

NOTICE

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2014 IL App (4th) 121108-U

NO. 4-12-1108

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 19, 2014

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
COREY D. PHILLIPS,)	No. 09CF495
Defendant-Appellant.)	
)	Honorable
)	Mark A. Drummond,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)) as it states the gist of a constitutional claim defendant was denied the effective assistance of counsel when trial counsel made no attempt to perfect the impeachment of a witness after the witness denied the existence of a deal regarding his testimony and the prosecutor's follow-up question implied such a deal existed.

¶ 2 In July 2012, defendant, Corey D. Phillips, filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In his petition, defendant alleged he was denied due process when the State's key witness was promised "consideration for his testimony." The trial court found the petition frivolous and patently without merit and summarily dismissed it. Defendant appeals, arguing the dismissal was improper because he stated the gist of a constitutional claim his trial counsel knew of a deal

between the State and the key witness but failed to perfect impeachment on this matter. We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4 Following a jury trial, defendant, in December 2009, was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), a Class X felony. The evidence showed defendant was involved in a dispute with the victim, Kenneth Norwood, and Norwood initiated an altercation by striking defendant's head.

¶ 5 Norwood testified, on the afternoon of August 12, 2009, he was awakened in his apartment around 2 p.m. by his girlfriend, Archieona French, who told him defendant was downstairs making threatening comments about him. According to Norwood, he went outside, with French following behind him, and confronted defendant, who owed him \$90. "[A] lot of people" were outside. Norwood struck defendant's head. Defendant pulled out his gun and tried to strike Norwood with it but dropped the gun. Defendant picked up the gun and then fired four shots at Norwood, who was about one foot away from defendant. Two shots struck Norwood in the leg. The bullets passed through and caused minor injuries to Norwood.

¶ 6 During cross-examination, Norwood admitted he struck defendant before either of them spoke a word. Norwood admitted not seeing defendant drop the gun or pick it up, but he testified others told him defendant dropped the gun. Defense counsel questioned Norwood regarding a potential deal he may have received for his testimony:

"Q. Did you meet with anybody or discuss your testimony here today?

A. No.

Q. You didn't meet with the State's Attorney's office?

A. Yes. Yes.

Q. Did you meet with any law enforcement to discuss your testimony?

A. No.

Q. Have you been promised anything for your testimony here today?

A. No, sir.

Q. You've not met with police and they've not made a deal with you in terms of your testimony?

A. I haven't been promised anything.

Q. You've been told, though, haven't you, that if you testify here today that certain charges would not be filed against you, is that correct?

A. I haven't been promised anything, sir.

Q. You've not been told that?

A. No.

Q. Have you had a discussion with law enforcement where they've discussed your testimony—

A. No.

Q. Let me finish, please. Where they've discussed your testimony and offered their assistance in seeing what they

could do if you testified?

A. No."

¶ 7 On redirect examination, the prosecutor stated, "just to clarify so everybody understands *** is it your understanding that you're not going to be referred to investigation for federal charges if you cooperate and testify truthfully in this case ***?" Norwood responded, "That's my first time hearing about that, Mrs. Rodriguez." On re-cross-examination, Norwood reiterated the same. He also testified, "I know they told me they ain't going to promise me nothing. They ain't said nothing about no federal charges or nothing." Defense counsel asked further, "So you can't come back later if something happens or if somebody or something files charges, you can't come back and raise that as a defense or say, [']hey, I was promised this or I was promised that?[']" Norwood stated he understood.

¶ 8 The testimony of the remaining witnesses shows no physical evidence was found and only Norwood identified defendant as the shooter at trial. French's testimony and statements to the police placed defendant on the porch with Norwood.

¶ 9 French testified, on August 12, 2009, she was visiting Norwood at 531 Lind Street in Quincy. She saw defendant standing outside the residence, by the porch. French asked defendant where Norwood's money was. Defendant denied owing Norwood money and said he was going to shoot Norwood and "beat his ass." French ran upstairs to tell Norwood about her interaction with defendant. Norwood ran downstairs. French did not immediately follow Norwood. She heard gunshots as she descended the stairs. By the time French exited the residence, Norwood had been shot and defendant "was walking up the alley." French also saw "a lot of people out there after [she] heard the gunshots." French did not see defendant with a gun.

