THIRD DIVISION
June 22, 2011

No. 1-09-3406

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
v.	)	No. 03 CR 18004 (01)
LEONARD BROWN, Petitioner-Appellant.	)	HONORABLE MARY MARGARET BROSNAHAN, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

O R D E R

HELD: On appeal from the summary dismissal of a postconviction petition, the petitioner's claim is not barred by the doctrines of *res judicata* or waiver. Following the Illinois Supreme Court's decision in *People v. Brown*, 236 Ill. 2d 175 (2010), the circuit court erred in summarily dismissing the *pro se* petition alleging ineffective assistance of counsel for failing to request a fitness hearing. However, the circuit court correctly declined to include the day the petitioner was sentenced as part of his presentence custody. Reversed and remanded for further proceedings.

Petitioner Leonard Brown (Leonard) appeals an order of the circuit court of Cook County summarily dismissing his *pro se* petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). Leonard claims his trial counsel was ineffective for failing to request a fitness hearing, where Leonard had informed counsel he had been diagnosed with depression and was taking medication at the time of the murder and throughout trial. Leonard separately argues this court should correct his sentence to reflect the day he was sentenced as part of his presentence custody. For the following reasons, we reverse and remand the case, concluding the circuit court erred in summarily dismissing his petition, but determining that no change to his sentence is necessary.

BACKGROUND

The record on appeal discloses the following facts. Leonard and codefendant Andre Tyson (Tyson) were each charged with first degree murder for the shooting death of Rashee Lewis. At trial, Leonard testified on his own behalf in support of a claim of self-defense. Following their simultaneous, severed jury trials, Leonard and Tyson were each convicted of the charged offense and sentenced to 52 years and 45 years in prison, respectively.

On direct appeal, Leonard and Tyson each contended they were denied effective assistance of counsel when counsel failed to tender an accomplice-witness instruction at trial.

Leonard, individually, contended: (1) his first degree murder conviction should be reduced to second degree murder since he proved by a preponderance of the evidence that he had an unreasonable belief that his use of force was justified; (2) the trial court erred in refusing to give an instruction on involuntary manslaughter; (3) he was denied a fair trial when the

prosecutor distorted the burden of proof in the State's closing argument; (4) one of his murder convictions should be vacated pursuant to the "one act, one crime" rule; (5) his sentence of 52 years was excessive; and (6) he should be given proper credit for time served prior to sentencing.

Tyson, individually, contended: (1) the trial court erred in refusing to instruct the jury on second degree murder, since this instruction was provided in Leonard's simultaneous but severed jury trial; (2) the trial court impeded his ability to knowingly exercise his constitutional right to testify when the court refused to rule on his pretrial motion seeking to bar the introduction of his prior convictions until after he testified; (3) the trial court erred in adding 15 years to his sentence for committing the offense while armed with a firearm; and (4) his mittimus listing two first degree murder convictions should be corrected, because his case involved one victim and the trial court sentenced Tyson to 30 years in prison for one count of murder.

This court issued an order generally affirming the convictions. *People v. Brown and Tyson*, Nos. 1-06-0034, 1-06-0035 (cons.) (Sept. 25, 2008) (unpublished order under Supreme Court Rule 23). However, the text of the order ruled that Leonard's case was remanded to the trial court to correct the mittimus to reflect credit for time served in presentence custody up to and including December 15, 2005, and to show only one conviction for first degree murder. Similarly, the order ruled that Tyson's case be remanded to the trial court for the sole purpose of correction of the mittimus to reflect the proper conviction and sentence. These rulings were not clearly reflected in the conclusion of the court's order.

On March 6, 2009, in the exercise of its supervisory authority, our supreme court issued an order directing this court to vacate its judgment and supplement our judgment with

consideration of Leonard's claim that one of his murder convictions should be vacated pursuant to the "one act, one crime" rule, and enter any appropriate judgment in light of that consideration. On May 4, 2009, our supreme court issued an order directing this court to vacate its judgment and reconsider Tyson's appeal in light of its decision in *People v. Patrick*, 233 Ill. 2d 62 (2009).

