2011 IL App (1st) 101547-U

FOURTH DIVISION
September 30, 2011

No. 1-10-1547

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, Illinois.
	)	
	)	
	)	No. 02 CR 20394
v.	)	
	)	
REESE WILLIS,	)	Honorable
	)	Dianne Cannon
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices PUCINSKI and STERBA concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's summary dismissal of the defendant's *pro se* postconviction petition was proper. The defendant's claims of ineffective assistance of trial and appellate counsels were either directly rebutted by the record or were forfeited, as they were raised for the first time on appeal.

¶ 2 The defendant, Reese Willis, was charged with first degree murder for his involvement in the shooting of the victim, Kenneth "C.B." Twyman. A jury found the defendant guilty and he was sentenced to natural life in prison. After the defendant's conviction and sentence were affirmed on appeal, the defendant filed a *pro se* petition for postconviction relief pursuant to the

Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). The circuit court summarily dismissed the defendant's *pro se* petition and the defendant now appeals. The defendant contends that the summary dismissal of his petition was improper because he set forth the gist of meritorious claims of ineffective assistance of both trial and appellate counsels. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following relevant facts and procedural history. The victim, Kenneth Twyman, was shot to death on June 30, 2002, at 5343 West Bloomingdale Avenue in Chicago. On July 10, 2002, the 17-year-old defendant was arrested on an unrelated matter. On July 15, 2002, the defendant was transported to Area 5 where he was questioned about his involvement in the June 30, 2002, shooting. After being held at the police station overnight, on the following day, the defendant gave a videotaped inculpatory statement.

¶ 5 A. Fitness Hearing

¶ 6 On March 14, 2006, the circuit court conducted a fitness hearing to determine whether the defendant was mentally fit to stand trial. The parties offered two conflicting expert medical opinions. The State offered the testimony of expert forensic psychiatrist, Dr. Roni Seltzberg, who, pursuant to court orders, interviewed the defendant on four separate occasions in order to determine his fitness to stand trial. Dr. Seltzberg testified that during those interviews, the defendant was alert, oriented and answered questions coherently, never expressing that he could not understand the questions asked. The defendant also showed numerous instances of abstract thought processes.

¶ 7 Dr. Seltzberg further testified that in determining the defendant's fitness to stand trial, she reviewed numerous records including, among other things: (1) the police arrest reports; (2) the defendant's criminal history; (3) the defendant's psycho-social history prepared by his aunt; (4) the defendant's medical records; and (5) a psychological evaluation of Dr. Coleman of the Forensic Clinical Services Center who determined that the defendant had a reading level of a third grader.[1]

¶ 8 According to Dr. Seltzberg, these records revealed, among other things, that since fifth grade the defendant had been attending special education classes, and that between 1998 and 1999, he was placed in a juvenile detention center. In March 1998, the defendant was administered the Wechsler Intelligence Scale for Children test (WISC test) and scored a verbal IQ of 64, a performance IQ of 80 and a full scale IQ of 70. A year later, in June, 1999, the verbal comprehension score increased to 79.

¶ 9 Based on all of the aforementioned information, Dr. Seltzberg concluded that the defendant had low average cognitive capacities, but that he was not mentally retarded. Dr. Seltzberg therefore opined to a reasonable degree of medical certainty that the defendant was fit to stand trial.

¶ 10 On cross-examination, Dr. Seltzberg admitted that she herself did not perform any standardized psychological tests on the defendant but rather that she relied on tests performed on the defendant in 1998 and 1999, when he was 14 and 15 years old.

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[1]Dr. Seltzberg also stated that in coming to her conclusion, she reviewed the report prepared by Dr. Michael Stone, the defendant's medical expert.

¶ 11 After the State presented its expert witness, the defense called Dr. Michael Stone, who was qualified as an expert in psychology and testified that it was his opinion that the defendant was not fit to stand trial. Dr. Stone explained that in coming to this conclusion he met with the defendant twice and performed several standardized psychological tests on him (including the Wechsler Adult Scale of Intelligence (WASI, 3d edition); the Wide Ranged Achievement Test (WRAT, 3d edition); the Test of Memory Malingering; the Bender Gestalt Visual Motor Test and the Color Trails Test)). Dr. Stone testified that the defendant's WASI test revealed a verbal IQ score of 69, a performance IQ score of 54, and a full IQ score of 60. Dr. Stone explained that the performance IQ put the defendant into the moderate mental retardation range, while the full IQ score placed him at the higher end of the mild mental retardation range. Dr. Stone also testified that the defendant's test results revealed that he was not capable of malingering. Based on his interview of the defendant and the test scores, Dr. Stone concluded that given the degree of the defendant's cognitive impairment, the defendant was not fit to stand trial.[2]

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[2]Dr. Stone also testified that the medical reports he reviewed indicated a general consensus among the prior mental health professionals regarding the defendant's upbringing and his general level of emotional difficulty. These reports all indicated that the defendant suffered the trauma of maternal drug addiction, the death of his father, at age two, the split-up of the family, foster care, where the defendant was abused, learning and emotional difficulties, alcohol and drug addiction (particularly cannabis and PCP) and a variety of disorders, depending upon the evaluator (including, attention deficit, hyperactivity, personality, depression, suicide ideation, behavioral acting out, and/or impulse disorders).

¶ 12 On cross-examination, Dr. Stone acknowledged that tests preformed by other mental health professionals who had evaluated the defendant in 1998 and 1999 reflected significantly better IQ scores, and that none of those health professionals concluded that the defendant was mentally retarded. Dr. Stone explained, however, that fluctuations in the lower levels of functioning IQ scores are not unusual, depending upon different factors, such as motivation, setting, and testing conditions.

¶ 13 After hearing the testimony of both experts, the trial court found the defendant fit to stand trial.

