 11-year-old daughter of petitioner's then-fiancée, Krishenna Winfield.

¶ 6 K.L. testified that she was 11 years old on May 28, 2002, and lived with Winfield and her 6-year-old brother, T.L. Petitioner had spent the previous night at their residence, and at around 7 a.m. that morning, Winfield left to apply for a low-income apartment. Winfield asked petitioner to watch the children and to ensure that K.L. got to school.

¶ 7 After Winfield left, petitioner called K.L. into Winfield's bedroom. K.L. went into the room, and petitioner began kissing her on the mouth. Petitioner also lifted K.L.'s shirt up and started kissing K.L.'s breasts. Then, petitioner removed K.L.'s pants, laid her on the bed, took off his clothes, and got on top of her.

¶ 8 According to K.L., petitioner's private part touched her private part. Petitioner started "going up and down" on top of her for "at least" three or four minutes. K.L. testified that petitioner's private part entered her private part but did not go "all the way in." K.L. said she was crying and asking petitioner to stop, but petitioner did not.

¶ 9 While petitioner was on top of K.L., T.L. came into the room. Petitioner told T.L. to “get the F [*sic*] out of there,” and T.L. eventually left. After the incident, K.L. went to school.

¶ 10 At around noon, Winfield met petitioner at her mother’s house, and petitioner dropped off T.L. Winfield and T.L. picked up K.L. from school at around 2:30 p.m., and Winfield noted that K.L. wanted to take a shower, which Winfield said was unusual. K.L. said she took a shower because she was stinking, but she did not tell her mother what happened because K.L. was afraid. They then went to her grandmother’s house with K.L.’s aunt.

¶ 11 Petitioner later called and asked to come over, so Winfield, K.L., and T.L. returned to their apartment. Petitioner arrived at around 7:30 p.m., and K.L. was in her bedroom, which was also the living room. T.L. then told Winfield that K.L. was in her room crying. Winfield asked K.L. what was wrong, and K.L. told her that petitioner “kissed her in her mouth, sucked on her titties[,] and stuck his penis in her.” Winfield told the children not to say anything, told petitioner that she was taking the children to the store to get some bread, and fled with them to Winfield’s mother’s house. After speaking to her mother, Winfield called the police. K.L. later went to the hospital, but she would not let the physicians examine her because she was afraid. The parties then stipulated that, if called, K.L.’s examining physician would have testified that he found no physical trauma to K.L.’s introitus, but that his exam was limited in scope due to K.L.’s refusal to cooperate.

¶ 12 On cross-examination, Winfield admitted that, when K.L. took an earlier trip to Indianapolis to visit with K.L.’s biological father, the father told Winfield that K.L. had sex with another boy. K.L. denied this, but Winfield took K.L. to a doctor for an examination. Winfield noted that K.L. was uncooperative during this examination, but the physician concluded that

K.L. had not had sex. On redirect examination, Winfield agreed that K.L. had been uncooperative with doctors since K.L. was a baby.

¶ 13 The trial court found petitioner guilty of all counts, merged the convictions into two convictions for predatory criminal sexual assault of a child, and continued the matter for sentencing.

¶ 14 On September 14, 2004, the trial court held a hearing on petitioner's motion for a new trial. Trial counsel informed the court that he had just received Winfield's victim impact statement. Winfield's statement provided in pertinent part that K.L. "suffers from severe depression, insomnia and anxiety attacks. She is also heavily medicated and has been since the beginning of this ordeal. My children and I have been receiving counseling, both as a family and individually." Trial counsel argued that this constituted newly discovered evidence regarding K.L.'s state of mind at the time of her testimony. Counsel argued that there was a "strong possibility" that Winfield, K.L, and T.L. were under medication at the time of their testimony, and asked for *voir dire* of Winfield or additional discovery. The trial court denied that request, but allowed trial counsel to amend his motion for a new trial to include this point as an additional ground for relief. The trial court then denied the amended motion for a new trial, noting that K.L. and T.L. were truthful and honest. The cause then proceeded to sentencing.

¶ 15 Trial counsel called Winfield to testify. Winfield stated that she brought K.L. to three different doctors before finding a physician at Mount Sinai Hospital who would treat K.L. Winfield said that, prior to this occurrence, neither she nor her children were ever on any medication. Winfield added that K.L. was taking Trilafon, Seroquel, and Zoloft, and K.L. had been taking these medications at the time of her testimony.