On May 14, 2009, we vacated our prior order and issued another order concluding that the trial court's erroneous refusal to rule on Tyson's motion *in limine* seeking to bar the introduction of his prior convictions for the purpose of impeachment until after Tyson testified was not harmless beyond a reasonable doubt under *Patrick*. This court reversed the judgment of the trial court as to Tyson and remanded the case for a new trial. This court also clarified that Leonard's case was remanded to the trial court to correct the mittimus to reflect a single conviction for murder the proper sentence. *People v. Brown and Tyson*, Nos. 1-06-0034, 1-06-0035 (cons.) (May 14, 2009) (unpublished order under Supreme Court Rule 23).[1]

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[1] There were further proceedings in Tyson's case. On September 30, 2009, our supreme court entered a judgment directing this court to vacate its judgment and reconsider Tyson's appeal in light of the Illinois Supreme Court's decision in *Patrick*, directing this court to vacate our May 14, 2009, order, and reconsider whether the trial court's failure to rule on the motion *in limine* was harmless error in light of Tyson's decision to testify. The mandate issued to this court on November 4, 2009. On December 9, 2009, this court entered an order vacating our prior order, reconsidering the issue of harmless error under *Patrick*, concluding that the error was harmless beyond a reasonable doubt and affirmed Tyson's conviction. *People v. Brown and Tyson*, Nos. 1-

On August 6, 2009, Leonard filed a *pro se* postconviction petition alleging in part his trial counsel was ineffective for failing to request a fitness hearing. Leonard attached an affidavit stating he was taking antidepressants and other prescribed medications at the time of the shooting and throughout trial. Leonard stated that the medication had side effects and impaired his ability to make sound and rational judgments. Leonard alleged he informed counsel he was diagnosed with severe depression, was continually on medication and therefore was unable to assist his attorney adequately in preparing a proper defense. Leonard also attached medical records to his petition showing he had been diagnosed with and treated for "major depression." Further, Leonard attached his trial testimony (which the petition characterizes as sometimes credible, sometimes withdrawn and confused) and a partial transcript of a pretrial hearing in which defense counsel states Leonard was on medication at the time of his statement to the police.

On October 22, 2009, the circuit court entered an order summarily dismissing Leonard's petition. The circuit court found there was no indication in Leonard's petition or the record that Leonard could not understand the nature and purpose of the proceedings against him, or assist in his defense. The circuit court, noting that Leonard testified on his own behalf at trial, found that even the "cherry-picked excerpts" Leonard provided showed Leonard was orientated and coherent. On November 30, 2009, Leonard filed a timely notice of appeal to this court.

06-0034, 1-06-0035 (cons.) (Dec. 9, 2009) (unpublished order under Supreme Court Rule 23).

DISCUSSION

I. Ineffective Assistance of Counsel

On appeal, Leonard contends the circuit court erred in summarily dismissing his petition as frivolous and patently without merit. The Act (725 ILCS 5/122-1 through 122-8 (West 2008)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143 (2004). 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 2008). 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). This court reviews *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360 (2000).

The State initially responds that Leonard's claims are procedurally barred by *res judicata* and forfeiture. A postconviction petition may be summarily dismissed at the first stage of proceedings where the petitioner's claims are barred by *res judicata* and forfeiture. *People v. Blair*, 215 Ill. 2d 427, 450 (2005). However, *res judicata* and forfeiture do not apply where fundamental fairness so requires; where the alleged forfeiture stems from the incompetence of appellate counsel; or where facts relating to the claim do not appear on the face of the original appellate record. *Blair*, 215 Ill. 2d at 451.

In this case, Leonard's petition alleges he was on medication for major depression at the time of trial and the medication had side effects. These facts do not appear on the face of the original appellate record. Accordingly, Leonard's claims are not procedurally barred.

In his petition, Leonard alleges he received ineffective assistance of counsel because counsel failed to seek a fitness hearing prior to the trial. Generally, in order to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish that the failure to request a fitness hearing prejudiced him within the meaning of *Strickland*, Brown must show that facts existed at the trial that would have raised a *bona fide* doubt of the defendant's ability " 'to understand the nature and purpose of the proceedings against him or to assist in his defense.' " See *People v. Harris*, 206 Ill. 2d 293, 304 (2002) (quoting 725 ILCS 5/104-10 (West 1998)). " 'Defendant is entitled to relief *** only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered.' " *Harris*, 206 Ill. 2d at 304 (quoting *People v. Easley*, 192 Ill. 2d 307, 319 (2000)). To determine whether there was a *bona fide* doubt of the defendant's fitness, a court may consider the defendant's irrational behavior, the defendant's demeanor at the trial, and any prior medical opinion on the defendant's competence. *Harris*, 206 Ill. 2d at 304. However, "there are 'no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of

manifestations and subtle nuances are implicated.' " *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991) (quoting *Drope v. Missouri*, 420 U.S. 162, 180 (1975)).

