2012 IL App (1st) 102422-U

FOURTH DIVISION
April 26, 2012

No. 1-10-2422

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LAVELL THORNTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County No. 04 CR 11177 Honorable Thomas M. Tucker, Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

Held: The trial court erred in dismissing defendant's first-stage *pro se* postconviction petition where defendant's claim of ineffective assistance of counsel based on a failure to investigate alibi witnesses was arguable in both fact and law.

¶ 1 Defendant Lavell Thornton[1] was charged with first degree murder in the shooting death of

[1] At various times during trial and on direct appeal, defendant was referred to as "Lavell" or "Lovell" and his last name was spelled either "Thorton" or "Thornton." He was also addressed

Deloney Watt. Following a bench trial, defendant was convicted of first degree murder and sentenced to 45 years in prison. On direct appeal, this court affirmed his conviction (*People v. Thorton*, No. 1-07-3225 (2009) (unpublished order under Supreme Court Rule 23)). On July 13, 2010, defendant filed a postconviction petition *pro se*, raising ten claims all related to ineffective assistance of trial and appellate counsel. The trial court dismissed his petition as frivolous and patently without merit, and defendant appeals on the grounds that his petition stated a claim arguable in fact and law that he received ineffective assistance of trial counsel where his attorney: (1) failed to investigate and call three alibi witnesses; (2) failed to call witnesses to corroborate his claim that his confession was coerced; and (3) failed to argue a motion to suppress his custodial statements. For the reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 Defendant, who was a juvenile at the time, was charged as an adult for the March 2004 shooting death of Deloney Watt in Maywood, Illinois. In the weeks following the murder, certain witnesses informed the Maywood Police Department of defendant's involvement and indicated that the murder weapon could be found in defendant's home. Subsequently, investigators went to the home defendant shared with his mother and obtained her consent to search defendant's bedroom. There, they recovered two guns. Defendant was arrested in connection with the guns and made a statement confessing to the murder. Prior to trial,

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by the nickname "Lamar." We refer to defendant as "Lavell Thornton," as this is the name used in defendant's filings before this court.

defendant filed a motion to quash arrest and suppress statements. The court denied the motion to quash arrest after a hearing, and continued the case for a hearing on the motion to suppress.

¶ 4 When the parties appeared before the court to argue the motion to suppress, defendant asked to hire a new attorney because he felt that his attorney was not representing him to the best of his ability. The court informed defendant he was free to seek new representation, but the case would proceed as scheduled. The State then indicated it was ready to proceed on the hearing on the motion to suppress, and the court passed the case to allow defense counsel to confer with his client. When the case was recalled, defense counsel told the court that defendant had informed him he wanted to withdraw the motion to suppress, and also reiterated defendant's desire to hire new counsel. The court continued the case for one week to allow defendant time to obtain new counsel. One week later, defendant told the court that his family would need two months to obtain a new attorney, which the court stated it would not provide. Defendant then said he had no choice but to proceed with his present attorney, and the case was continued for trial.

¶ 5 The evidence adduced at trial revealed that Deloney Watt was shot and killed on March 26, 2004 at approximately 10:20 p.m. as he was entering the back door of his house located at 830 South 19th Avenue in Maywood. Zheri Cureton testified on behalf of the State. He had given statements to Assistant State's Attorneys (ASA) Nick Tziavaras and Steven Krueger on April 14 and 15, 2004, implicating defendant in the murder. On April 15, he also testified before a grand jury regarding the murder. However, at trial, he testified that he had no independent recollection of the events on the date of the murder, nor did he recall signing any statements or the testimony he gave before the grand jury. On cross examination, he stated that he had no

knowledge of what happened to Watt on March 26, and only testified to the contrary after being coerced by the police. He stated that nothing in his statements was true.

¶ 6 Subsequently, Cureton's statements to the Assistant State's Attorneys and his grand jury testimony were admitted into evidence pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10.1 (West 2010). These statements all gave similar accounts of the events of March 26 in varying degrees of detail. His most comprehensive testimony occurred before the grand jury on April 15. There, Cureton testified that he and defendant were driving around Maywood on the evening of March 26, 2004 in a red four-door car when defendant spotted a black male teenager with whom he had been fighting. Defendant then drove to Cureton's grandmother's house to retrieve a .38 caliber handgun before driving back to the area where they had seen the unidentified male.