¶ 14 B. Motion to Suppress

¶ 15 On April 26, 2006, the defendant moved to suppress his statement to police, alleging that: (1) he did not have the intellectual capacity to understand and waive his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1996); and (2) that his statement was obtained as a result of psychological and mental coercion.

¶ 16 At the suppression hearing, the defendant again called Dr. Stone, who testified that it was his opinion that the defendant could not meaningfully have waived his *Miranda* rights. Dr. Stone's testimony as to the defendant's IQ test scores was identical to his testimony at the fitness hearing. In addition, at the motion to suppress hearing, Dr. Stone testified that after his interview with the defendant he came to the conclusion that the defendant was incapable of understanding his *Miranda* rights. Dr. Stone first explained that during his interview with the defendant, he learned that the defendant had ingested alcohol, marijuana and PCP, on the day of his arrest, and only two days prior to making his inculpatory statement to police. Dr. Stone next acknowledged

that when initially asked to explain the meaning of his *Miranda* rights, during the interview, the defendant responded that it means "to shut up." He explained, however, that when probed further, by being asked "do you know why you are not supposed to say anything," the defendant did not understand what he was being asked. Moreover, according to Dr. Stone, when asked about his *Miranda* right to have an attorney, the defendant responded that he had a right to have an attorney present, but then stated that an attorney was present during his videotaped statement. According to Dr. Stone the defendant was not able to appreciate that it was not his attorney, but rather an Assistant State's Attorney that was present during the interview.[3]

¶ 17 The parties next stipulated to include Dr. Seltzberg's testimony at the defendant's fitness hearing as evidence at the defendant's suppression hearing. In addition, Dr. Seltzberg testified that it was her opinion that the defendant knowingly and voluntarily waived his *Miranda* rights before giving his inculpatory statement to police. Dr. Seltzberg testified that in coming to this conclusion she watched the defendant's videotaped statement to the police as well as interviewed the defendant herself. Dr. Seltzberg stated that during her interview with the defendant, the defendant appeared to understand his right to remain silent, his right to have an attorney present and that anything he said could be used against him in a court of law. In addition, when asked to explain what it meant to have an attorney present, the defendant told her "It means that you have a right to have lawyers at your side when you are being questioned," and stated that he was in the

[3]Dr. Stone also testified that the defendant told him during the interview that the two detectives who interviewed him were being "good cop, bad cop," and told him that he was going to get 80 years in prison if he did not say what he was "supposed to say."

process of reading a John Grisham novel which dealt with this same issue. Based on the defendant's answers during her interview, Dr. Seltzberg concluded that the defendant had the ability to understand his *Miranda* rights at the time of his statement to police.

¶ 18 During the suppression hearing, the State also called Detectives John Trahanas and Peter Best, who interviewed the defendant at Area 5 on July 15, 2002. Detective Trahanas testified that at about 6 p.m. on that date together with his partner Detective Best, he was assigned to pick up the defendant at the Cook County Department of Corrections and transport him to Area 5 police headquarters. Detective Trahanas testified that prior to transporting the defendant, he advised the defendant of his *Miranda* rights and the defendant indicated that he understood them.

¶ 19 According to Detective Trahanas, once at Area 5 headquarters, at about 7 p.m., the detectives gave the defendant something to eat and then proceeded to question him. The initial interview began at approximately 7:30 p.m. and lasted about 20 minutes. According to Detective Trahanas, Detective Best started the interview by reading the defendant his *Miranda* rights. The defendant indicated he understood those right, that he wished to waive them and speak to the police. Detective Trahanas then informed the defendant about the shooting and told him that they had already charged the defendant's cousin, codefendant Chevelle Richardson, in the matter. Detective Trahanas also told the defendant that codefendant Richardson had identified the defendant as an accomplice. Detective Trahanas testified that at this point he and Detective Best left the interview room.

¶ 20 According to Detective Trahanas, at about 8:30 p.m. the detectives returned to the interview room only to give the defendant water and a sweater because he was cold. About an

hour later, at about 9:25 p.m., Detective Trahanas heard the defendant knocking on the door of the interview room asking to speak to someone. Detectives Trahanas and Best returned to the room and re-*Mirandized* the defendant. During this portion of the interview, the detectives showed the defendant the beginning of codefendant Richardson's video statement to police. The defendant, however, again gave the detectives an exculpatory statement, and they left the station for the evening.

¶ 21 Detective Trahanas testified that the next morning at about 11 a.m., he returned to Area 5 to interview the defendant again. At about noon, Detective Trahanas contacted the Felony Review Unit of the State's Attorneys's Office, and left for the day.

¶ 22 Detective Trahanas stated that throughout his dealings with the defendant, the defendant never indicated to him or to Detective Best that he did not wish to speak to them or that he wanted an attorney. Detective Trahanas acknowledged that during the interview he told the defendant that he "knew the defendant was the shooter," but denied telling the defendant that "all the evidence pointed at him." The detective also denied ever telling the defendant that he was "going to be charged anyway," so he "might as well give a statement and put it on tape."

¶ 23 On cross-examination, Detective Trahanas acknowledged that when he initially picked up the defendant at the correctional center he was aware that the defendant was in custody for another case, but that he did not attempt to find out the identity of the attorney representing the defendant on that case.

¶ 24 Detective Best testified consistent with the testimony of Detective Trahanas. In addition,

he stated that at about 3:40 p.m. on July 16, 2004, he interviewed the defendant together with Assistant State's Attorney (ASA) Ray Regner. Detective Best testified that ASA Regner first identified himself to the defendant explaining that he was an attorney but not the defendant's attorney, and then proceeded to read the defendant his *Miranda* rights. According to Detective Best, the defendant waived his *Miranda* rights and gave an oral statement. ASA Regner then gave the defendant three options for memorializing his statement: an oral admission, a handwritten admission or a videotaped confession. The defendant chose to videotape his statement. The defendant signed a videotaped consent form and the videotape was made at 6:47 p.m.