The State responds that the circuit court correctly dismissed Leonard's petition as frivolous and patently without merit. Neither "frivolous" nor "patently without merit" is defined in the Act. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). However, in *Hodges*, the Illinois Supreme Court ruled:

> "[A] *pro se* petition seeking postconviction relief under the Act may be summarily dismissed as 'frivolous or *** patently without merit' pursuant to section 122-2.1(a)(2) only if the petition has no arguable basis either in law or in fact. 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. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. See, *e.g.*, *People v. Robinson*, 217 Ill. 2d 43 (2005) (rejecting claim that appellate counsel was ineffective for failing to argue on direct appeal that out-of-court identification of defendant was inadmissible hearsay, where record showed that the statement at issue fell within the hearsay exception for spontaneous declarations). Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

Leonard relies heavily on *People v. Brown*, 236 Ill. 2d 175 (2010), where the Illinois Supreme Court applied *Hodges* to a claim that defense counsel was ineffective for failing to request a fitness hearing. In that case, the postconviction petitioner, Raymond Brown (Raymond), became intoxicated and involved in a domestic dispute. *Brown*, 236 Ill. 2d at 179.

When several police officers arrived at the apartment building where Raymond lived, Raymond was standing outside the front door of his apartment holding a butcher knife. *Id.* Raymond refused to drop the knife and threatened to kill one of the police officers. *Id.* Raymond began advancing towards the officer, swinging the knife. *Id.* Raymond ultimately lunged at the officer while reaching for the officer's handgun with his free hand. *Id.*

Based on the evidence, the trial court found Raymond guilty of attempted first degree murder of a peace officer. *Id.* at 180. At his sentencing hearing, Raymond read a statement indicating he had been depressed, had previously tried to kill himself, and only wanted the police to kill him. *Id.* He also stated he was taking "psych medication" and was told he should have received a psychiatric evaluation prior to his trial, but counsel failed to bring the matter to the court's attention. *Id.* He added he began taking his medications after incarceration and he no longer felt depressed, but he still felt like he wanted to die, though, as recently as his previous court hearing. *Id.*

The trial court questioned counsel about Raymond's statements *Id.* Defense counsel stated he was not aware that Raymond was taking psychotropic medication. *Id.* The court further inquired whether there was any reason for counsel to have a *bona fide* doubt of Raymond's fitness to stand trial. *Id.* Counsel responded that Raymond "spoke very coherently to me," and "seemed fine," and counsel "had no problem communicating with him." *Id.* The trial court noted it had not observed anything in Raymond's conduct or appearance indicating a *bona fide* doubt of his fitness. *Id.* Raymond's treatment with psychotropic medication, standing alone,

did not raise a presumption of unfitness to stand trial. *Id.* Thus, the trial court proceeded with the sentencing hearing and imposed a 25-year term of imprisonment. *Id.*

Raymond's postconviction petition alleged, among other things, that his trial counsel was ineffective for failing to request a fitness hearing. *Id.* at 181. Raymond alleged he told his attorney that he was taking several psychotropic medications to treat bipolar disorder and depression, both before and after his arrest. *Id.* He allegedly informed counsel that he attempted suicide before he was arrested and on the day of his arrest. *Id.* He also alleged he was attempting "suicide by police" on the day of the offense. *Id.*

Raymond further alleged that he took "very heavy psych medication" during his trial that affected his ability to comprehend the events. *Id.* Raymond alleged he "didn't know exactly what was happening at [his] trial and didn't understand everything at his trial." *Id.* Raymond claimed his trial counsel lied when he informed the trial court that he was unaware petitioner was taking psychotropic medication. *Id.* According to Raymond, his attorney only visited him for a few minutes before each hearing. *Id.* Raymond attached medical records to his petition, along with affidavits from his mother and aunt stating Raymond had told counsel of his medication and past suicide attempts. *Id.* The circuit court summarily dismissed Raymond's petition. *Id.*

The Illinois Supreme Court, applying the standards announced in *Hodges*, concluded that Raymond's postconviction allegations could not be characterized as fantastic or delusional, adding the trial testimony describing petitioner's offense lent credibility to his allegations of mental illness and history of suicide attempts. *Id.* at 186. The *Brown* court then turned to determine whether Raymond's petition was based on an indisputably meritless legal theory. The

court rejected the State's argument that Raymond's petition, taken as a whole, did not allege a *bona fide* doubt of his fitness to stand trial. *Id.* at 187-88. The court also rejected the State's argument that the petition was insufficient because it did not allege Raymond informed trial counsel that his medication affected his ability to understand the proceedings, because a *pro se* petitioner is not required to allege facts supporting all elements of a constitutional claim to survive summary dismissal. *Id.* at 188. The court further ruled Raymond's legal theory was not completely contradicted by the record:

