

NOTICE

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2024 IL App (5th) 220447-U

NO. 5-22-0447

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and is not precedent 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,)	Vermilion County.
)	
v.)	No. 18-CF-117
)	
COLE HUBER,)	Honorable
)	Derek J. Girton,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Boie concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's dismissal of the defendant's postconviction petition is reversed and the cause is remanded for second stage postconviction proceedings where the defendant demonstrated the gist of a constitutional claim of ineffective assistance of trial counsel.

¶ 2 A jury found the defendant, Cole Huber, guilty of home invasion, residential burglary, and two counts of aggravated battery. The defendant was sentenced to 25 years for home invasion and a 5-year consecutive sentence for aggravated battery in the Illinois Department of Corrections (IDOC). His convictions were affirmed on direct appeal in *People v. Huber*, 2021 IL App (4th) 190447-U. The defendant subsequently filed a *pro se* postconviction petition claiming violations of his constitutional right to effective assistance of counsel. The circuit court found that the defendant raised issues which could have been raised on direct appeal, and the defendant failed to

attach supporting affidavits. The defendant's postconviction petition was summarily dismissed at the first stage. The defendant appeals the dismissal of his postconviction petition. For the following reasons, we reverse and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 On July 30, 2017, a man broke into Floyd Martin's home, attacked Martin, and took his watch and money. On March 5, 2018, the defendant was charged by information with home invasion (720 ILCS 5/19-6(a)(2) (West 2016)), residential burglary (720 ILCS 5/19-3 (West 2016)), aggravated battery with great bodily harm to a person 60 or over (720 ILCS 5/12-3.05(a)(4) (West 2016)), and aggravated battery to a person 60 or over (720 ILCS 5/12-3.05(d)(1) (West 2016)). On April 5, 2018, a grand jury indicted the defendant for the same conduct.

¶ 5 The victim, Floyd Martin, was deposed prior to trial. The defendant filed several pretrial motions, including a motion *in limine* to bar evidence of the defendant's past convictions. The defendant argued that admitting his prior conviction was unduly prejudicial. He relied on *People v. Montgomery*, 47 Ill. 2d 510 (1971), and argued that it was more important to allow the jury to hear the defendant's story than the State's interest in reciting the defendant's criminal record. The circuit court allowed the State to impeach the defendant based on prior theft and retail theft convictions.

¶ 6 The jury trial began on January 22, 2019. After jury selection and opening statements, the victim, Floyd Martin, testified. Martin was 90 years old on the date of the home invasion, July 30, 2017. Martin testified that after he went to bed, at approximately 9:30 p.m. or 10 p.m., a man broke into his house. The intruder went into Martin's bedroom and demanded money. He took Martin's watch and money from his wallet. Martin testified that the man then threw his wallet on the floor

after taking his money out. The intruder attacked Martin, injuring his head, legs, and right arm. Photographs of Martin's injuries were admitted into evidence.

¶ 7 Martin additionally testified that after he was attacked, the intruder told him, "if you leave this room *** I'll kill you." Martin was bleeding from the attack, and he tried to stop the bleeding for approximately 15 to 20 minutes while he remained in his bedroom. After Martin believed that the man was gone, he walked through his house. The kitchen phone, which had been mounted on the wall, was on the kitchen floor. Martin used his cell phone to call 911.

¶ 8 The State asked Martin if he gave the individual permission to enter his home. Martin responded that the individual had been in the house once or twice before that night, but he did not have permission to enter Martin's home that evening. The State then asked Martin if he could recognize the person from that night in the courtroom. Martin responded, "I don't know if I will or not." The State asked Martin to look in the direction of the defendant. Martin testified, "Well, that—that looks like him over there but I—I won't say definitely that it is."

¶ 9 Martin testified that he remembered viewing a photo lineup on August 23, 2017, and he circled the person that he believed had injured him on July 30, 2017. The photo lineup was admitted into evidence and revealed that Martin had identified the defendant. The State additionally admitted Martin's 911 call into evidence. Martin testified that when the police arrived after he called 911, he was taken to the hospital by ambulance because he was bleeding. He was hospitalized for three or four days and then transferred to a rehabilitation clinic. Martin additionally testified that his house was damaged from the home invasion.