¶ 25 On cross-examination, Detective Best testified that he could not remember whether the defendant was handcuffed during his interviews. He also acknowledged that when Detective Trahanas and he left for the evening on July 15, 2004, the defendant remained in the same interview room overnight. He was not given blankets or any other sleeping materials.

¶ 26 After the State rested, the defendant testified on his own behalf at the motion to suppress hearing. The defendant stated that he was 17 years old at the time of his arrest, that up to that point, he had only finished eight grade, and that all of his school classes were learning disability classes. The defendant stated that when Detective Trahanas came to Cook County jail on July 15, 2002, he initially told him that he was going to the police station to appear in a physical line up. The defendant stated that he first told the detectives that he did not wish to go with them but that after they talked to him and told him they were going to question him, he "went along." The defendant stated that he was handcuffed behind his back and then placed in a police vehicle.

The defendant testified that the detectives first drove him to an alleyway, where they asked him whether he was familiar with the location. When the defendant indicated that he was not, they told him "not to play with them," that "they had statements," that "all the evidence pointed at him," and that his "a** was going down."

¶ 27 The defendant next testified that he was taken to the police station where he was placed in a small interview room and handcuffed to a pole connected to a bench on which he was sitting. The defendant testified that the police threatened him and said that he should admit his involvement in the murder. The detectives told the defendant that an attorney would be appointed to represent him, and the defendant initially requested an attorney. The defendant repeatedly told the officers that he was not involved in the shooting, but they continued to pressure him to admit his guilt. According to the defendant, the detectives showed him a statement made by Sije Richardson, codefendant Richardson's niece, and told him that "he would be in trouble if he did not say what was in the statement." The detectives also showed the defendant a videotape of codefendant Richardson's confession. The defendant testified that after viewing Richardson's entire videotaped confession, he "lost all hope," because all the stories the detectives were telling him before now seemed "believable." He therefore agreed to give a videotaped statement admitting to the crime.

¶ 28 The defendant stated that the detectives told him "everything" he was supposed to say on the videotape. In addition, the detectives instructed him to act remorseful on the tape because the jury or the judge would be sympathetic to him and he would "get a lighter charge." As the defendant explained his decision to make the statement:

> "I just knew if I got on tape, this will make these people leave me alone, and I thought I was going to be all right. I didn't know what to think. I was confused. I didn't know what to think. I just know they was bombarding me with a whole bunch of questions and allegations that I never did."

¶ 29 On cross-examination, the defendant was asked whether it was true that when the detectives left the room, he knocked on the door and asked to speak to them. The defendant responded that he never knocked on the door because he was handcuffed. He further explained that he was moved from the interview room only once to go to the bathroom, and that this happened because he became upset and was crying and had kicked over the soda can the detectives had given him.

¶ 30 After hearing the evidence of all the witnesses, the circuit court denied the defendant's motion to suppress his statement. In doing so, the circuit court explained:

> "There is not one scintilla of evidence that [the defendant] was ever coerced or promised anything or threatened in any way or did not give this because, as he put it, he lost hope. He lost hope after he saw on a videotape that his friend, rappie [*sic*], codefendant, had implicated him in the crime.
>
> Having lost that hope, he decided to tell his version, and he did it on videotape after being advised of his rights."

¶ 31 C. Jury Trial

¶ 32 In March 2006, the defendant was tried for attempted aggravated kidnaping and first

degree murder in a simultaneous but separate jury trial with codefendant Richardson. The parties called over 20 witnesses at trial. For purposes of brevity, we summarize only that evidence, which is relevant for purposes of this appeal.

¶ 33 Occurrence witness, Hazel Butler testified for the State that she was sitting on her porch at 5344 West Bloomingdale Avenue on the evening of June 30, 2002, when she saw a maroon car with two individuals inside pull up across the street. She saw a man walk towards the car while talking to the man in the passenger seat. Butler testified that she turned her head for a moment and then heard two gunshots. She saw the man who had walked towards the car run, and she saw the maroon car quickly driving off. Butler spoke to the police when they arrived on the scene and accompanied them on a drive around the neighborhood looking for the maroon car. Butler testified that she could not see the occupants of the car and was therefore incapable of providing a description or making an identification of the car's passengers. On July 14, 2002, Butler was shown a Polaroid photograph of a car and stated that it "looked like" the vehicle she witnessed at the scene of the crime.

¶ 34 Officer Lester Fliger testified that at approximately 11 p.m. on June 30, 2002, he received an assignment directing him to the scene of a crime at 5344 West Bloomingdale Avenue. When Officer Fliger arrived, the victim, Kenneth Twyman, was on the front porch of a nearby residence. Officer Fliger identified two potential witnesses, Hazel Butler and Clifton Jones. He testified that during his initial investigation the vehicle present during the shooting was described as an older model red four-door Ford. Officer Dunigan testified that he canvassed the crime scene after the shooting and among other things retrieved a nine millimeter cartridge near 5341

West Bloomingdale Avenue.

¶ 35 Officer Molda testified that at approximately 4 p.m., on July 10, 2002, he conducted a traffic stop on a red Dodge vehicle near 2301 West Pulaski Road because the vehicle had a broken window. The defendant was the only occupant and the driver of the vehicle. As Officer Molda approached the vehicle, he observed a silver nine millimeter handgun on the drivers' side floor board of the vehicle. Officer Molda arrested the defendant and recovered the nine millimeter handgun, which had five live rounds in it. Officer Molda identified the red car in the photograph that was shown to Hazel Butler as the red Dodge that the defendant was driving at the time of the traffic stop.