¶ 7 Defendant eventually parked the car to look for one of the "twins," as brothers Deloney and Delaney Watt were known in the neighborhood. Defendant and Cureton walked through several yards and jumped a fence before arriving in the backyard of 830 South 19th Avenue. Cureton stood between the two garages behind that location while defendant approached the house because he heard someone coming. Cureton saw defendant take out the gun, and a few moments later he heard two or three gunshots coming from the side of the house. Immediately afterwards he saw defendant running back towards him. They returned to the car and drove back to Cureton's grandmother's house to return the gun. Defendant and Cureton then went to pick up brothers Jamall McCline and Ronald Robinson. While all four of them were driving around, defendant said he shot one of the twins.

¶ 8 Jamall McCline testified that defendant arrived at his house with Cureton at approximately 10:45 p.m. on March 26. McCline and his brother, Ronald Robinson, left their house with defendant and Cureton and drove to the area of 19th Avenue and Warren Street, where they saw ambulances and police cars. On direct examination, McCline stated he did not remember if defendant said anything upon seeing these emergency vehicles; however, McCline had previously testified before the grand jury that defendant had said he murdered "one of the twins." McCline did not remember giving this answer.

¶ 9 ASA Krueger testified regarding the statements defendant gave following his arrest on April 14. Krueger testified that defendant's mother, Mary Ross, and Youth Officer Sonja Horn were present at all times during the taking of defendant's written statement. After defendant and his mother signed Miranda warnings, Krueger asked defendant what he knew about Watt's murder. Defendant initially replied that he did not know anything about the murder with the exception of what he heard around the neighborhood. At that point, defendant's mother interrupted and repeatedly admonished defendant to "tell the truth." Krueger then informed defendant that he learned from other witnesses that defendant had committed the murder, and defendant's mother asked defendant once more to tell the truth. Defendant began to cry and said "yeah, mom. It was a mistake." Krueger and Officer Horn then stepped out of the room to allow defendant to compose himself. When they returned 10 minutes later, defendant proceeded to give Krueger his statement and later agreed to a videotaped confession, both of which were admitted into evidence at trial.

¶ 10 The written and oral accounts of the murder by defendant were nearly identical.

Defendant stated that on March 26, 2004 he was with Cureton driving a red Oldsmobile when he saw Lashawn Felton walking with another individual. Defendant had fought with Felton less than six months ago. Cureton told defendant to get Cureton's gun, so the two drove to Cureton's aunt's house to retrieve a .38 caliber handgun. They drove back to where they had seen Felton and defendant parked the car. He and Cureton then walked behind the homes on 19th Avenue. They jumped the fence at the back of 830 South 19th Avenue and were hiding behind garbage cans when they heard someone walking down the driveway. Defendant told Cureton to give him the gun and defendant proceeded to walk up the back stairs to the residence. He saw an individual who he believed to be Felton about to enter the home and fired a shot, which hit the individual in the head. As the individual turned around, defendant realized it was not Felton but one of the twins. He fired two more shots before leaving. He and Cureton then ran back to the car and drove to Cureton's grandmother's house where they hid the gun in the garage. Defendant proceeded to drive with Cureton to McCline and Robinson's house. The next morning, defendant went to Cureton's cousin's house where Cureton cleaned and wiped the gun. Defendant later sold the gun for $150.

¶ 11 In both his written and videotaped statements, defendant denied that any threats or coercion by police precipitated his confession. He also acknowledged that his mother was present for the duration of his statement. At the conclusion of the videotape, defendant's mother was asked about her belief in the truthfulness of defendant's confession and she stated "I know my son. I know when he's telling the truth. He's telling the truth. He stated he killed that boy. He's telling the truth."