¶ 16 At the conclusion of the sentencing hearing, the trial court sentenced petitioner to 30 years' imprisonment on each count. Trial counsel filed a motion to reconsider sentence and a motion to reconsider the trial court's denial of the motion for a new trial. Trial counsel reiterated that petitioner was entitled to a new trial because of the newly discovered evidence that K.L. and T.L. were taking psychotropic medications when they testified. Trial counsel attested in an affidavit that, pretrial, he met with Winfield "on numerous occasions" and "repeatedly" asked her for permission to interview her, K.L., and T.L., but Winfield refused, stating that the family was in counseling. In addition, trial counsel stated that he apprised the State of Winfield's refusal, but the State did not tender any discovery materials regarding K.L.'s mental health. Concluding that Winfield had not been truthful with him, trial counsel further argued petitioner was entitled to a new trial because trial counsel rendered ineffective assistance based upon a lack of due diligence. Following a hearing and argument, the trial court denied these motions.

¶ 17 On direct appeal, petitioner alleged that: (1) the State failed to disclose the complainant's post-occurrence use of psychotropic medications as required under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the trial court relied on an improper aggravating factor at sentencing; (3) the trial court erred in holding hearings on two post-trial motions in petitioner's absence; and (4) his mittimus should only reflect one conviction. We ordered the mittimus corrected, but otherwise affirmed the convictions and sentences. *People v. Carter*, No. 1-04-3430, 366 Ill. App. 3d 1219 (2006) (unpublished order under Rule 23), *appeal denied*, 222 Ill. 2d 580 (2006).

¶ 18 Petitioner later filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), alleging that the State failed to disclose that the complainant was schizophrenic and on antipsychotic medication at the time of trial (again, pursuant to *Brady*). The trial court *sua sponte* dismissed petitioner's 2-1401 petition

because it was untimely and that the issue was *res judicata* since it had been raised on direct appeal. We noted that the trial court erred in dismissing the 2-1401 petition for untimeliness, but we affirmed the dismissal because *res judicata* barred further consideration of the issue. *People v. Carter*, 2012 IL App (1st) 103134-U, *appeal denied*, No. 115714 (May 29, 2013).¹

¶ 19 On August 28, 2012, petitioner filed the pending postconviction petition. He claimed, *inter alia*, that trial counsel was ineffective for failing to investigate “complainant’s use of psychotropic medications” before, during, and after trial. The trial court, however, summarily dismissed petitioner’s postconviction petition, finding it frivolous and patently without merit.

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 On appeal, petitioner contends that the trial court erred in summarily dismissing his postconviction petition at the first stage of proceedings. Petitioner argues that his trial counsel was at least arguably ineffective for failing to investigate K.L.’s “psychological history and use of psychotropic medications at the time of trial.” Petitioner asserts that the State’s case depended “wholly” upon witness credibility, and this information came to light after trial.

¶ 23 The Act allows a defendant to challenge a conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). An action for postconviction relief is a collateral proceeding rather than an appeal from the underlying judgment. *People v. Williams*, 186 Ill. 2d 55, 62 (1999). Principles of *res judicata* and waiver will limit the range of issues available to a postconviction petitioner “ ‘to constitutional matters which have not been, and could not have been, previously adjudicated.’ ” *People v. Scott*, 194

¹ Petitioner also raised this issue in a federal habeas corpus petition, which the federal district court denied. See *Carter v. Hulick*, No. 07 C 5937 (N.D. Ill. Sept. 29, 2008).

Ill. 2d 268, 273-74 (2000) (quoting *People v. Winsett*, 153 Ill. 2d 335, 346 (1992)). Accordingly, rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised in the earlier proceedings, but were not, will ordinarily be deemed waived. *Id.* at 274; 725 ILCS 5/122-3 (West 2010).

¶ 24 Once a petitioner files a petition under the Act, the trial court must first, independently and without considering any argument by the State, decide whether the petition is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2010). A postconviction petition is frivolous or patently without merit only if it “has no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition lacking an arguable basis in law or fact is one “based on an indisputably meritless legal theory or a fanciful factual allegation.” *Hodges*, 234 Ill. 2d 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.

