2011 IL App (1st) 092531-U
No. 1-09-2531

FIFTH DIVISION
August 5, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 5903
	)	
QUINHON DOUGLAS,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justice Joseph Gordon and Justice Epstein concurred in the judgment.

O R D E R

HELD: Where defendant's first stage *pro se* postconviction petition alleged the gist of an ineffective assistance of counsel claim, the trial court erred in dismissing the petition.

¶ 1 Defendant Quinhon Douglas appeals from the summary dismissal of his *pro se* petition for relief under the Post-

Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2008). Defendant contends his petition adequately alleged a claim that: (1) his trial counsel was ineffective for failing to investigate and call witnesses; and (2) the State knowingly solicited perjured testimony from both of its eyewitnesses. We reverse and remand for further proceedings.

¶ 2 About midnight or 1 a.m. on December 15, 2002, Rodney Campbell was fatally shot in the alley behind Tarina Montgomery's apartment building at 8324 South Buffalo Avenue, where Montgomery had held a birthday party for Terrance Cannon. At trial, Cannon testified that he saw defendant shoot the victim. Montgomery testified that she saw defendant point a gun at the victim but she walked away and then heard gunshots. The sole defense witness, Tawana Lewis, testified that Cannon was at her apartment building at 8326 South Brandon Avenue when the victim was shot. The defense theory at trial was that neither Cannon nor Montgomery were present when the shooting occurred.

¶ 3 At trial, Terrance Cannon testified that Montgomery's party started around 8:45 or 9 p.m. on December 14, 2002. About 20 people were at the party including defendant, the victim, and Lorenzo Lee. Around midnight, Cannon left the party with several other guests through the back door, which leads to a backyard and an alley. He saw the victim and defendant in the alley, talking and standing two or three feet apart. Cannon then

saw defendant pull a gun from his pocket and shoot the victim four or five times. After the victim fell, defendant went toward a green minivan that was parked across the alley. Before he got into the van, he fired the gun about three times toward Cannon and the other guests. Cannon ran and did not see defendant leave. The first time Cannon spoke with police a few days later, he told them he did not know anything because he left the party between 11 p.m. and 1 a.m. and went with Lewis's cousin Titaaboo to Lewis's apartment. He did not tell them the truth because "I ain't [*sic*] know what was going on, *** and I was scared with that." On December 18, 2002, Cannon identified defendant as the shooter from a photo array. No one told Cannon what to say when he testified at trial. Cannon has three previous felony convictions.

¶ 4 Tarina Montgomery testified that her party ended around 12:30 or 1 a.m. She then noticed that 8 or 10 guests were standing by the back door. She heard defendant and the victim arguing then saw defendant pull out a gun and point it at the victim. Montgomery walked toward the front of her building. She heard three or four gunshots but did not see who fired the shots. Montgomery did not speak with the police until several days later, and did not tell them the truth the first time because she did not want to be involved. The police did not tell her what to say at trial.

¶ 5 Testimony from forensic experts revealed that four fired shell casings and six empty beer bottles were recovered as evidence from the alley. Fingerprints found on the bottles did not match defendant. It was unclear whether the shell casings came from the same weapon, but two bullets that were recovered from the victim's body were fired from the same weapon.

¶ 6 Detective Eileen Heffernan testified that during the course of her investigation she learned defendant was a possible offender. She spoke with Shakeeta Taylor, Lewis's neighbor. Heffernan also interviewed Cannon, who told her that he witnessed defendant shoot the victim. When she showed Cannon a photo array, he identified defendant as the shooter.

¶ 7 The defense then stipulated that Detective Shebish would testify that during an interview, Cannon told Shebish that he left Montgomery's party between 11 p.m. and midnight and went to Brandon Avenue with Titaaboo. After someone came there later and told them the victim had been shot, Cannon went back to the scene.

¶ 8 Tawana Lewis testified that she went to Montgomery's party with Tashawna Malone and Titaaboo. They left the party around 11 p.m. and met Cannon on the way home. He joined them and stayed at Lewis's for an hour and a half or two hours, until someone came to the door and told Cannon someone had been killed. Cannon left but came back to the building around 1 a.m. with

Taylor. He told Lewis a man had been killed at the party. Lewis knew defendant from high school. Taylor, the mother of defendant's child, drove Lewis to court to testify, though they did not discuss her testimony.

¶ 9 The jury found defendant guilty of first degree murder. The trial court denied defendant's motion for new trial and sentenced defendant to 55 years in prison.

¶ 10 Defendant appealed and this court affirmed defendant's conviction. *People v. Douglas*, No. 1-06-3186 (2008) (unpublished order under Supreme Court Rule 23).