¶ 36 Officer William Moore, who impounded the Dodge Stratus in which the defendant was arrested, testified that he discovered a red stain on the interior of the passenger-side door, as well as that he recovered a compact disc with a red stain on it. Although it was determined that the red stains were blood, Davere Jackson, an expert in DNA analysis, testified that none of the blood was that of the victim; rather the bloodstain on the door was codefendant Richardson's blood, and the blood on the compact disc was the defendant's blood. Forensic scientists who examined the impounded vehicle, including the fabric from the passenger seat headrest, also testified that they found no gunshot residue and no latent prints suitable for comparison.

¶ 37 Cook County Assistant Medical Examiner Dr. Adrienne Segovia testified that she performed the autopsy on the victim. According to Dr. Segovia, the defendant suffered two gunshot wounds, one which entered the right side of his back and exited on the left side of the abdomen, and the other, which entered the inner portion of his left arm. Dr. Segovia recovered a

slightly deformed, medium caliber copper jacketed bullet in the outer portion of the victim's forearm. Dr. Segovia testified that the autopsy did not reveal any evidence of close range firing or stippling of the skin. She stated, however, that the victim was shot from a distance of no longer than 12 inches.

¶ 38 Angela Horn of the Illinois State police forensic science center testified that the fired cartridge case recovered at the scene was not fired from the gun recovered from the defendant's car. She, however, testified that she could not conclusively identify or exclude the gun as the source of the bullet fragment that Dr. Segovia found in the victim's arm.

¶ 39 Codefendant Richardson's niece, Sije Richardson, next testified that on July 2, or July 3, 2002, the defendant told her that he had shot someone by the name of C.B. but that he was not sure whether or not C.B. was dead. Sije knew C.B. to be Kenneth Twyman, and had learned from an aunt that C.B. was dead. On July 14, 2002, Sije gave a written statement to the police.

¶ 40 Detective Trahanas testified consistent with his testimony at the defendant's suppression hearing. He added that he went to pick up the defendant from the Cook County Correctional facility after an interview with Sije Richardson on July 14, 2002.

¶ 41 ASA Ray Regner next testified that he was present when the defendant made his inculpatory statement to police. He testified that he advised the defendant of his *Miranda* rights and then had a 40-60 minute conversation with him, after which the defendant agreed to have his statement videotaped. The defendant's videotaped statement was then played to the jury.

¶ 42 In that statement, the defendant told police that about 10 or 11 a.m., on June 30, 2002, he

was at the home of his cousin, codefendant Chevelle Richardson, watching a movie. The movie involved large sums of money, and the defendant told his cousin that he wished he had that much money. Codefendant Richardson then informed the defendant that he had a friend named Cliff who "had a problem with a fellow named C.B." and that Cliff was going to get someone to kill C.B. for $5,000. When codefendant Richardson said this, the defendant said, "Cool. For $5,000, yeah."

¶ 43 According to the defendant's videotaped statement, he and codefendant Richardson then got into the defendant's car and drove to a currency exchange to meet Cliff. At the currency exchange, codefendant Richardson introduced the defendant to Cliff, who said he had "a nice piece of change for them" if they killed C.B. and "dumped him in an incinerator." The defendant and codefendant agreed to kill C.B. in exchange for $5,000, and Cliff told them he would contact codefendant Richardson by telephone once he knew where C.B. was. The defendant spent the afternoon at codefendant Richardson's girlfriend's house, drinking and smoking marijuana.

¶ 44 The defendant told the police that at about 10:30 p.m., codefendant Richardson received a telephone call, after which he told the defendant that "it was time." The two drove off in the defendant's red Dodge Stratus to where C.B. would be. According to the defendant, codefendant Richardson had a chrome nine millimeter handgun with him. When they arrived at C.B.'s location, the defendant stopped the car and codefendant Richardson exited the car and went over to talk to C.B. After about a minute, Richardson returned and called C.B. over. According to the defendant, at this moment, codefendant Richardson was sitting in the front passenger side and the defendant was in the driver's seat. Richardson passed the handgun to the defendant and the

defendant put it under his shirt. C.B. walked up to the passenger side of the car, and codefendant Richardson shook C.B.'s hand through the open window. According to the defendant, codefendant Richardson was "trying to get C.B. to go for a ride with them," but "C.B. smelled something fishy" and tried to back away. At this point, codefendant Richardson grabbed C.B. with both hands, and the defendant pointed the gun at C.B.'s chest and pulled the trigger. He told the police that he fired the gun four times into C.B.'s "chest area" and that C.B. fell down. The defendant panicked and drove off. He dropped codefendant Richardson off, and then drove to his girlfriend's house.

¶ 45 In his videotaped statement, the defendant further averred that later that evening, at about 11:45 p.m., he called codefendant Richardson from a pay phone, and Richardson told him that he had the money, and that they should meet on North Avenue near some shopping malls. When the defendant met Richardson, Richardson gave him $1,000.

¶ 46 The defendant also told police that he returned the gun to codefendant Richardson after he shot C.B., and that on the following day, he washed and cleaned his entire car. The defendant also acknowledged that a few days later he spoke to codefendant's niece, Sije Richardson, in Garfield Park and asked her if she knew whether C.B. was dead. The defendant also told Sije that he and Richardson had shot C.B.

¶ 47 After the State rested, the defendant testified on his own behalf. The defendant denied his involvement in the murder, denied speaking to Sije Richardson on the matter, and said he obtained the gun found in his car on July 4, 2002. The defendant testified in detail about how the

police obtained his confession. His testimony at trial was consistent to his testimony at the motion to suppress hearing. In addition, the defendant told the jury that after he watched codefendant Richardson's videotaped statement, he did not know what to do because he could not understand "why his cousin would say the things he did on tape." He stated that he was crying and shaking and that he told the detectives who interviewed him that he "did not do anything." When Detective Best told the defendant that he was going to be locked up and that it was better for him to do what codefendant had done and make a videotaped statement, the defendant explained that he "was so upset that he just wanted to get it all over with," and agreed.