¶ 10 During cross-examination, Martin testified that on the night of July 30, 2017, he was in bed when he heard a loud noise and saw a man in the doorway of his bedroom. Martin described the man as 5' 8" or 5' 9" and he weighed approximately 200 pounds, but he was not "too good at

judging weights.” Martin also did not remember seeing facial hair on the man that night. Martin could not recall whether he told Officer Holt that the man had dark facial hair. Martin additionally testified that he could have told Detective Dunham that the man was 6’ 2.” He could not recall if he told Detective Dunham that the man weighed 265 pounds and had a long white beard. Martin additionally could not recall what the man was wearing, or his eye or hair color. Martin testified that he wore glasses to drive and was not wearing his glasses that night when he was in bed.

¶ 11 Martin’s daughter, Marilyn Sue Smith, testified to the condition of the house after the home invasion. She would visit her father twice a week. After the incident, on July 31, 2017, she met with Detective Dunham at Martin’s house to view the damage. Marilyn testified that the front porch lock was broken. Marilyn was shown a photograph of a piece of Plexiglas that had been on the outside of the kitchen window which faced Martin’s driveway. Marilyn testified that there was a screen covering the window that was screwed into the home. When she viewed the house after the incident, the screen had been removed, it was twisted, and lying in the driveway. The screen had never been removed prior to the incident. Marilyn observed a visible handprint on the Plexiglas window.

¶ 12 Detective Ralph Dunham testified that when he was collecting the palm prints from the Plexiglas window, the Plexiglas broke. Dunham collected and transported the broken pieces. He put the pieces back together after leaving the scene and before taking photographs of the palm prints. Dunham used a print kit to reveal the prints on the Plexiglas and then he lifted the print from the glass. Dunham additionally collected an AT&T U-verse box stained with a red blood-like substance. The palm prints from the Plexiglas, inked palm prints of the defendant, buccal swabs from the defendant and Martin, and the U-verse box were sent to the Illinois State Police Crime Lab.

¶ 13 Dunham additionally testified to the photo lineup. Dunham was not present when the photo lineup was administered to Martin by an independent administrator, but he was aware that Martin had identified the defendant in the photo lineup. Dunham additionally testified that Martin described the perpetrator as having long white whiskers but not a full beard, 6'2" tall, and weighing 265 pounds.

¶ 14 John Carnes with the Illinois State Police Forensic Science Laboratory testified that he was a forensic scientist with a specialization in latent print examination. Carnes testified that the latent print on the Plexiglas was made by the same person whose palm prints were on the defendant's palm print card. Carnes additionally testified that the palm print was not made through a window screen because there was no impression of a window screen on the palm print.

¶ 15 Amanda Humke, a forensic scientist in biology and DNA with the Illinois State Police, testified to the DNA mixture found on the AT&T U-verse. The major male DNA profile found in the U-verse sample matched the DNA profile of the defendant. There was also a minor male DNA profile that matched Martin's DNA profile. Humke testified that the major male DNA profile that was consistent with the defendant would be expected to occur in approximately 1 in 2.3 octillion unrelated individuals.

¶ 16 After the State rested, the defendant called a witness to testify that he found Martin's wallet on the street while he was driving. He met with a police officer to return the wallet. Dunham additionally testified that Martin's wallet was recovered and returned to Martin's daughter.

¶ 17 Defense counsel additionally introduced portions of Martin's deposition transcript. Martin had testified that the police department had circled the photo on the lineup. The defendant was admonished regarding his right to testify, and he did not testify at trial.

¶ 18 The parties presented closing arguments. The defense argued that the defendant should not be convicted because there was a misidentification and “sloppy police work.” During the incident, Martin was not wearing his glasses and had trouble seeing the perpetrator. Martin had initially identified the suspect as having white whiskers and weighing 265 pounds. He also had testified that he did not really remember the suspect. The defense additionally argued that there were several items of evidence which were not processed for DNA evidence or fingerprints. The Plexiglas window was broken during the collection of evidence and the evidence was not photographed at the scene. The defense argued that the palm print could have been made from the inside of the house and the DNA evidence from the U-verse could have been from an earlier time when the defendant was visiting Martin.

¶ 19 The jury found the defendant guilty on all counts. The defendant filed a motion for a new trial, which the circuit court denied.

¶ 20 The defendant was sentenced to 25 years with 3 years of mandatory supervised release (MSR) for the offense of home invasion. The defendant was additionally sentenced to a consecutive sentence of five years with three years of MSR for the offense of aggravated battery with great bodily harm to a person 60 years old or over.