¶ 12 At trial, defendant denied shooting Deloney Watt and stated his confession was the product of police coercion. Specifically, he testified that he was arrested on an outstanding warrant for aggravated battery at 5:00 p.m. on April 14, 2004 by Maywood Police Officer Randy Brown. Upon his arrival at the Maywood police station, he was interrogated about Watt's murder by Officer Brown and Officer Dwayne Wheeler, among others. When defendant denied having anything to do with the murder, the officers became angry. Officer Wheeler then took defendant into another room where defendant was made to strip naked and left alone for several hours. When Officer Wheeler returned, he was carrying a shoebox containing guns that defendant had in his room. According to defendant, Officer Wheeler told defendant that unless defendant memorized a statement confessing to the murder and providing details of the crime, charges of child endangerment would be filed against his mother and sister because of the guns found in defendant's room. In the face of this threat, defendant gave false statements confessing to the crime. When he was asked at trial about specific portions of his statement, he denied the truth of some and was unable to recall others, including whether he was with Cureton on March 26 and whether he went to McCline and Robinson's house that night.

¶ 13 After hearing closing arguments, the trial court found defendant guilty of first degree murder and further found that defendant personally discharged the weapon that was used to commit the murder. Prior to sentencing, defendant argued *pro se* regarding the ineffectiveness of his trial counsel. With the assistance of the court and defense counsel, defendant was able to articulate three bases for his claim of ineffectiveness; namely, defense counsel's failure to visit defendant in jail, counsel's failure to have Cureton, McCline and Robinson sign affidavits, and

counsel's failure to elicit testimony from defendant's mother and sister regarding their inability to see defendant after his initial arrest. The court found there was insufficient evidence to merit a hearing on this issue and proceeded to hear arguments regarding sentencing.

¶ 14 Defendant introduced his pre-sentence investigation report (PSI), which revealed that defendant had been raised by his mother in a "rough" neighborhood and had limited contact with his father. The investigating officer was unsuccessful in contacting defendant's family members to further develop this information. Ultimately, the court sentenced defendant to a total of 45 years in the Illinois Department of Corrections.

¶ 15 On direct appeal, defendant argued that the trial court erred in denying his motion to quash arrest, he received ineffective assistance of counsel when his attorney conceded his guilt in closing arguments, and the trial court's inquiry into his posttrial ineffective assistance claims was insufficient. This court affirmed defendant's conviction (*People v. Thorton*, No. 1-07-3225) (2009) (unpublished order under Supreme Court Rule 23)).

¶ 16 Defendant timely filed the instant postconviction petition *pro se* on July 13, 2010, alleging ineffective assistance of both trial counsel and appellate counsel. Specifically, defendant alleged, among other things, that his trial counsel filed to investigate three witnesses who would have provided defendant with an alibi for the night of the murder. Defendant alleged that his father, Lavell Thornton, Sr., brother, Marcell Thornton, and sister, Tiffaney Thornton, would have testified that defendant was with them at Lavell Sr.'s house in Chicago at the time the murder was committed in Maywood. He further stated that he made his attorney aware of the testimony these witnesses would offer, but his attorney nevertheless declined to put them on the

stand.

¶ 17 Defendant also alleged his counsel was ineffective for failing to investigate and develop the testimony of Tiffaney and his mother, Mary Ross, who were prepared to testify that they were prohibited from seeing defendant after he was arrested and being questioned by the police. According to defendant, this testimony would have corroborated his assertion at trial that his confession was coerced.

¶ 18 Finally, defendant alleged that his counsel's failure to argue an already-filed motion to suppress statements amounted to ineffective assistance. Defendant alleged that on the day the hearing on the motion to suppress was to occur, his attorney informed him that he had not interviewed Mary or Tiffaney, who were scheduled to testify at the hearing. His attorney also represented that the motion was likely to be denied in any event, and that he would elicit the testimony of defendant's mother and sister at trial. Based on these assurances, defendant agreed to dismiss the motion. Defendant maintained that if the motion to suppress had been fully argued, it would have been granted and his confession suppressed, which would have resulted in insufficient evidence to sustain a conviction.