¶ 48 According to the defendant, Detective Best explained to him how the murder occurred and he repeated the story back to Detective Best, with the detective "interrupting to correct any mistakes and telling him how he should say it." After the defendant went through the statement with Detective Best, an assistant State's attorney took his videotaped statement.

¶ 49 The defendant also testified that he repeated the story the police gave him, not just what codefendant Richardson said in his videotaped statement. The defendant identified several discrepancies between the statement the police directed him to give and codefendant's videotaped statement. For example, the defendant pointed out that it was the police who told him to state that he was watching a movie involving large sums of money with his cousin on the morning of the shooting, and that this information was not in codefendant's confession. Similarly, the defendant testified that information about codefendant Richardson supplying the gun came from the detectives and not from codefendant's videotaped statement. The defendant finally noted that

the police told him to say that he shot the victim in the chest, when in fact the victim had not been shot there.

¶ 50 As part of his case-in-chief, the defendant also called Dr. Stone, who testified consistently with his testimony during the pretrial motions, including his finding that the defendant's IQ was 60, which placed him in the mild mental retardation range.

¶ 51 In rebuttal, the State called Dr. Seltzberg, who testified consistently with her testimony at the defendant's fitness hearing. Dr. Seltzberg specifically stated that she watched the defendant's videotaped confession and that it appeared to her that the defendant had no trouble communicating with the assistant State's attorney. Dr. Seltzberg also explained that as a result of her interviews of the defendant, she believed his IQ score was more consistent with the 1998 IQ test that yielded a score of 70, versus Dr. Stone's test that yielded a score of 60. On cross-examination, Dr. Seltzberg, acknowledged, however, that even an IQ of 70 falls in the upper end of the mild mental retardation range.

¶ 52 In rebuttal the State also called Detective Best, who denied playing codefendant Richardson's tape in its entirety for the defendant. Detective Best stated that he did not tell the defendant to cry on tape and denied showing the defendant a copy of Sije Richardson's written statement. Detective Best also testified that prior to the defendant's videotaped statement the medical examiner had performed the victim's autopsy and the police were aware that the victim had been shot in the back and arm, rather than the chest.

¶ 53 On cross-examination, defense counsel attempted to impeach Detective Best with several

early police reports,[4] which provided a contradictory version of the victim's injuries, indicating that the victim was "twice, fatally shot in the chest." Detective Best admitted that, just as the defendant had stated in his confession, these early police reports, indicated that the victim was shot in the chest, and not in the back as was revealed by the autopsy report. Detective Best reiterated, however, that prior to his interview with the defendant, he was aware that the victim was in fact shot in the back.

¶ 54 Finally, over defense counsel's objection, during rebuttal, the State was permitted to play codefendant Richardson's entire videotaped statement, implicating the defendant, to the jury. The trial court instructed the jury that the statement was being introduced into evidence only to rebut the defendant's testimony that he derived some of his confession from codefendant's videotaped statement, and that the jury could not consider it for the truthfulness of the statement itself.

¶ 55 In closing argument, defense counsel argued that codefendant Richardson, and his niece, Sije Richardson, lied to the police and falsely implicated the defendant as the shooter. Further, defense counsel argued that the detectives who interviewed the defendant combined Sije's and codefendant's statements to coerce the defendant into giving a false confession. Counsel pointed out that the detectives told the defendant that the victim was shot in the chest and that the

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[4]We note that none of these early police reports, which were prepared by officers not testifying at trial, were admitted into evidence. In addition, the trial court informed the jury during the cross-examination of Detective Best that they were inadmissible hearsay.

defendant relayed that erroneous detail in his videotaped statement to the police. Counsel argued that if the defendant had actually shot the victim, he would have known that the victim was shot in the back, and not the chest. Defense counsel also pointed out that at the time of his confession the defendant was only 17 years old and that he was mildly to moderately mentally retarded, under either Dr. Stone's or Dr. Seltzberg's evaluations, so that he was easily manipulated.

¶ 56 After deliberations, the jury found the defendant not guilty of attempted aggravated kidnaping but guilty of first degree murder. The jury further found that during the commission of the offense the defendant personally discharged a firearm that proximately caused the victim's death, and that the defendant committed the murder pursuant to an agreement by which he was to receive money in turn for the crime. After a sentencing hearing, the circuit court sentenced the defendant to natural life in prison.

¶ 57 D. Posttrial Proceedings

¶ 58 The defendant challenged his sentence on direct appeal, arguing that his mental retardation and youth were not properly considered in mitigation. This court, however, disagreed, and affirmed the defendant's conviction and sentence in an unpublished order entered on September 23, 2009. See *People v. Reese*, No. 1-07-1681 (unpublished order pursuant to Illinois Supreme Court Rule 23) (September 23, 2009).

¶ 59 On February 5, 2010, the defendant file a *pro se* petition for postconviction relief. In that petition, the defendant first alleged that his trial counsel was ineffective for, *inter alia*, failing to adequately investigate and examine discovery documents prior to his suppression hearing, so as

to establish that the defendant's confession was coerced. Specifically, the defendant argued that trial counsel should have used the same police reports he used at trial to impeach Detective Best, at the suppression hearing, to corroborate the defendant's claim that his confession was false, coerced and coached by the detectives.

¶ 60 In his *pro se* postconviction petition, the defendant also alleged that his appellate counsel was ineffective for failing to raise numerous issues on appeal, including trial counsel's ineffectiveness on the aforementioned ground. Finally, the defendant alleged that trial counsel was biased against him.