¶ 25 To survive dismissal at this initial stage, the postconviction petition “need only present the gist of a constitutional claim,” which is “a low threshold” that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Moreover, a petition need not make legal arguments or cite to legal authority. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). In addition, all well-pleaded facts must be taken as true unless “positively rebutted” by the trial record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). However, “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.” *Delton*, 227 Ill. 2d at 254-55. In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of

the proceeding, and any action by the appellate court. 725 ILCS 5/122-2.1(c) (West 2010). In addition, a postconviction petition may be dismissed at the first stage of proceedings as frivolous and patently without merit when the claims raised therein are barred by *res judicata* or forfeiture. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). We review the trial court's summary dismissal of a postconviction petition *de novo*. *People v. Simms*, 192 Ill. 2d 348, 360 (2000). Finally, while the trial court's reasoning may provide assistance to this court, we only review the judgment, not the reasoning, of the trial court. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 26 This issue presented to this court concerns a claim of ineffective assistance of counsel. Those claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish ineffective assistance, a defendant must show both that (i) counsel's performance was deficient and (ii) the deficient performance prejudiced the defendant. *Id.* (citing *Strickland*, 466 U.S. at 687). Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice is found where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 496-97; *Strickland*, 466 U.S. at 690, 694. The failure to establish either prong of the *Strickland* test is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (citing *Strickland*, 466 U.S. at 697).

¶ 27 Nonetheless, matters of trial strategy are generally immune from claims of ineffective assistance of counsel except where the trial strategy results in no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly

assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690-91.

¶ 28 Preliminarily, petitioner notes that the State's response brief includes numerous citations to unpublished decisions from foreign jurisdictions. We agree with petitioner that these citations are improper, as it is well established that unreported decisions, notably those of foreign jurisdictions, carry no weight before this court. See, e.g., *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75, 82 (2002) (holding that foreign unreported decisions are "of no precedential value"). Accordingly, we will not consider those decisions and admonish the State to refrain from this practice in the future. We now turn to the merits.

¶ 29 Petitioner's claim centers on the alleged failure of trial counsel to investigate or seek the mental health records of K.L, the 11-year-old victim. The State responds in part that this issue has been litigated on direct appeal and in petitioner's prior 2-1401 petition and is therefore *res judicata*. Petitioner argues, however, that forfeiture is inapplicable here because he is alleging an omission by counsel, which can be properly raised on collateral review. We disagree. The record reveals that this issue arose during petitioner's sentencing hearing, when Winfield submitted her victim impact statement indicating K.L.'s use of various psychotropic medications at the time of her testimony. Upon review of Winfield's statement, trial counsel immediately sought to *voir dire* Winfield. When the trial court rejected that request, trial counsel amended his motion for a new trial to include this matter, after the denial of that motion, and filed two motions to reconsider that denial, one of which included trial counsel's affidavit attesting to his own ineffectiveness. Petitioner even points out in his brief that "his claim is corroborated by the record." Clearly, petitioner could have raised this matter on direct appeal but did not. As a result, this claim is forfeited. See *Scott*, 194 Ill. 2d at 274.

¶ 30 Moreover, petitioner’s contention fails to meet the requirements of *Strickland*. It is true that this court has held that, when confronted with “ ‘*articulable evidence that raises a reasonable inquiry* of a witness’s mental health history, a court should permit a defendant to discover that history.’ ” (Emphasis added.) *People v. Plummer*, 318 Ill. App. 3d 268, 279 (2000) (quoting *People v. Dace*, 114 Ill. App. 3d 908, 915 (1983)). Here, however, no such articulable evidence raised any reasonable inquiry with respect to K.L.’s mental health. There was nothing before trial or during the presentation of the evidence to indicate that K.L. suffered from any sort of mental illness. Although Winfield’s victim impact statement alluded to K.L.’s use of psychotropic medications and counseling that allegedly resulted from petitioner’s actions, this information was not reasonably available before trial, nor did it arise during K.L.’s testimony or otherwise during the presentation of the evidence. Evaluating all the circumstances of this case and applying a “heavy measure of deference to counsel’s judgments,” as we must (see *Strickland*, 466 U.S. at 690-91), we cannot say that trial counsel’s decision not to further investigate was unreasonable, nor that his trial strategy result in no meaningful adversarial testing (*West*, 187 Ill. 2d at 432-33).

