

NOTICE
Decision filed 05/28/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130010-U

NO. 5-13-0010

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 08-CF-2058
)	
FRANK PRICE,)	Honorable
)	Richard L. Tognarelli,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal as frivolous and patently without merit of the defendant's *pro se* postconviction petition is reversed where the allegations, supported by affidavits, of extraneous and improper juror communications presented the gist of a claim that the defendant was denied a fair trial.

¶ 2 Frank Price (the defendant) appeals from the summary dismissal, by the circuit court of Madison County, of his petition filed pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The circuit court dismissed the petition pursuant to section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2010)), after determining that it failed to present "the gist of a constitutional claim" and

finding it to be frivolous and patently without merit. For reasons which follow, we reverse and remand this cause for further proceedings on the petition.

¶ 3 The defendant was convicted by a jury of the first-degree murder of a five-year-old child. He was sentenced to a term of imprisonment of 70 years on December 22, 2009. His conviction and sentence were affirmed by this court on direct appeal. *People v. Price*, 2011 IL App (5th) 100047-U.

¶ 4 On December 3, 2012, the defendant filed a *pro se* postconviction petition in which he raised seven issues, including the ineffective assistance of appellate counsel for failure to raise some of the issues on direct appeal. The circuit court dismissed the petition as frivolous and patently without merit. On appeal, the defendant argues that the summary dismissal was error with respect to three of the issues raised in the postconviction petition, all of which, he argues, presented the gist of a constitutional claim sufficient to withstand summary dismissal. On appeal, if we find that even one of the defendant's claims presents the gist of a constitutional claim, the entire petition must be remanded to the circuit court for the appointment of counsel and further proceedings on the petition. See *People v. Rivera*, 198 Ill. 2d 364, 371 (2001).

¶ 5 Among the claims of constitutional error contained in the defendant's postconviction petition, the dismissal of which he appeals, is the claim that persistent extraneous juror communications denied him the right to a fair trial by an impartial jury. The petition alleges that during trial breaks the jurors and the trial spectators and witnesses shared the same waiting area and restroom. The victim's mother, Tonia Whitehead, was seen and heard attempting to influence the jury by telling them, "come

on let's get it over just find him guilty." Attached to the petition are numerous affidavits from individuals who claim to have witnessed contact between jurors and individuals attending the trial. According to the affidavits, the jurors were not sequestered from the family or witnesses of either the defendant or the victim. One affidavit stated that the affiant had seen "the sister of the victims [sic] mother say to 3 jury members by the elevators to go downstairs, 'come on let's just get this over and just find him guilt [sic].' The jurors looked at each other and then at the woman that spoke this." This same affiant stated: "I was present on the fourth day of the jury trial for Frank Price and was in the ladies room waiting to use the bathroom. There were three female jurors [sic] present and the mother of the victim, her sister and her friend in the bathroom also. The victims' [sic] family looked directly at the juror discussed the trial amongst themselves ***." Another affidavit stated the same facts. Another affiant stated that she saw and heard the mother of the victim tell three jurors by the elevators, "comes [sic] on let's get it over, just find him guilty." According to the affidavit, the jurors looked at each other and then at the woman who had so spoken.

¶6 At the first stage of a postconviction proceeding, the circuit court must independently review the petition and determine whether it is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A postconviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the "gist" of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. Because most first-stage postconviction petitions are drafted by defendants with little legal knowledge or training, the threshold for survival is low.

People v. Hodges, 234 Ill. 2d 1, 9 (2009). To set forth the gist of a constitutional claim, the petition need only present a limited amount of detail and need not set forth the claim in its entirety. *Edwards*, 197 Ill. 2d at 244. Further, the petition need not contain legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d at 244.

¶ 7 A postconviction petition may be 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 which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations include those which are fantastic or delusional. *Hodges*, 234 Ill. 2d at 17. Thus, a petition which is frivolous or patently without merit is one based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 17.

¶ 8 Our review of the circuit court's summary dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 9 Initially, we reject the State's claim that the petition's claim relating to improper juror communications was properly dismissed because it could have been raised on direct appeal, but was not. Although the occurrence of the improper juror communications was known to defense counsel at trial, and was included in the defendant's posttrial motion, the claim is based on matters *de hors* the record on appeal and could not have been raised

on direct appeal. Accordingly, it is properly raised in the postconviction petition. See *People v. Thomas*, 38 Ill. 2d 321, 323-25 (1967).