¶ 10 Julie Ann Howell, who resided at 527 Lind Street in Quincy, agreed she saw "a large number of persons" outside the residence at 531 Lind Street before 1 p.m. on August 12, 2009. Around 1 p.m., Julie heard three gunshots. She looked through her window and saw someone leaving her neighbor's house. The man was wearing a gray shirt and white shorts. As he walked down Julie's driveway, she saw him put a gun in his pocket. Julie described the man as "[b]igger, stockier," and African American. The man, after walking in her driveway, walked "[u]p the alley across the street."

¶ 11 Andrew Howell, Julie's husband, testified he heard sounds Julie believed were gunshots. Andrew believed they were fireworks. Julie got up and looked through the window. She reported seeing someone in the driveway. A couple of seconds later, Andrew stood and went to the window. He saw "a black male," but he could not describe what the male was wearing.

¶ 12 Delaun Tornell Elliott testified, on August 12, 2009, he had been staying at 531 Lind Street for approximately six months. Just before Norwood was injured, Elliott was upstairs watching television. Elliott heard Norwood arguing with someone as Norwood went down the stairs that led to the front door. Elliott followed Norwood. Norwood exited the front door and "off of the front step off of the sidewalk in front of our step." Elliott went to the kitchen to get a drink. As Elliott turned toward the kitchen, he saw "a couple people on the porch" and "somebody else on the sidewalk." Elliott could not see the person standing in front of Norwood. Elliott heard the gunshots and went into the living room, where he stayed until he "knew everything was cool." When asked if he could see "where the shooter went," Elliott stated he went down the block and down the alley. Elliott described the individual as "a tall, black male."

Elliott denied telling Detective Cathy Martin the man was named "Corey Phillips." According to Elliott, "people outside in front of the house said they thought his name was Corey Phillips." Elliott testified he saw the gun, which appeared to be black, but he did not see the shooter. On cross-examination, Elliott testified, when Norwood opened the door to stand on the porch, French was already outside.

¶ 13 Cathy Martin, a detective with the Quincy police department, testified Norwood identified defendant as the shooter at the hospital on August 12, 2009. Bruce Scott, a resident of 531 Lind Street, also identified defendant as the shooter. Detective Martin testified she interviewed defendant on August 13, 2009. Defendant wore white shorts and a white shirt, and stated he wore the same clothes the day before. Defendant could not tell Detective Martin where he was on August 12. Defendant denied being on Lind Street that day. Detective Martin testified, during three searches, no bullet, fragment, or shell was found.

¶ 14 On cross-examination, Detective Martin stated she interviewed Scott at the scene of the shooting. Scott informed her the shooter wore a white shirt and black shorts. He also identified the weapon as a silver gun with wooden handles. Elliott told Detective Martin the gun was black. Detective Martin stated defendant's story did not change during her interview of him.

¶ 15 Scott also testified at trial. When Scott was asked if defendant was at his house on August 12, 2009, Scott testified the following: "See, that's just where I'm kind of confused on. You know, I think—He, you know, because I had been drinking. I'm on a lot of medications, and I get confused [on] a lot of things, so, uhm, I couldn't swear he was there ***." When asked if he knew the details of the shooting on August 12, Scott replied, "I heard it and everything, and it was, you know, explained to me that that's, you know, what had taken place."

Scott, when asked who explained it to him, testified, "several different people." Scott did not remember seeing defendant leave the residence. Scott recalled "somebody pointing out a large person going down the street, and I know [defendant] is a large person, and you know, that's what I got." According to Scott, he spoke with Detective Martin. He told her "what I remembered and what I was told."

¶ 16 Detective Martin was recalled to testify further regarding her interview of Scott, which occurred a short time after Norwood was shot. Scott told her defendant and Norwood argued over money. According to Scott, he heard defendant say, "Bitch, I got something for you," and then saw defendant pull out a gun and shoot Norwood. Scott was sitting on the porch when the shooting occurred.