¶ 11 On July 9, 2009, defendant filed a *pro se* postconviction petition alleging, in pertinent part, that he was denied the effective assistance of trial counsel and the right to a fair trial. Specifically, defendant alleged that based on Lewis's trial testimony, his attorney should have interviewed Taylor, Malone, and Titaaboo, and presented them as witnesses to corroborate Lewis and discredit the State's witnesses. In support of this claim, defendant attached his own statement and the affidavit of Taylor. Defendant also alleged that the State knowingly used the false testimony of Cannon and Montgomery. Defendant supported this claim with Taylor's affidavit as well as the affidavit of Shenia Swanega, Lorenzo Lee's mother.

¶ 12 In his purported affidavit, which was not notarized, defendant alleged that in 2008 he learned Malone and Titaaboo

would be willing to sign sworn statements but he was unable to contact them because they moved. He claimed that they would have said they were with Cannon and Montgomery at around 11:30 p.m. on December 14, 2002. About 45 minutes later, "some guy" told Cannon that someone had been shot at the party. Cannon and Montgomery asked Taylor to drive them back to Montgomery's building.

¶ 13 In a notarized affidavit, Shakeeta Taylor attested that around 12 a.m. on December 15, 2002, she saw Montgomery outside Taylor's apartment building. Montgomery was looking for Cannon, who had left the party with Taylor's neighbors earlier. They joined Cannon at Lewis's apartment, along with Lewis, Malone, and Titaaboo. Between 30 and 60 minutes later, someone told Cannon that there had been a shooting outside Montgomery's place, and Cannon asked Taylor to drive him and Montgomery back to her building. When they arrived, Cannon got out of the car, then returned to tell them the victim was dead. Taylor told the police and defense counsel what she knew but defense counsel never returned her calls. Taylor is the mother of one of defendant's children, but they were no longer in a relationship at the time of the shooting.

¶ 14 Shenia Swanega attested that her son, Lorenzo Lee, was taken into custody by detectives in December 2002. Lee was one of the persons present at the party at Montgomery's

apartment. About a week later, Lee told Swanega that the detectives threatened to charge him with murder. Lee said he was placed in a locked room with Cannon and Montgomery and they were all told they would face charges if they did not make statements implicating defendant. Both Cannon and Montgomery told Lee they did not see who shot the victim and they did not see defendant with a gun.

¶ 15 The trial court summarily dismissed defendant's petition and this appeal followed. We review the summary dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 16 On appeal, defendant first contends that his petition presented the gist of an ineffective assistance of counsel claim. Specifically, defendant argues his counsel was ineffective for failing to interview and call witnesses, including Taylor, Malone, and Titaaboo, who would have undermined the State's case and corroborated his theory of defense at trial that Cannon and Montgomery were not at the party at the time of the shooting and therefore did not see who shot the victim.

¶ 17 The State contends that review of the merits of defendant's petition should be precluded for two reasons. First, the State asserts that we should not consider defendant's allegations because he failed to comply with Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005) by not including the order

from which he is appealing in the appendix to his appellate brief. *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 440 (2009). However, because the order was included in the record and attached to the reply brief, his initial failure to include the order does not hinder our review and we decline to dismiss the appeal. See *Budzileni*, 392 Ill. App. 3d at 440-41; *People v. Townsend*, 275 Ill. App. 3d 200, 204-05 (1995).

¶ 18 The State next contends that defendant has forfeited review of his claim because it is premised entirely on the record and could have been raised on direct appeal. See *People v. Scott*, 194 Ill. 2d 268, 282-83 (2000). We disagree. Here, defendant bases his ineffective assistance of counsel claim on his attorney's alleged failure to call witnesses who would have corroborated his defense and undermined the State's case. Defendant supports his claim with his statement and Taylor's affidavit, which include statements that were not part of the trial record and could not have supported a claim on a direct appeal. Defendant properly brought his claim in a postconviction petition. See *People v. Parker*, 344 Ill. App. 3d 728, 737 (2003). Moreover, a defendant generally will not be required to bring an ineffective assistance of counsel claim on a direct appeal or else forfeit it, because the trial record is often " 'incomplete or inadequate for this purpose' " as it is not sufficiently developed to litigate or preserve such a claim.

People v. Bew, 228 Ill. 2d 122, 134 (2008) (quoting *Massaro v. United States*, 538 U.S. 500, 504-05 (2003)). Therefore, defendant has not forfeited review of his claim.

¶ 19 At the first stage of proceedings, a postconviction petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A petition is considered frivolous or without merit only if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. A fanciful factual allegation is fantastic or delusional, while a meritless legal theory is one completely unsupported by the record. *Hodges*, 234 Ill. 2d at 16-17. At this stage, defendant's petition need only demonstrate the "gist" of a constitutional claim. *Brown*, 236 Ill. 2d at 184.

¶ 20 A first stage petition claiming ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17. The decision to call a witness is a matter of trial strategy and generally will not support an ineffective assistance claim. *People v. Patterson*, 217 Ill. 2d 407, 442 (2005). However,

counsel may be ineffective for failure to call a witness whose testimony would support an otherwise uncorroborated defense. *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003); *People v. Skinner*, 220 Ill. App. 3d 479, 485 (1991).