¶ 10 The petitioner's claim of deprivation of a fair trial because of extraneous jury communications, supported by numerous consistent affidavits, is based neither on an indisputably meritless legal theory nor on fanciful factual allegations. We reject out of hand any argument that the claim of extraneous jury communications is based on fanciful factual allegations. It is neither fantastic nor delusional. To the contrary, it is supported by numerous, largely consistent affidavits stating that such communications did occur and some affidavits stating the content of those communications. The claim of extraneous juror communication is not incredible. Accordingly, we find that it has an arguable basis in fact.

¶ 11 Nor can we conclude that the defendant's claim is based on an indisputably meritless legal theory. *Hodges*, 234 Ill. 2d at 16. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A jury verdict will be set aside as a result of outside influences or communications if the defendant was prejudiced as a result of the improper communication or outside influence. *People v. Hopley*, 182 Ill. 2d 404, 458 (1998). While the allegations of the defendant's *pro se* postconviction petition may not be sufficient to make a "substantial showing" that the extraneous juror communications prejudiced him, as required at the second stage of postconviction proceedings, we do believe it is sufficient to state the "gist" of such a claim at the first stage. While a "mere suspicion of partiality" may not be sufficient to reverse a defendant's conviction on direct

appeal (*People v. Ward*, 371 Ill. App. 3d 382, 401-02 (2007)), it may indeed be sufficient to present the "gist" of a constitutional claim at the first stage of a postconviction proceeding.

¶ 12 It is important to explicitly distinguish two supreme court cases relied upon by the State to argue that the allegations of the defendant's petition were insufficient to escape first-stage dismissal. Both *People v. Hobley*, 182 Ill. 2d 404 (1998), and *People v. Williams*, 209 Ill. 2d 227 (2004), involved the second-stage dismissal of the defendants' postconviction petitions, the stage at which the defendant must make a "substantial showing" of a constitutional violation. In *Hobley*, the supreme court found that the defendant had made such a substantial showing where juror affidavits described an incident in a restaurant where the sequestered jury was having a meal in which other restaurant patrons yelled comments urging them to convict. 182 Ill. 2d at 458-59. The affidavits stated that several of the jurors were upset, scared or felt that their life was in danger. The court held that the affidavits were sufficient to warrant an evidentiary hearing to determine whether the incident resulted in prejudice to the defendant. 182 Ill. 2d at 461-62.

¶ 13 In *Williams*, the court found that the defendant had not made a "substantial showing" that extraneous juror communication prejudiced the jury against him to warrant an evidentiary hearing where the juror affidavit stated only that another juror had told him that she had had a conversation with her husband about the case, but the substance of that conversation was not known. Because there was no indication that the extraneous

communication might have been prejudicial to the defendant, he had not made a "substantial showing" sufficient to warrant an evidentiary hearing.

¶ 14 Keeping in mind that at the first stage of postconviction proceedings the defendant need only present the "gist" of a constitutional claim, and is not required to make a "substantial showing" of a constitutional violation, we find the facts of the instant case are more akin to those in *Hobley*, than those in *Williams*. The affidavits attached to the defendant's petition relate not only the occurrence of several extraneous communications with jurors, but also the substance of at least one of those communications. It is averred that the five-year-old victim's mother or aunt, or both of them, told the jurors something to the effect of, "come on, let's get this over—just find him guilty." While this statement may not appear overtly threatening or prejudicial, we believe that together with the other averments of the affidavits it is sufficient to present the gist of a claim that the defendant was deprived of a fair trial by extraneous juror communications.

¶ 15 The defendant's *pro se* postconviction petition did not lack an arguable basis either in law or in fact, and it should not have been dismissed as frivolous or patently without merit. Accordingly we remand this cause to the circuit court of Madison County for further proceedings on the petition pursuant to sections 122-4 through 122-6 of the Act (725 ILCS 5/122-4 through 122-6 (West 2010)).

¶ 16 Accordingly, the order of the circuit court of Madison County dismissing the defendant's postconviction petition is hereby reversed and this cause is remanded to that court for further proceedings on the petition.

¶ 17 Reversed and remanded.