> "Defense counsel's statements at sentencing about petitioner's condition are called into question by petitioner's allegations and supporting affidavits asserting counsel lied to the court when he stated he did not know petitioner was taking psychotropic medication. Defense counsel's statements are also undermined by petitioner's allegations that counsel spent only a few minutes with him before each hearing and was too distracted by his father's death to devote adequate attention to petitioner's defense. Further, counsel's statements at sentencing do not positively rebut petitioner's allegations on his mental illness, his suicide attempts, or that his psychotropic medication prevented him from understanding the trial proceedings. Thus, petitioner's legal theory is not completely contradicted by defense counsel's statements at sentencing.
>
> The trial court's statement at sentencing that petitioner's conduct and appearance did not show a *bona fide* doubt of his fitness is a relevant consideration, but it is not determinative of petitioner's fitness to stand trial. The observation does not positively rebut any of petitioner's allegations on his mental illness, psychotropic medications,

suicide attempts, or failure to understand the trial proceedings. The trial court's observation, therefore, does not render petitioner's legal theory indisputably meritless.

Additionally, petitioner's statement at sentencing is of limited significance because it was made more than one month after the trial. In his sentencing statement, petitioner asserted he felt like he wanted to die as recently as the prior hearing. Thus, any indication that petitioner was lucid in making the statement at sentencing or understood the trial proceedings at that time does not necessarily establish his condition at the time of trial. The statement does not positively rebut any of petitioner's allegations tending to indicate a *bona fide* doubt of his fitness. In particular, the statement does not contradict petitioner's allegation that his psychotropic medication prevented him from understanding the trial proceedings.

Petitioner's waivers of his right to a jury trial and his right to testify were essentially brief exchanges with the trial court where petitioner asserted he understood the trial court's admonitions. Those brief exchanges do not positively rebut any of petitioner's allegations in his postconviction petition. Additionally, they do not conclusively demonstrate an ability to understand the proceedings or assist in the defense." *Id.* at 189-91.

The *Brown* court concluded that "[a]t most, the record creates a factual dispute on whether there was a *bona fide* doubt of petitioner's fitness." *Id.* at 191.

The State argues that *Brown* is distinguishable from this case, asserting that in *Brown*, "the issue was not whether petitioner met his burden of proving the existence of a *bona fide*

doubt, but whether, for the purposes of a first-stage postconviction petition, the existence of a *bona fide* doubt was at least *arguable*." However, this case is also an appeal from a first-stage, summary dismissal of a postconviction petition. Accordingly, Leonard is not required to prove his case now.

The State further argues the record before us not only contradicts the allegations in the petition, but also affirmatively shows no *bona fide* doubt of Leonard's fitness. The State claims that Leonard provided no evidence that he was taking or needed to take medication during trial. However, Leonard in fact states in his affidavit that he was taking medication during trial.

The State next notes that Raymond allegedly suffered not only from depression, but also suffered from a bipolar disorder. The legal issue is whether Leonard's condition or medication impaired his ability to understand the nature and purpose of the proceedings against him or to assist in his defense, regardless of the specific diagnosis. The State observes that Raymond previously attempted suicide and claimed his confrontation with the police was a suicide attempt. Again, this is a relevant consideration, but the State cites no authority ruling that suicidal tendencies are necessary to show a *bona fide* doubt of fitness. Moreover, the State overlooks the medical records attached to Leonard's petition, which state in part that Leonard "once went to the Emergency Room feeling that he had no reason to live and this is why he was admitted to the hospital."

The State correctly notes our courts have found that suicide attempts do not necessarily raise a *bona fide* doubt of fitness. See*,* e.g.*, People v. Lopez*, 216 Ill. App. 3d 83, 85-88 (1991); *People v. Stevens*, 188 Ill. App. 3d 865, 888-91 (1989). However, both *Lopez* and *Stevens* were

direct appeals decided on the merits of the fitness issue; *Stevens* relied in part on the fact that the trial court heard evidence of the suicide attempts. *Stevens*, 188 Ill. App. 3d at 890. Neither involved a summary dismissal of a postconviction petition.