¶ 19 Attached to defendant's petition were the signed affidavits of defendant, Lavell Sr., Mary, Tiffaney, and Marcell. Lavell Sr. stated that he picked defendant up from Mary's house on March 25, 2004, and the two of them went to Lavell Sr.'s apartment in Chicago. They spent the morning of March 26 painting Lavell Sr.'s apartment and left at 12:30 p.m. to eat lunch and visit defendant's aunt. At around 7:30 or 8:00 p.m., they returned to Lavell Sr.'s apartment where they began a game of cards. They were joined by Tiffaney and Marcell, who came to see the

apartment and left after 11:00 p.m. Lavell Sr. did not take defendant back to Mary's home in Maywood until the next day, at which time Mary told Lavell Sr. that a murder had been committed the night before.

¶ 20 Tiffaney and Marcell recounted the same version of events. Specifically, Tiffaney stated that she and Marcell left Mary's house in Maywood between 9:45 and 10:00 p.m. on March 26 to visit Lavell Sr. When they arrived at Lavell Sr.'s apartment 15 to 20 minutes later, they saw defendant and Lavell Sr. waiting outside. They did not leave Lavell Sr.'s apartment until 11:30 p.m.

¶ 21 Defendant's affidavit mirrored those of his father and siblings in all relevant respects. Further, defendant and his family all averred that these facts were made known to defendant's attorney, but counsel failed to investigate this possible defense.

¶ 22 Mary and Tiffaney also submitted affidavits regarding the events on the night defendant was arrested. They averred that they first learned defendant was in police custody after a friend informed them she had seen defendant placed under arrest on April 14, 2004, during the day. When Mary and Tiffaney arrived at the Maywood Police Station at 1:00 a.m. on April 15, Officer Wheeler informed them they could not see defendant. At 5:00 a.m., Mary was told defendant wanted to make a videotaped confession. Tiffaney stated that she did not have contact with defendant until 8:00 a.m. when an officer told Mary she could see defendant for the recording of his confession. Both Tiffaney and Mary averred they were available to testify on defendant's behalf at trial and repeatedly called defense counsel to discuss the content of their testimonies but counsel never returned their calls.

¶ 23 The trial court summarily dismissed defendant's petition as frivolous and patently without merit in an oral ruling. Defendant timely filed this appeal.

¶ 24 ANALYSIS

¶ 25 The Post-Conviction Hearing Act (Act) allows a defendant who is imprisoned in a penitentiary to challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1 (West 2010); see also *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). A defendant electing to proceed under the Act must first file a petition, verified by affidavit, in the circuit court in which the original proceeding occurred. 725 ILCS 5/122-1(b) (West 2010). Because a postconviction proceeding is a collateral attack on the conviction, the petition must be limited to constitutional issues that have not been, nor could have been, adjudicated on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Moreover, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*. *People v. Towns*, 182 Ill. 2d 491, 502-03 (1998).

¶ 26 The Act establishes a three-stage process for adjudicating a postconviction petition in non-capital cases. 725 ILCS 5/122-1 (West 2010). At the first stage, the circuit court may dismiss a petition only if it is frivolous or patently without merit. *People v. Harris*, 224 Ill. 2d 115, 125-26 (2007). A frivolous petition is one that is based on an "indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Stated differently, a petition must have an arguable basis either in law or fact in order to survive summary dismissal. *Id.* This presents a pleading question in the sense that all well-pled facts not positively rebutted by the trial record must be liberally construed and taken as true, and the court

must refrain from addressing substantive questions or making credibility determinations. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). If the petition survives dismissal at this initial stage, it advances to the second stage, where counsel may be appointed to an indigent defendant and the State may move to dismiss the petition. *Harris*, 224 Ill. 2d at 126. The defendant must make a substantial showing of a constitutional violation in order to proceed to an evidentiary hearing, which is the third and final stage of the postconviction process. *Id.*, citing 725 ILCS 5/122-6 (West 2004).

¶ 27 In the case *sub judice*, only the first stage is at issue. Our review of the trial court's first-stage summary dismissal is *de novo*. *People v. Davis*, 403 Ill. App. 3d 461, 464 (2010).