¶ 61 In support of his *pro se* petition, the defendant attached: (1) his own affidavit, averring that all the allegations he made in his petition were true; (2) numerous pages of transcripts from his suppression hearing and his trial; and (3) the first-page of a letter from the Office of the State Appellate Defender, addressed to the defendant.[5]

¶ 62 On April 26, 2010, in a written order, the circuit court summarily dismissed the defendant's postconviction petition, finding that it was frivolous and patently without merit. The

[5]The precise content of this letter, dated January 21, 2009, is unclear. The first page, which is included, discusses the United States Supreme Court decision in *Tennessee v. Street*, 471 U.S. 409 (1985), and its applicability to the defendant's case, and begins to advise the defendant that the office of the particular attorney writing the letter could not raise a *Bruton* confrontation claim on the defendant's behalf.

defendant now appeals, contending that the summary dismissal of his *pro se* petition was improper as he sufficiently alleged the gist of a constitutional claim of ineffective assistance of both trial and appellate counsels, so as to proceed to the second stage of postconviction review.

¶ 63 II. ARGUMENT

¶ 64 On appeal, the defendant contends that the circuit court erred when it summarily dismissed his postconviction petition because his allegations taken as true stated the gist of a meritorious claim that his trial attorney rendered him ineffective assistance. The defendant specifically asserts that his trial counsel was ineffective because he failed to present relevant evidence during the hearing on his motion to suppress his confession, namely (1) police reports which erroneously stated that the victim was shot in the chest, and not the back, and which would have shown that the defendant's confession, also stating that he shot the victim in the chest, was coerced and orchestrated by the police, and (2) scientific brain research which reveals that young defendants with mental deficiencies are particularly susceptible to police manipulation and coercion. The defendant also contends that his appellate counsel was ineffective for not raising the same deficiency of trial counsel on direct appeal. For the reasons that follow, we disagree.

¶ 65 We begin by noting the familiar principles regarding postconviction proceedings. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2006)) provides a means by which a defendant may challenge his conviction for "substantial violations of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 377 (1997). A postconviction action is a collateral attack on a prior conviction and sentence, and "is not a substitute for, or an addendum

to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

¶ 66 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104(2005). At the first stage of post-conviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2006); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, the trial court examines the petition independently, without input from the parties. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court." *People v. Brown*, 236 Ill. 2d 175, 184, (2010) (citing 725 ILCS 5/122-2.1(c) (West 2006)). The defendant "need only present a limited amount of detail," and need not set forth the claim in its entirety, or include " 'legal arguments or [citations] to legal authority.' " *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *Gaultney*, 174 Ill. 2d at 418). A *pro se* petitioner is not excused, however, from providing any factual detail whatsoever on the alleged constitutional deprivation. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). The allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*People v. Jones*, 211 Ill. 2d 140, 144 (2004)), requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill.2d 1, 9 (2009)). Accordingly, the trial court may summarily dismiss a petition as "frivolous and patently without merit," only where the petition "has no arguable basis either in law or in fact," *i.e.*, "is

one which is based on an indisputably meritless legal theory or a fanciful legal allegation." See *People v. Hodges*, 234 Ill. 2d 1, 17 (2009) ("An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional."). We review the circuit court's summary dismissal *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 67 The defendant's allegations of ineffective assistance of counsel are evaluated in accordance with the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Bloomingburg*, 346 Ill. App. 3d 308, 316-17 (2004). Under this test, the defendant must show both that counsel's performance was deficient and that prejudice resulted from such deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143 (2007), citing *Strickland*, 466 U.S. at 687. A postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage of the proceedings if: (1) counsel's performance *arguably* fell below an objective standard of reasonableness; and (2) the petitioner was *arguably* prejudiced as a result. See *Hodges*, 234 Ill. 2d at 17.

¶ 68 A. Trial Counsel's Failure to Introduce Early Police Reports at the Suppression Hearing

¶ 69 We begin with the defendant's contention regarding trial counsel's failure to introduce the early police reports at his motion to suppress hearing to corroborate his contention that the detectives "fed him" the confession. While we acknowledge that under the first prong of *Strickland* we are called to give deference to the strategy of trial counsel (see *People v. Jackson*,

205 Ill.2d 247, 259 (2001)[6]), in the present case, we fail to appreciate any strategic value in counsel's failure to include the police reports at the defendant's suppression hearing, particularly since counsel attempted to use the same reports to impeach Detective Best during the defendant's trial. What is more, the State itself, makes no effort on appeal, nor could it, to rationalize the strategic value of counsel's decision. The record reveals that in addition to maintaining that he was intellectually unable to understand and waive his *Miranda* rights, the defendant maintained both at the suppression hearing and at trial that the detectives who interviewed him provided him with the facts of the shooting, which he then repeated in his videotaped confession. Since the early police reports mirrored the defendant's confession, and incorrectly noted that the victim was shot in the chest, and not the back, it is incomprehensible why counsel would choose not use those reports to bolster the defendant's allegations of a falsely coerced confession. This is

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[6]It is clear that to establish the deficiency prong, defendant must show that his counsel's performance, objectively measured against prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *Jackson*, 205 Ill.2d at 259, citing *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Under the first prong, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Jackson*, 205 Ill. 2d at 259, citing *People v. Evans*, 186 Ill. 2d 83, 93(1999).