¶ 17 Adam Yates, a Quincy police officer, testified defendant was identified as the shooter at the scene. A 14-year-old boy, who Officer Yates believed provided a false name, identified the shooter as wearing black jogging pants.

¶ 18 Defendant called Doug McQuern, a detective with the Quincy police department, who testified he presented a photo lineup on August 12, 2009, to Elliott. The lineup contained a photograph of defendant. Elliott could not identify him.

¶ 19 William Calkins, an officer with the Quincy police department, testified he interviewed French regarding the shooting. French told Officer Calkins defendant had a silver gun and provided the officer with the make and model of the weapon. French also told the officer defendant was running with the gun. Officer Calkins testified no weapon was found during a search of defendant's mother's apartment.

¶ 20 The jury found defendant guilty. Defendant was sentenced to 30 years'

imprisonment. Defendant appealed, arguing his sentence was excessive. This court, finding defendant forfeited his argument by not filing a motion to reconsider, affirmed the sentence and conviction. *People v. Phillips*, 2011 IL App (4th) 100240-U, ¶ 11.

¶ 21 In July 2012, defendant filed his *pro se* postconviction petition. Defendant alleged, in relevant part, he was denied due process where a key witness for the State was promised "consideration for his testimony." Defendant maintained a letter from his trial counsel showed the State told counsel about the deal and argued the record shows the witness, during testimony, denied the deal existed.

¶ 22 Defendant attached the letter to his postconviction petition. The letter from defense counsel to defendant, dated April 14, 2011, states the following:

"I am writing in response to your letter to me dated April 11, 2011[,] where you ask about my knowledge of the deal that Kenneth Norwood made to testify at your trial. I have pulled your file and from reviewing my notes it appears that I would have learned this information from the State[']s Attorney['s] Office. I say this because that is the type of information that the prosecution must disclose, and on top of that, I do not recall ever having any communication with any of the investigating officers prior to their testimony at trial. Moreover, if you remember when I questioned Mr. Norwood on the stand about this issue he initially denied being offered any plea deal, or having any discussions with either law enforcement of the State[']s Attorney['s] Office what so ever [*sic*].

Obviously, he was lying because I remember making a big deal about the fact that he was lying and that the information that I had was contrary to what he was saying. At that the prosecuting attorney stood up and made the court aware of the fact that Mr. Norwod had been either referred and/or charges deferred pending the outcome of his truthful testimony at trial.

I do not have a copy of the transcript of Mr. Norwood's testimony, but your appellate defender would have a copy of that portion of the transcript and the exact statements made at trial about referral or deferral would be located in that transcript. As I recall, there was no specific deal that was cut, but rather a 'wait and see if you testify truthfully at trial and then we will decide whether or not we will charge you with anything' approach was taken and that is how I remember it coming out at trial. "

¶ 23 In October 2012, the trial court found the petition frivolous and patently without merit. The court concluded the petition had no arguable basis in law or fact and was contradicted by the record. The petition was dismissed.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 The Act sets forth a three-stage process by which defendants may seek postconviction review of a claim their convictions led to a substantial denial of constitutional rights. *People v. Dopson*, 2011 IL App. (4th) 100014, ¶ 17, 958 N.E.2d 367. In the first stage, a

trial court considers whether a petition, filed pursuant to the Act, is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). The court examines the petition and determines "whether the petition alleges a constitutional deprivation that is un rebutted by the record." *People v. Couch*, 2012 IL App (4th) 100234, ¶ 11, 970 N.E.2d 1270. The threshold to survive this stage is low, "requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). A court must dismiss any petition deemed frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 27 If the postconviction petition is not frivolous or patently without merit, it advances to the second stage, where counsel is appointed and the *pro se* petition may be amended. *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 653. At the second stage, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2012). The proceedings advance to the third stage if the State answers the petition or the court denies the motion to dismiss. At the third stage, the defendant may submit additional evidence supporting his or her claim. *Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2012).