¶ 31 In addition, the petition does not explain why trial counsel should have been aware of K.L.’s purported mental health issues pretrial or during the evidentiary portion of the trial. Accordingly, he cannot establish that trial counsel’s actions were objectively unreasonable. See *People v. Wilson*, 191 Ill. 2d 363, 377-78 (2000) (rejecting the defendant’s ineffective assistance of counsel claim for failing to investigate a witness where the defendant’s petition did not explain why trial counsel would have had any reason to know of the witness’s existence, and holding that, in the absence of any such explanation, “we are simply unable to conclude that counsel’s actions fell below an objective standard of reasonableness”). Since petitioner cannot

meet either prong of the *Strickland* test, his claim of ineffective assistance of counsel necessarily fails. See *Clendenin*, 238 Ill. 2d at 317-18 (citing *Strickland*, 466 U.S. at 697).

¶ 32 On rehearing, defendant asserts that he raised an alternative claim of ineffective assistance of appellate counsel. He cites to one page of his opening brief that consists of a single sentence recounting that defendant alleged this claim in his *petition*. His brief, however, fails to comply with Supreme Court Rule 341, which requires that the argument section of an appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Defendant provides nothing. It is a deep-rooted rule that a reviewing court is not merely a repository into which an appellant may "dump the burden of argument and research. *People v. Davis*, 335 Ill. App. 3d 1, 20 (2002); *People v. Williams*, 267 Ill.App.3d 82, 86, 203 Ill.Dec. 831, 640 N.E.2d 981 (1994) (defendant waived review of arguments by providing one paragraph in support of each with no citations to the portions of the record relied on and no citation to relevant authority). Nor is it our obligation to act as an advocate or seek error in the record. *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). Since he failed to comply with the requirements of Supreme Court Rule 341(e)(7), defendant has forfeited our review of this issue.

¶ 33 Finally, our decision is unaffected by petitioner's reliance upon *People v. Plummer*, 344 Ill. App. 3d 1016 (2003), or *People v. Tate*, 2012 IL 112214. In *Plummer*, the defendant, who had been convicted of murder, filed a postconviction petition alleging, *inter alia*, ineffective assistance of trial counsel for failure to request a continuance to obtain the mental health records of witness Erica Frazier. *Plummer*, 344 Ill. App. 3d at 1019. It was uncontested that the defendant's conviction was based primarily upon the testimony of Frazier (as to conversations she either overheard or had with the defendant) as well as fingerprint evidence. *Id.* at 1021.

During the defendant's trial, however, "an *in camera* examination of Frazier was heard outside the presence of the jury regarding her suicide attempt and subsequent five-day hospitalization for depression in 1990." *People v. Plummer*, 318 Ill. App. 3d 268, 271 (2000) (direct appeal). Here, by contrast, there was no such similar indication that the complainant suffered from any similar serious mental illness. Although K.L. was uncooperative with the examining physicians following both the incident at issue in this case and also a prior incident after a visit in Indianapolis, K.L. testified that she was afraid of doctors in general, and Winfield added that K.L. had been uncooperative with doctors since infancy. *Plummer* is therefore distinguishable.

¶ 34 In *Tate*, the defendant was convicted of first degree murder and aggravated discharge of a firearm, and alleged in his postconviction petition both actual innocence and that his trial counsel was ineffective for failing to call four witnesses, two of whom the defendant claimed could establish an alibi. *Tate*, 2012 IL 112214, ¶¶ 3-4. The supreme court rejected the State's forfeiture argument because none of the four witnesses were called to testify, and as a result, the contents of their affidavits could not have been included in the record. *Id.* ¶ 15 (citing *People v. Erickson*, 161 Ill. 2d 82, 86-88 (1994) (declining to excuse procedural default of claim that counsel was ineffective for failing to show witness lied about holding degree in psychology, where witness admitted on cross-examination that he was not a psychologist)). Here, the record was sufficiently developed to claim ineffective assistance of counsel on direct appeal. Indeed, trial counsel himself proclaimed his own ineffectiveness in an affidavit to his posttrial motion, and the issue of the witnesses' use of psychotropic medications at the time of trial was squarely addressed at the sentencing hearing, as well. Accordingly, *Tate* is also factually distinct from the case before us, and petitioner's claim of ineffective assistance of trial counsel is unavailing.

¶ 35

CONCLUSION

¶ 36 The trial court did not err in summarily dismissing petitioner's postconviction petition at the first stage because his claim of ineffective assistance of trial counsel was both forfeited and petitioner failed to establish that his trial counsel's actions were objectively unreasonable. Accordingly, we affirm the judgment of the trial court.

¶ 37 Affirmed.