¶ 21 The defendant filed a motion to reconsider the sentence, which was denied. The defendant subsequently filed a direct appeal and argued that the circuit court erred in denying a motion to dismiss the home invasion charge and by denying the defendant’s motion to strike a juror for cause. See *People v. Huber*, 2021 IL App (4th) 190447-U. The circuit court’s decision was affirmed.

¶ 22 A petition for postconviction relief was filed by the defendant where he claimed that he received ineffective assistance of counsel. The defendant claimed that his trial counsel failed to present evidence of actual innocence, including medical records that demonstrated that the

defendant received treatment on the night of the incident; testimony from his alibi witness, the defendant's mother, Nancy Griffin; and testimony from Dorinda Faust, who would have testified to occasions where Faust had accompanied the defendant to the victim's residence. The defendant claimed that trial counsel advised the defendant against testifying because the State would impeach the defendant with prior domestic battery, battery, and assault arrests and convictions. Because the victim was assaulted, the defendant was led to believe that the jury would convict the defendant based on prior misdemeanors. Therefore, the defendant alleged he was not able to testify and provide an explanation for the DNA and fingerprint evidence found inside Martin's home.

¶ 23 The defendant additionally claimed that trial counsel mentioned "*Montgomery*" in his motion *in limine* argument, but the circuit court failed to apply the *Montgomery* balancing test when deciding on the admission of the defendant's prior convictions of theft and retail theft. See *Montgomery*, 47 Ill. 2d 510. The defendant also claimed that his trial counsel failed to file a motion to suppress the photo array identification evidence, and Martin was uncertain of the identification of the perpetrator. The defendant additionally raised issues with sentencing.

¶ 24 The defendant filed attachments with his postconviction petition. The supporting documentation included copies of medical records from Presence United Medical Center dated July 30, 2017, as well as his medical record request, police reports, the deposition transcript of Floyd Martin, and his affidavit. The defendant in his affidavit averred that he informed his trial counsel that on the night of the incident he was hospitalized due to a drug overdose and his trial counsel never obtained the defendant's medical records. The defendant additionally averred that his mother picked him up from the hospital at approximately 8:30 p.m. on July 30, 2017; the defendant's mother drove the defendant to her home in Danville, Illinois; and the defendant stayed with his mother at her home until the following day. The defendant provided his attorney with his

mother's contact information, informed his attorney that his mother had an advanced stage of cancer, and informed his attorney that his mother may not be able to testify at trial. His affidavit included an explanation that he was unable to obtain a sworn statement from his mother because she was deceased.

¶ 25 The defendant additionally averred that he had been inside Martin's home prior to the date of the incident and assisted Martin with opening a window because he did not have a functioning air conditioner. On a separate occasion, the defendant had fallen near Martin's house and had used Martin's kitchen phone. The defendant averred that he wished to testify but his trial counsel would not let him testify because of prior arrests and convictions.

¶ 26 The circuit court denied the defendant's request for postconviction relief in a docketing statement. The circuit court found that the defendant could have raised all but two of the issues on direct appeal. The circuit court found that the issue regarding potential witnesses would not have been available to raise on appeal, but the defendant failed to attach required affidavits from potential witnesses. The petition for postconviction relief was dismissed. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, the defendant argues that the circuit court erred in summarily dismissing his *pro se* postconviction petition at the first stage of the proceedings where he asserted a gist of a constitutional claim of ineffective assistance of counsel. Specifically, the defendant claims that his trial counsel was ineffective for failing to present alibi testimony and for incorrectly informing the defendant that his prior misdemeanor convictions or arrests would have been used as impeachment evidence if the defendant would have testified at trial.