The State also claims it can be inferred that counsel looked into the issue but did not believe there was a *bona fide* doubt of fitness. The State correctly indicates that the record shows counsel was aware that Leonard was taking antidepressants at the time of his statement, but did not question Leonard about his depression or medication during the hearing on the motion to suppress Leonard's statement. However, Leonard correctly notes that it could be equally inferred that counsel's failure was due to ineffective assistance of counsel, either by failing to follow through on investigating Leonard's condition or in misjudging the results of any such investigation. The State's inferences are not facts that positively rebut Leonard's allegations.

Moreover, the State relies on the circuit court's finding that even the "cherry-picked excerpts" of Leonard's trial testimony attached to the petition demonstrated he was orientated and coherent. Leonard responds that in *Brown*, the circuit court's finding that Raymond's conduct and appearance did not show a *bona fide* doubt of his fitness was relevant, but not determinative, and did not positively rebut any of Raymond's allegations on his mental illness, psychotropic medications, suicide attempts, or failure to understand the trial proceedings. *Brown*, 236 Ill. 2d at 190. The State argues *Brown* is distinguishable on this point, as the circuit court was judging Raymond's statement at sentencing and other brief exchanges during waivers of his rights to a jury trial and to testify on his behalf.

In this case, Leonard's testimony at trial was the primary basis for his claim of self-defense. However, the *Brown* court rejected the argument that Raymond's statements and appearance completely rebutted his claim *before* adding the statement at sentencing was of limited significance because it was made more than a month after the trial. See *Brown*, 236 Ill. 2d at 190-91. In this case, while Leonard may have appeared to have lucidly testified at trial, the record does not completely rebut his allegations of suffering from major depression and having taken medication that impaired his ability to understand the nature and purpose of the trial proceedings.

At this juncture in the litigation and based solely on the allegations of the petition, Leonard's claim may seem factually weaker than Raymond's claim considered by the Illinois Supreme Court. Yet a belief that allegations are unlikely, without more, is insufficient to justify summarily dismissing a petition. *Hodges*, 234 Ill. 2d at 19. We are instructed that *pro se* petitions should be read with a lenient eye, allowing borderline cases to survive summary dismissal. *Hodges*, 234 Ill. 2d at 21. Accordingly, we conclude the circuit court (which did not have the benefit of the *Brown* decision) erred in summarily dismissing Leonard's *pro se* petition.

II. Sentencing

Leonard also argues that his mittimus must be corrected to reflect that he served 862 day in presentence custody, rather than 861 days. Leonard contends he is entitled to credit for the day of his sentencing. The State disagrees. Although proceedings under the Act are generally limited to considering alleged violations of federal or state constitutional rights, sentencing credit issues

may be addressed for the first time on appeal from postconviction proceedings. See *People v. Flores*, 378 Ill. App. 3d 493, 495-96 (2008) (and cases cited therein).

The State is correct that Leonard is not entitled to credit for the day of sentencing because the mittimus is issued and effective that same day. In *People v. Williams*, 239 Ill. 2d 503 (2011), our supreme court addressed the question of whether the date of sentencing is properly classified as "time spent in custody as a result of the offense for which the sentence was imposed" under section 5–4.5–100 of the Unified Code of Corrections (Code). The court analyzed sections 5–4.5–100 and 3–6–3 of the Code (730 ILCS 5/5–4.5–100, 3–6–3 (West 2008)), under which defendants are to receive one day of good-conduct credit for each day spent in presentence custody, as well as credit for each day of their sentence under section 3–6–3 of the Code. Thus, defendants will ultimately receive the same credit whether the day of his sentencing is counted under section 3–6–3 or section 5–4.5–100 of the Code. *Williams*, 239 Ill. 2d at 507. The court held, "[b]ecause section 5–8–5 requires the court to commit the defendant to the Department at the time of the entry of judgment, section 5–4.5–100 means that the sentence commences upon the issuance of the mittimus," and therefore, "the date of issuance of the mittimus is a day of sentence, subject to counting under section 3–6–3." *Williams*, 239 Ill. 2d at 509. The court concluded that "the date a defendant is sentenced and committed to the Department is to be counted as a day of sentence and not as a day of presentence credit." *Williams*, 239 Ill. 2d at 510. Thus, the date of Leonard's sentence and issuance of mittimus is not to be included.

CONCLUSION

In sum, Leonard's claim is not barred by the doctrines of *res judicata* or waiver. The circuit court erred in summarily dismissing Leonard's *pro se* petition. However, the circuit court correctly declined to include the day Leonard was sentenced as part of his presentence custody. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is reversed and remanded for further proceedings consistent with this order.

Reversed and remanded.