¶ 28 On appeal, defendant's petition is premised entirely on the ineffectiveness of his trial counsel. The two-pronged test to establish ineffective assistance of counsel sets a high standard. *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). Defendant must demonstrate that his representation was so unprofessional as to fall below an objective standard of reasonableness and that this deficient performance resulted in prejudice to defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When reviewing the summary dismissal of a postconviction petition alleging ineffective assistance, we must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced by this failure. *Hodges*, 234 Ill. 2d at 17.

¶ 29 We first address defendant's claim that he did not receive effective assistance of counsel where his attorney failed to investigate and call his father and siblings as alibi witnesses. The State initially contends this argument was defaulted based on defendant's failure to raise it

contemporaneously with his other *pro se* posttrial claims of ineffective assistance of counsel. It is sufficient to note that there is no precedential authority for the proposition that any bases for ineffective assistance claims not raised during a posttrial *Krankel* inquiry are procedurally defaulted for purposes of postconviction proceedings. Instead, it is only those matters that could have been raised on *direct appeal*, but were not, that are forfeited. See *Pitsonbarger*, 205 Ill. 2d at 456. (Emphasis added). Here, the State does not suggest defendant could have raised the issue of ineffectiveness based on the failure to present alibi evidence on appeal, given that it depended on matters outside of the record. See *People v. Patterson*, 192 Ill. 2d 93, 129 (2000). Accordingly, we find no procedural default.

¶ 30 We next turn to whether defendant's claim of ineffective assistance based on his attorney's failure to investigate his alleged alibi has an arguable basis in fact and law. Defendant attached affidavits of three alibi witnesses to his postconviction petition, each of which provides a detailed account of defendant's whereabouts the evening of March 26, 2004, when the murder was committed. For example, the affidavit of Lavell Sr. states that he and defendant went to Chicago, Illinois the evening of March 25 in order to paint Lavell Sr.'s apartment. According to Lavell Sr., he and his son spent the day of March 26 together, and were joined that evening by Tiffaney and Marcell at approximately 10:00 p.m. Defendant did not return to his mother's house in Maywood until March 27. The affidavits of Tiffaney and Marcell, as well as defendant's own affidavit, corroborate this account of events.

¶ 31 The State maintains that because defendant testified at trial that he could not recall his whereabouts on the night of the murder, this alibi defense is incredible and beyond the limits of

human belief. We disagree. As a preliminary matter, we note that we cannot make credibility determinations at this stage of review. *Coleman*, 183 Ill. 2d 366, 380-81 (1998). Moreover, our supreme court has recently cautioned that a belief in the unlikeliness of a defendant's allegations cannot, without more, justify summary dismissal of a postconviction petition. *Hodges*, 234 Ill. 2d at 19. This is particularly true where we are considering the petition of a *pro se* defendant. Because a *pro se* petitioner has little legal knowledge or training, the threshold for survival of his claims is low, and we must construe his petition liberally, "allowing borderline cases to proceed." *Id.* at 9, 21, quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2nd Cir. 1983). Thus, it is only where the allegations are patently fantastic or delusional that a petition lacks an arguable basis in fact. *People v. Brown*, 236 Ill. 2d 175, 189 (2010).

¶ 32 Our supreme court has stated that federal *habeus corpus* precedent may inform our determination of what constitutes fantastic or delusional factual allegations. *Hodges*, 234 Ill. 2d at 12-14. We find instructive the review of such precedent in *People v. Jones*, 399 Ill. App. 3d 341, 374 (2010) (Howse, J., dissenting), which collected federal cases discussing frivolous factual claims. For example, the Sixth Circuit characterized as frivolous the allegations that Robin Hood and his Merry Men withheld prisoners access to their mail, or that a genie granted a warden's wish to deny prisoners access to textbooks. *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990). Similarly, the Seventh Circuit held that a defendant's claim that prison guards intentionally served him food with metallic substances was a fanciful allegation lacking any factual basis. *Evans v. Six Unknown Federal Prison Guards*, 908 F.2d 975 (7th Cir. 1990) (table); see generally, *Jones*, 399 Ill. App. 3d at 374 (Howse, J., dissenting).