¶ 29 The Post-Conviction Hearing Act (Act) sets forth a three-stage procedure through which a defendant may challenge his conviction based on allegations of a substantial denial of his

constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2020); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding is a collateral attack on the trial court proceedings and not an appeal from the judgment of conviction. *People v. English*, 2013 IL 112890, ¶ 21. “Proceedings under the Act advance through three stages.” *People v. Morales*, 2019 IL App (1st) 160225, ¶ 17. ¶ 30 At the first stage of postconviction proceedings, the circuit court determines whether the defendant’s petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2020); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition is considered frivolous or patently without merit if the defendant’s allegations, taken as true, fail to state the gist of a meritorious constitutional claim. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The circuit court may summarily dismiss a petition as frivolous or patently without merit if the petition has “no arguable basis either in law or in fact.” *Hodges*, 234 Ill. 2d at 16; 725 ILCS 5/122-2.1(a)(2) (West 2020). “If the petition passes that low bar, it is docketed for second-stage proceedings.” *Morales*, 2019 IL App (1st) 160225, ¶ 17. This court reviews the circuit court’s dismissal of a petition at the first stage of the proceedings *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 31 The petition must be supported by “affidavits, records, or other evidence *** or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2020). The requirement set forth in section 122-2 serves to establish that the petition’s allegations are capable of “objective or independent corroboration.” *Collins*, 202 Ill. 2d at 67. “Failure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney.” *People v. Hall*, 217 Ill. 2d 324, 333 (2005).

¶ 32 The defendant asserted that his trial counsel was ineffective for failing to secure alibi testimony of his now deceased mother. He attached an affidavit to his complaint averring that he

was hospitalized on July 30, 2017, and attached supporting medical records from that date. According to the defendant, at approximately 8:30 p.m. on July 30, 2017, his mother had picked him up from the hospital and they drove to her home in Danville, Illinois, where they stayed together until the next morning. Trial counsel received the defendant's mother's contact information and the defendant had notified trial counsel that his mother may not be able to testify by the trial date due to an illness. The defendant additionally explained in his affidavit that he was unable to obtain a sworn statement from his mother because she is now deceased.

¶ 33 The failure to attach an affidavit from his deceased mother or his trial attorney to corroborate the defendant's claim for ineffective assistance of counsel should not have prevented the petition from advancing to the second stage. The circuit court erred in denying the defendant's petition at the first stage for failing to provide sufficient supporting evidence.

¶ 34 We turn to whether the defendant alleged the gist of a meritorious constitutional claim in his *pro se* petition where he claimed that his sixth amendment right to effective assistance of trial counsel was violated. See *People v. Brown*, 2017 IL 121681, ¶ 25. If apparent on the record, a defendant is required to raise ineffective assistance of counsel claims on direct review. *People v. Veach*, 2017 IL 120649, ¶ 46. Ineffective assistance of counsel claims, however, are sometimes better suited as collateral proceedings where the record is incomplete or inadequate for resolving the claims. *Veach*, 2017 IL 120649, ¶ 46.

¶ 35 A claim of ineffective assistance of counsel is evaluated under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 687-88. Strategic decisions will not support a claim of ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86

(1989). Prejudice is shown where there was a reasonable probability that the result of the proceedings would have been different, but for counsel's deficient performance. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 45.

¶ 36 First stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than petitions at the second stage. *People v. Tate*, 2012 IL 112214, ¶ 20. A postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage if "it is arguable that counsel's performance fell below an objective standard of reasonableness" and "it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. Trial strategy considerations are inappropriate for first stage determinations. *Tate*, 2012 IL 112214, ¶ 22.

¶ 37 "Trial counsel has a duty to conduct both factual and legal investigations." *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). Whether defense counsel's failure to investigate amounts to ineffective assistance is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *Montgomery*, 327 Ill. App. 3d at 185. "Counsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 38 The defendant claimed in his petition that he had repeatedly informed his attorney that his mother was terminally ill, and he needed to interview the defendant's mother and secure alibi testimony. The defendant's allegations, taken as true, support an arguable claim that trial counsel performed unreasonably by failing to investigate and obtain alibi testimony and obtain medical records. Additionally, it is arguable that the defendant was prejudiced by trial counsel's failure to interview and secure testimony of an alibi witness.

¶ 39 The defendant additionally argued in his *pro se* postconviction petition that trial counsel was ineffective for advising him that prior arrests and convictions for misdemeanor domestic battery, battery, and assault would be used to impeach him if he were to testify in his own defense. Because the Act does not permit partial summary dismissals, we need not address this additional ineffective assistance of counsel claim. *Morales*, 2019 IL App (1st) 160225, ¶ 43. We cannot say that defendant's petition lacked an arguable basis in fact or law where the defendant's petition set forth sufficient facts and supporting documents to state the gist of a claim of ineffective assistance of counsel.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we reverse the order of the circuit court of Vermilion County and remand the matter for further proceedings.

¶ 42 Reversed and remanded.