particularly true where the only evidence presented at the suppression hearing was testimony, thereby making the circuit court's determination one based on the witnesses' credibility. *People v. Hinton*, 302 Ill. App. 3d 614, 620 (1998), citing *People v. Wilson*, 116 Ill. 2d 29, 40 (1987) (if defendant's testimony is the only evidence that a confession was obtained through coercion and the State's witnesses testify otherwise, the circuit court is permitted to believe the State's witnesses over the defendant). Accordingly, we conclude that under the record before use, the defendant has met his burden of demonstrating that trial counsel's performance *arguably* fell short of the standard of reasonableness required under *Strickland*. See *Hodges*, 234 Ill. 2d at 17 (holding that it was at least *arguable* that counsel's failure to investigate, interview, and present the testimony of three witnesses, who could have corroborated the defendant's theory that he acted in self-defense, fell below an objective standard of reasonableness); see also *e.g.*, *People v. Gunartt*, 218 Ill. App. 3d 752, 762 (1991) (holding that defense counsel was ineffective for failing to investigate and present information that could have been used to corroborate the defendant's trial testimony); *People v. Montgomery*, 327 Ill. App. 3d 180, 185-86 (2001) (holding that counsel's failure to investigate and present evidence supporting the defense theory, *i.e.*, an alternative cause of the victim's death, fell below an objective standard of reasonableness).

¶ 70 We therefore next turn to prejudice. At the first stage of postconviction review, to establish prejudice under *Strickland*, a defendant must show that *arguably* there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694; *Bloomingburg*, 346 Ill. App. 3d at 317. A

reasonable probability is one sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694.

¶ 71 In the present case, in his *pro se* petition the defendant alleged that had his trial counsel done at the suppression hearing what he did at trial, *i.e.*, introduced several police reports incorrectly detailing that the victim was shot in the chest to impeach Detective Best and to corroborate the defendant's claim of a coerced and false confession, the outcome of his suppression hearing would have been different, and correspondingly so would have the outcome of his trial.

¶ 72 Although we agree with the defendant that apart from his confession, the evidence introduced at his trial was far from overwhelming[7], so that the exclusion of his confession could arguably have made a difference in the outcome of the trial, we cannot similarly agree that the introduction of the police reports at the suppression hearing could arguably have changed the outcome of that proceeding. The defendant's contention that the introduction of the police reports would have sufficiently corroborated his claim of coercion, so as to result in the exclusion of his confession at trial is directly contradicted by the record. See *Hodges*, 234 Ill.2d at 16 ("A legal theory is indisputably meritless if it is completely contradicted by the record");

[7]Aside from the confession, the inculpatory evidence at trial consisted solely of: (1) the testimony of codefendant's niece Sije Richardson, who stated that the defendant admitted his involvement in the shooting to her; and (2) the possible identification of a vehicle similar to the defendant's vehicle at the scene of the crime.

see also *Coleman*, 183 Ill.2d at 385 (noting that all well-pleaded facts must be taken as true unless "positively rebutted" by the trial record).

¶ 73 The record reveals that when defense counsel attempted to use the police reports indicating that the victim was shot in the chest at trial to impeach Detective Best and corroborate the defendant's testimony that his confession had been orchestrated, Detective Best acknowledged the reports, but then testified that at the time of his interrogation of the defendant, the police, including himself, were aware of the autopsy report and its conclusions, namely that the victim was shot in the back and left arm, and not the chest. The record further establishes that the autopsy report was completed on July 2, 2002, and that the defendant was questioned and gave his videotaped statement, on July 16, 2002. Under these circumstances, and the two week lapse between the completion of the autopsy report (whose existence Detective Best explicitly acknowledged) and the defendant's videotaped statement, we cannot see how, even arguably, the introduction of the police reports at the suppression hearing could have corroborated the defendant's claim of a false confession. Had Detective Best coerced the defendant into giving a false confession, based on the results of the autopsy, he surely would have instructed the defendant to state that the bullets struck the victim in his back and his left arm, and not his chest.

¶ 74 The trial court itself came to this conclusion, albeit at trial and not during the suppression hearing, when, during Detective Best's cross-examination, it called the police reports "irrelevant." In that respect the record reveals that after defense counsel repeatedly attempted to impeach Detective Best with the police reports, written by different officers, indicating that the

victim was shot in the chest and not the back and arm, the following colloquy occurred:

> "DEFENSE COUNSEL: Again, this is a report I would ask be marked as Defendant's Exhibit Number 9 for identification purposes. It is a 12 page report apparently crated by Detective Barz, B-A-R-Z
>
> ASSISTANT STATE'S ATTORNEY: Again, your Honor, same objection, improper impeachment.
>
> THE COURT: Counsel, he's just testified as to what he knew, what the medical examiner told him. What other police officers put in their reports, whether it was based on the defendant's statement or anything else, is irrelevant. He has indicated that the medical examiner told him where the gunshot wounds were."

Accordingly, the trial court itself indicated that because Detective Best testified that he knew, before interviewing the defendant, the results of the autopsy and that the victim had been shot in the back, the police reports, stating that the victim was shot in the chest, would not have helped the defendant in supporting his claim of a false confession. See *People v. Beltran*, No. 2–09–0856 (August 23, 2011), citing *People v. Melock,* 149 Ill.2d 423, 433 (1992) (in determining whether a trial court properly ruled on a motion to suppress, a reviewing court may properly consider the testimony adduced at trial, as well as the suppression hearing).

¶ 75 In addition, we note that the record contradicts the defendant's claim that his statement to police conflicts with the autopsy report. The record reveals that at trial, Dr. Segovia, who

performed the autopsy, testified that in addition to a gunshot wound to his arm, the victim also had an entrance gunshot wound on his back and a corresponding exit wound on his abdomen. Dr. Segovia could not determine the order of the gunshot wounds. She stated, however, that neither of the wounds was inflicted from a distance greater than 12 inches. The record further reveals that in his videotaped statement to police, the defendant testified that while codefendant Richardson held the victim, he pointed the gun at the victim's "chest area," and pulled the trigger four times. The defendant, nowhere in his statement, however, said that he shot the victim in the chest, or that he saw the bullet strike the victim in the chest. Rather, he only stated that he fired at the "chest area." Under these circumstances, it is not unreasonable to conclude that the bullet actually struck the victim in the left arm or in the back as he attempted to pull away from codefendant Richardson's grasp and flee from the car. Accordingly, any factual conflict between the defendant's statement and the autopsy report is by no means so significant that the introduction of the police reports could have changed the outcome of the suppression hearing.