¶ 33 With these principles in mind, we find defendant's factual allegations in his petition do not rise to the level of the irrational or delusional, notwithstanding his trial testimony. While defendant's testimony at trial that he could not remember certain events that transpired on the date of the murder is puzzling in light of the fact that he alleges he had previously informed his attorney of the existence of an alibi, defendant provides an explanation for this apparent inconsistency. Specifically, in his affidavit, defendant explained that he was admonished by his attorney to testify only to the "circumstances surrounding *** arrest." He stated that his attorney told him the State's case was sufficiently weak that no alibi evidence would be necessary in order to obtain an acquittal. This explanation may appear unlikely, but it is neither fantastic nor delusional, particularly when we consider that defendant had complained about his representation on several occasions during both pretrial and posttrial motions.

¶ 34 More significantly, when viewed in context, defendant's lapses in memory at trial do not necessarily reflect a general failure to remember anything about the day of March 26, but instead can be construed as a failure to recall specific events that took place that day. For example, it was in response to his attorney's question regarding the truthfulness of his statement that he was in a red Oldsmobile with Cureton on March 26 that defendant testified: "I really can't say where I was on that day because I don't remember. I don't remember." The statements "I don't remember" may have reflected only defendant's inability to remember the time, if any, he spent with Cureton that day. Similarly, on cross-examination, when defendant was asked about the truth of his statement that he was at McCline and Robinson's house on March 26, he replied: "I don't remember if I went to their house that evening or not. I don't know what happened that

day." Again, though his response was broadly phrased, he could have been describing only a loss of memory in relation to activities with McCline and Robinson on March 26. Thus construed, defendant's trial testimony does not render his alibi defense irrational or delusional in the same way as the allegations in the federal *habeus* petitions in *Lawler* or *Evans.* As a result, we cannot conclude defendant's petition lacks an arguable basis in fact.

¶ 35 For similar reasons, we do not find defendant's alibi is positively rebutted by his trial testimony and therefore lacking an arguable basis in law. See *Brown*, 236 Ill. 2d at 189. While there may be an inconsistency between defendant's sworn trial testimony and his allegations as to what he told his attorney regarding his whereabouts the night of the murder, when we gave defendant's statements a liberal construction, we cannot say they completely contradict his alibi for the night of the murder.

¶ 36 As such, we find the State's reliance on *Jones* misplaced. There, we affirmed the summary dismissal of the defendant's first-stage postconviction petition based on a claim of ineffective assistance of counsel where the defendant's trial counsel failed to call two alibi witnesses. *Jones*, 399 Ill. App. 3d at 369-72. Our holding was based in part on the fact that the alibi offered by the two witnesses would have contradicted the testimony of the defendant's mother at trial that the defendant was at home asleep when the shooting occurred. *Id.* at 369-70. Moreover, we noted that the defendant himself, in a letter to his parents attached as an exhibit to his postconviction petition, stated that he was at home when the crime was committed. *Id.* at 370. In contrast, here, defendant did not provide any information as to his activities the night the murder was committed, except to say he did not remember. Therefore, there was no testimony

that could be contradicted by the presentation of an alibi defense.

¶ 37 Nor do we find any other evidence in the record that serves to conclusively rebut defendant's alibi. The State points us to the pre-sentence investigation report (PSI), highlighting defendant's statements that he did not did not have much contact with his father and did not see him until his arrest. The State urges us to consider these statements in a vacuum and construe them literally, which we decline to do. Significantly, the PSI is not a transcript but a summary of a conversation between the defendant and the investigating probation officer; therefore, there is little context in which to interpret defendant's statements. For instance, when defendant stated that he did not see his father until he was arrested in the instant case, he could just as easily have been providing a general description of his upbringing in a single-parent family as responding to a specific question regarding when he first met his father. Moreover, were we to take defendant's statement at face value, we would have to conclude that defendant never saw his father for the first 16 or 17 years of his life, a fact which is contradicted by defendant's other statements in the PSI that he and his father did not have "much" contact, implying that some contact did in fact occur.