¶ 28 This case involves a first-stage dismissal of defendant's postconviction petition. We review defendant's claim *de novo*. *Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 29 Defendant argues his petition states the gist of a constitutional claim he was denied the effective assistance of counsel due to his counsel's failure to perfect impeachment of the complaining witness, Norwood. Defendant acknowledges defense counsel broached the subject, but argues he failed to prove-up the impeachment. Defendant highlights the prosecutor's

attempt to "clarify" by asking if there was an agreement where a federal investigation would not be prompted if Norwood testified truthfully and Norwood's continued denial of such an agreement. Despite such clarification, defense counsel did not seek another witness on the matter or produce documentary evidence to the contrary.

¶ 30 A postconviction petition that alleges ineffective assistance of counsel should not be summarily dismissed in the first stage of proceedings if it is arguable (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced. *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

¶ 31 Defense counsel arguably provided ineffective assistance by not attempting to perfect the impeachment of Norwood. Defense counsel's letter indicates counsel believed an agreement with Norwood for his testimony had been reached. Despite Norwood's denial of such an agreement, the prosecutor's attempt to "clarify" suggests such an agreement existed: "just to clarify so everybody understands *** is it your understanding that you're not going to be referred to investigation for federal charges if you cooperate and testify truthfully in this case ***?" It is also arguable defense counsel should have taken additional action to determine whether the prosecutor or Norwood was mistaken. In addition, the letter raises other concerns. Although counsel believed an agreement existed, one possibly involving police officers, defense counsel did not talk to the officers before trial. The letter shows defense counsel's memory conflicts with the actual events at trial.

¶ 32 We find unconvincing the State's reliance on cases showing impeachment of witnesses is generally considered trial strategy, which does not support an ineffective-assistance claim. See *People v. Smith*, 177 Ill. 2d 53, 92, 685 N.E.2d 880, 897 (1997); *People v. West*, 187

Ill. 2d 418, 432, 719 N.E.2d 664, 673 (1999). As the State's cases show, the exception to this rule is when the trial strategy is "so unsound that 'counsel entirely fails to conduct any meaningful adversarial testing.'" *Id.* at 432-33, 719 N.E.2d at 673 (quoting *People v. Guest*, 166 Ill. 2d 381, 394, 655 N.E.2d 873, 879 (1995)). Here, the standard is whether it is *arguable* counsel's performance fell below an objective standard of reasonableness (see *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212) and whether it is arguable the trial strategy is so unsound counsel failed to conduct any meaningful adversarial testing (*West*, 187 Ill. 2d at 432-33, 719 N.E.2d at 673). Defendant's petition meets this standard. As the record stands after trial and at the first stage of postconviction proceedings, trial counsel believed a deal existed, the prosecutor suggested the existence of a deal that Norwood denied, but counsel did not further test this conflict. Defendant's postconviction claim is sufficient to survive the first stage.

¶ 33 Defendant was arguably prejudiced. Norwood was the only witness who testified defendant shot him. French, Norwood's girlfriend, did not see the shooting, and her testimony is arguably influenced by her relationship with the victim. The record shows inconsistencies in the identification of the weapon, the clothes on the shooter, and the shooter's conduct after the shooting. No physical evidence linked defendant to the shooting. Norwood's testimony was important.

¶ 34 The State's case, *People v. Williams*, 332 Ill. App. 3d 254, 773 N.E.2d 143 (2002), is distinguishable. *Williams* involved a direct appeal. *Id.* at 256, 773 N.E.2d at 145. This case, however, is an appeal from the first-stage dismissal of a postconviction petition with a different burden of proof. While in *Williams*, the defendant, to prevail, had to prove "counsel's deficient performance so prejudiced the defendant that but for counsel's errors the outcome of the trial

likely would have been different," (*Id.* at 263, 773 N.E.2d at 150), here defendant need only show it is *arguable* counsel's performance prejudiced defendant (*Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212).

¶ 35 Defendant's petition was improperly dismissed as it stated the gist of a constitutional claim.

¶ 36 III. CONCLUSION

¶ 37 We reverse the trial court's summary dismissal of defendant's postconviction petition and remand for additional proceedings.

¶ 38 Reversed and remanded.