¶ 76 We therefore find that the record directly rebuts the defendant's contention that counsel's failure to introduce the police reports at the suppression hearing could have prejudiced the outcome of that hearing, so as to preclude the introduction of the defendant's confession at trial. See *Hodges*, 234 Ill.2d at 16 ("A legal theory is indisputably meritless if it is completely contradicted by the record"); see also *Coleman*, 183 Ill.2d at 385 (noting that all well-pleaded facts must be taken as true unless "positively rebutted" by the trial record). We, therefore, find this contention by the defendant to be frivolous and patently without merit.

¶ 77 B. Trial Counsel's Failure to Introduce Scientific Research at the Suppression Hearing

¶ 78 The defendant next contends that his petition should not have been summarily dismissed because he stated a gist of a constitutional claim of ineffective assistance of trial counsel where counsel failed to introduce certain scientific research at the suppression hearing to support his claim that he was susceptible to police coercion because of his low IQ and his young age. The defendant cites to several published studies, law review articles and United States Supreme Court decisions, which suggest that minors are particularly susceptible to police coercion, and which, he argues, counsel should have, but, failed to bring to the attention of the trial court at the suppression hearing.

¶ 79 The State points out, and we agree, that the defendant has forfeited this issue for purposes of appeal. The defendant did not raise this contention in his postconviction petition, but, rather raises it for the first time on appeal. Our supreme court has clearly held that claims not raised in a postconviction petition are forfeited and may not be raised fo the first time on appeal. See *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (*Jones II*); *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (*Jones I*); *Coleman*, 183 Ill. 2d at 380 ("[t]he questioned raised in an appeal from an order dismissing a postconviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act") (Emphasis added); *People v. Jones*, 341 Ill. App. 3d 103, 106 (2003) ("the scope of our review on appeal from the dismissal of defendant's [postconviction] petition is limited to consideration of only those claims actually raised in defendant's petition."); *People v. Jefferson*, 345 Ill. App. 3d 60, 71 (2003) (holding that,

at the first stage of postconviction proceedings, " '[t]he circuit court is required to make an independent assessment *** as to whether *the allegations in the petition,* liberally construed and taken as true, set forth a constitutional claim for relief.' (Emphasis added) [Citation.] Issues that are raised for the first time on appeal are by definition not 'allegations in the petition' "); see also 725 ILCS 5/122-2 (West 2006) ("[a postconviction] petition *shall have* attached thereto affidavits, records, or other evidence, *supporting its allegations*" (emphasis added)); *People v. Collins*, 202 Ill. 2d 59, 66-69 (2002) (holding that postconviction petitioner cannot be excused from the *pleading* requirements of section 122-2); *People v. Turner*, 187 Ill. 2d 406, 414 (1999) (holding that failure to attach the necessary affidavits, records or other evidence or explain its absence is "fatal" to a postconviction petition); see also *Montgomery*, 327 Ill. App. 3d at 186 (holding that affidavit attached on appeal but not as part of defendant's postconviction petition as required by the Act is stricken because "[a]ppellate review is generally restricted to what has been properly presented and preserved of record in the trial court").

¶ 80 In the present case, the defendant nowhere in his petition alleged that counsel was ineffective for his failing to bring to the court's attention the voluminous scientific research on teenage brains that he now cites for the first time on appeal, arguing that it would have changed the outcome of his suppression hearing. Since the defendant did not make this claim anywhere in his *pro se* postconviction petition, nor did he bring the research he now cites to the trial court's attention, we find that it would be ill advised for us to consider this issue for the first time on appeal without it first being presented for initial scrutiny and evaluation at the trial court level.

See *e.g.*, *Jefferson*, 345 Ill. App. 3d at 71 (holding that, at the first stage of postconviction proceedings, " '[t]he circuit court is required to make an independent assessment *** as to whether *the allegations in the petition,* liberally construed and taken as true, set forth a constitutional claim for relief.' (Emphasis added) [Citation.] Issues that are raised for the first time on appeal are by definition not 'allegations in the petition' ").

¶ 81 C. Ineffective Assistance of Appellate Counsel

¶ 82 We lastly address the defendant's remaining claim, that appellate counsel was ineffective for failing to raise the issue of trial counsel's effectiveness on direct appeal. The two-prong *Strickland* standard used by a court reviewing the summary dismissal of a postconviction petition, which alleges the ineffective assistance of trial counsel applies equally to claims of ineffective assistance of appellate counsel. *Jones*, 399 Ill. App. 3d at 368. Accordingly, " '[a] defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise the issue was objectively unreasonable and that, but for his failure, defendant's conviction or sentence would have been reversed.' " *Jones*, 399 Ill. App. 3d at 372 (quoting *People v. Griffin*, 178 Ill.2d 65, 74 (1997)). If the underlying issue is nonmeritorious, the defendant cannot show prejudice from the failure to raise it on appeal. *People v. Rogers,* 197 Ill. 2d 216, 222 (2001); see also *People v. Coleman*, 168 Ill.2d 509, 523 (1995).

¶ 83 Since we have already determined that the underlying claim, *i.e.*, trial counsel's failure to introduce the police reports at the suppression hearing has no arguable merit, we must also

conclude that appellate counsel's decision not to pursue this issue on appeal was likewise objectively reasonable. See *Rogers*, 197 Ill. 2d at 223.

¶ 84 III. CONCLUSION

¶ 85 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 86 Affirmed.