¶ 38 The State also directs our attention to the statements of Mary Ross, defendant's mother, made during defendant's videotaped confession, where she stated she believed defendant was telling the truth. We fail to see how this statement contradicts defendant's alibi, particularly where there was no evidence adduced at trial or in the petition that Mary knew defendant was with his father the night of the murder, as he now contends. Instead, the State makes the purely speculative argument that Mary must have been made aware of this fact when she spoke with

Lavell Sr. the day after the murder. However, in his affidavit, Lavell Sr. states only that he and Mary spoke for "awhile" when he dropped defendant off on March 27 and that Mary told him of a murder that occurred the prior evening. He does not suggest that he informed Mary that defendant spent the previous night with him. Indeed, he would have no reason to convey this information, as their conversation occurred prior to the time when Lavell Sr. and Mary became aware that defendant was a suspect in the murder. Thus, the testimony of Lavell Sr., Tiffaney and Marcell would have at least arguably supported an alibi defense given that it was not conclusively contradicted by the record.

¶ 39 Finally, we consider whether defendant's legal theory of ineffectiveness based on a failure to present testimony from these alibi witnesses is indisputably meritless. Ordinarily, the decision of whether to call certain witnesses is a matter of trial strategy within trial counsel's discretion. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). As a result, such decisions are generally immune from claims of ineffective assistance of counsel. *Id.* Importantly, though, in order to enjoy immunity, these strategic decisions must be based on a "thorough investigation of all matters relevant to plausible options." *Strickland*, 466 U.S. at 690; see also *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002) ("[d]efense counsel has a professional obligation, both legal and ethical, to explore and investigate a client's alibi defense"). It follows that a complete failure to investigate a viable defense may support an ineffective assistance claim. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 36.

¶ 40 In the instant case, defendant and his family members allege in their affidavits that defense counsel wholly failed to investigate defendant's alleged alibi for the night of the murder.

Lavell Sr., for example, averred that when he tried to arrange a meeting with defendant's attorney to inform him of defendant's whereabouts between March 25 and March 27, counsel responded that he had a very busy schedule and refused to return his calls. Tiffaney made similar accusations in her own affidavit. Taking these allegations as true, as we must for purposes of evaluating a postconviction petition at its initial stage (*Coleman*, 183 Ill. 2d at 380), it is at least arguable that this failure to investigate fell below an objective standard of reasonableness that prejudiced defendant. See *Hodges*, 234 Ill. 2d at 22 (failure to investigate and interview three alibi witnesses arguably supported a claim of ineffective assistance of counsel for purposes of first stage postconviction review); see also *People v. Truly*, 230 Ill. App. 3d 948, 955 (1992) (finding ineffective assistance where defense counsel did not investigate four witnesses whose contact information was provided to him, and who could testify to an alibi and to the defendant's physical incapacity for committing the crime). For these reasons, we conclude that defendant's claim of ineffective assistance of counsel based on a failure to investigate an alibi defense was not frivolous or patently without merit.

¶ 41 Because we have determined his allegation of ineffective assistance survives summary dismissal, we do not address defendant's remaining two claims that his counsel was also ineffective for failing to present the testimony of his mother and sister that would allegedly corroborate his testimony that his confession was coerced, or for failing to argue an already-filed motion to suppress custodial statements, as it is well settled that partial summary dismissals are not permitted under the Post-Conviction Hearing Act. See *People v. Rivera*, 198 Ill.2d 364, 374 (2001). Thus, we remand the entire petition for further proceedings, regardless of the merits of

these other claims. See *People v. Cathey*, 2012 IL 111746, ¶ 34

¶ 42 Importantly, nothing in our decision today is intended to express an opinion regarding whether defendant has made a substantial showing of a constitutional violation and is entitled to proceed to an evidentiary hearing, as such a determination is properly reserved to the lower court on remand for second-stage postconviction proceedings. *Cathey*, 2012 IL 111746, ¶ 32.

¶ 43 CONCLUSION

¶ 44 For the reasons stated, we reverse the judgment of the trial court and remand for second-stage postconviction proceedings and the appointment of counsel.

¶ 45 Reversed and remanded.