¶ 21 As an initial matter, we agree with the State that defendant's purported affidavit, in which he avers to the statements of both Malone and Titaaboo, may not be considered because it was not notarized. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (an affidavit filed pursuant to the Act must be notarized to be valid).

¶ 22 Nonetheless, we find that defendant's ineffective assistance of counsel claim, alleged in his petition and supported by Taylor's properly notarized affidavit, was based on neither fanciful factual allegations nor meritless legal theory. According to defendant's allegations, had Taylor been called she would have testified that she saw Cannon and Montgomery at her own apartment building when they received the news that someone had been killed at the party, and she drove both back to Montgomery's, where Cannon learned of the victim's death. In her affidavit Taylor attests to the same, and specifically states that Cannon was at Lewis's apartment at the time of the shooting. Defendant's allegations are further supported by Lewis's testimony at trial, and Cannon and Montgomery's admissions that they did not initially tell the police the "truth" about what

happened. Based on the record, defendant's factual allegations are not fanciful.

¶ 23 Additionally, defendant's theory that his counsel was ineffective for failing to call Taylor is not completely contradicted by the record. Had defense counsel called Taylor as a witness, she would have contradicted the testimony of both Cannon and Montgomery, as in her affidavit she attested she saw both at Lewis's apartment from around midnight until they received news of the shooting. More importantly, Taylor would have corroborated the testimony of the sole defense witness. Particularly because the State presented no conclusive physical evidence, its case relied heavily on the testimony of Cannon and Montgomery, and defendant presented only one witness to contradict the State's two eyewitnesses at trial. Therefore, it is certainly arguable that defendant was prejudiced by counsel's failure to call a witness to corroborate Lewis's testimony and further undermine the State's witnesses. See *People v. Makiel*, 358 Ill. App. 3d 102, 107, 119-20 (2005) (the defendant's case was remanded for a third stage evidentiary hearing based on his petition's unrebutted supporting affidavit from a potential witness who would have contradicted the testimony of two State witnesses); *People v. Butcher*, 240 Ill. App. 3d 507, 510 (1992) (counsel was ineffective where he failed to call two witnesses who would have corroborated the one defense witness and further

undermined the contradictory identification testimony of the State's witnesses); *Skinner*, 220 Ill. App. 3d at 485 (counsel was found to be ineffective where testimony of two witnesses would have corroborated the defendant's testimony and contradicted the testimony of State witnesses). Finally, defense counsel was aware of Taylor as she attested that she told him what she knew and attempted to contact him on numerous occasions. We find defendant's theory that his counsel was ineffective for failing to call Taylor as a witness was not meritless.

¶ 24 The State argues that defense counsel's decision not to call Taylor should be considered trial strategy based on the fact that Taylor was the mother of one of defendant's children and therefore not a credible witness, relying on *People v. Dean*, 226 Ill. App. 3d 465 (1992). However, we find *Dean* to be inapposite as it was decided using an abuse of discretion standard. *Dean*, 226 Ill. App. 3d at 467. Since *Dean*, the Illinois Supreme Court has held that the proper standard of review for a first stage postconviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Furthermore, credibility determinations are improper at the first stage of postconviction review. *Coleman*, 183 Ill. 2d at 385. Here, because nothing on the record demonstrates the reason defendant's counsel did not call Taylor, it is arguable that his failure to

do so was not trial strategy and fell below an objective standard of reasonableness.

¶ 25 The other cases cited by the State are distinguishable. See *People v. Pecoraro*, 175 Ill. 2d 294 (1997); *People v. Barcik*, 365 Ill. App. 3d 183 (2006). In *Pecoraro*, the court found the defendant's trial counsel was not ineffective for failure to investigate because he had a sound theory of defense at trial and was not required to develop a speculative theory that someone else was responsible for the crime. *Pecoraro*, 175 Ill. 2d at 324. In *Barcik*, the court found that the defendant's counsel made a reasonable strategic decision in not calling the defendant's fiancee to testify to his sobriety because she was intoxicated at the time of his arrest and had a relationship with the defendant, and was therefore not a credible witness. *Barcik*, 365 Ill. App. 3d at 192-93. In contrast, here defendant presented a potential witness who would have corroborated his theory of defense at trial, undermined the State's case, and whose only issue of credibility was a child with defendant, not her level of intoxication at the time of the incident or a current relationship. Under these circumstances, we find that defendant has presented an arguable claim that his counsel was ineffective for failing to call Taylor as a witness.

¶ 26 Because defendant adequately alleged the gist of an ineffective assistance of counsel claim, we need not address

defendant's allegation that the State knowingly solicited perjured testimony from its eyewitnesses, as partial summary dismissals are not permitted at the first stage under the Act. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

¶ 27 For the foregoing reasons, we reverse the decision of the trial court and remand for further proceedings.

¶ 28 Reversed and remanded.