2014 IL App (1st) 1113602-U
No. 1-11-3602

THIRD DIVISION
SEPTEMBER 30, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County.
	)	
v.	)	07 CR 19092
	)	
FERREL CUNNINGHAM,	)	The Honorable
	)	Michael Brown,
Petitioner-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's post-conviction petition based on ineffective assistance of his trial counsel based on failing to request Y-STR testing of the vaginal swab sample, failing to impeach the State's use of the product rule for DNA statistical probability of a random match, and failing to file a pre-trial motion to suppress the DNA results based on contamination and degradation in the samples had no arguable basis in law or fact and was properly dismissed at the first stage of post-conviction proceedings. The evidence clearly established that there was no contamination of the vaginal swab sample, there was no Y-STR testing on the vaginal swab because PCR testing had already yielded a clear match to defendant, and the oral and vaginal swab samples which were the ones actually tested were not contaminated or degraded.

¶ 2 BACKGROUND

¶ 3 Defendant, Ferrel Cunningham, appeals from the circuit court's judgment dismissing his petition for post-conviction relief at the first stage of proceedings. The narrow issue before us is whether the trial court properly dismissed defendant's post-conviction petition based on his trial counsel's alleged defective performance in failing to challenge certain aspects of the DNA testimony. Defendant was identified as the perpetrator of a criminal sexual assault by means of a "cold-case" DNA database match. We first briefly summarize the facts relevant to this appeal.

¶ 4 The victim, C.G., was sexually assaulted in December of 1998. At the underlying trial, C.G. testified that on December 6, 1998, a Sunday night, she went to a hockey game, a restaurant, and then to a bar at 104th Street and Western Avenue in Chicago. She left the bar shortly after 1 a.m. and began walking to her boyfriend's mother's house, about four blocks away. As she walked, a black male who was about 5'7" or 5'8" approached her and asked for a donation. C.G. did not get a good look at the man because he approached her from behind. C.G. ignored the man and kept walking. When C.G. reached the mouth of an alley, the man grabbed her from behind, choked her neck with both his hands, said he had a knife, and led her down the gravel alley, forced her to the ground, and assaulted her. The man inserted his penis into C.G.'s vagina and mouth several times and ejaculated into C.G.'s vagina. The man then took two dollars from C.G. and left. C.G. testified that she was not able to get a good look at the man's face during the attack because she kept her eyes closed. C.G. ran to a house and asked for help. The man who answered the door invited her in and called 911. Within a few minutes, police officers and an ambulance arrived and C.G. was taken to Little Company of Mary Hospital.

¶ 5 Christina Lapinska, a registered nurse at the hospital, testified that she and Dr. Lara examined C.G. around 2:10 a.m. on December 7, 1998. Lapinska noticed reddening around

C.G.'s neck, a small laceration on her left thigh, abrasions to her right knee and right heel, and also observed mud all over C.G.'s leg and face. Dr. Lara performed an internal and external examination of C.G.'s vaginal area. No evidence of internal trauma was noted. Dr. Lara collected a vaginal swab.

¶ 6 Lapinska collected evidence from C.G. in a sexual assault kit. Lapinska instructed C.G. to stand on a sterile piece of paper and undress, after which Lapinska folded up the paper and placed it into a bag. Lapinska then collected scrapings from underneath C.G.'s fingernails, swabbed her mouth, collected blood samples, and combed C.G.'s pubic hair and the hair on her head. Lapinska placed all the samples into sealed envelopes, which she placed into the sexual assault kit. Before her shift ended, Lapinska gave the kit to another nurse at the hospital. The parties stipulated that the nurse gave the kit to a police officer through a proper chain of custody.

¶ 7 Officer Kahagan responded to the scene of the assault to gather evidence and to take photographs. Kahagan recovered a pair of shoes, underwear, a broken belt, two Blackhawks ticket stubs, and C.G.'s driver's license. No latent prints were found on the driver's license or on the tickets.

¶ 8 On December 8 and 9, 1998, police officers showed C.G. a photo array, but C.G. was not able to identify her attacker. C.G. also viewed a lineup on December 10, 1998, as well as another photo array on December 13, 1998, but she still could not identify her attacker.

¶ 9 Karen Kooi Abbinanti, a forensic scientist for the Illinois State Police who testified as an expert in forensic biology, testified that she received the sealed sexual assault kit and bag of clothes recovered from C.G. in March of 1999. Abbinanti found a strong indication of the presence of semen on the two vaginal swabs in the kit. Abbinanti also found a trace reading of sperm heads on an oral swab, but a negative presence of semen on the throat swab. Abbinanti

preserved the swab heads from the vaginal and oral swabs and placed them into the freezer for future DNA analysis. Abbinanti also observed stains on the crotch area of C.G.'s jeans, and so Abbinanti also preserved a cutting from the jeans.

¶ 10 Greg DiDomenic, a forensic scientist for the Illinois State Police, also testified as an expert in forensic biology and forensic DNA analysis. DiDomenic testified that at some point in 1999, he performed restriction fragment length polymorphism (RFLP) testing on the samples preserved by Abbinanti. DiDomenic determined that he had enough DNA to perform analysis on the vaginal and oral swabs, but not on the cutting from the jeans. In order to perform the DNA analysis it was necessary for DiDomenic to consume all of the DNA from the swabs. DiDomenic separated the swabs into three fractions: a female fraction; a mixed fraction; and a sperm-only fraction. The sperm fractions from the vaginal and oral swabs did not contain any detectable DNA. From the mixed fraction of the vaginal swab, DiDomenic identified one DNA profile which matched C.G., and another DNA profile from an unknown person. He identified the foreign profile at three of the five locations he examined. DiDomenic identified only C.G.'s profile from the oral swab. The mixed fraction of the oral swab was degraded. DiDomenic input the unknown DNA profile into the database, but there was no match with the DNA of any known profile in the database.

¶ 11 The parties stipulated that Andrea Lambatos, a forensic scientist with the Illinois State Police, would be qualified as an expert in forensic DNA analysis. In 2000, Lambatos conducted further DNA analysis on the vaginal swabs. Lambatos identified a mixture of two DNA profiles. One profile matched C.G., and the other was an unknown male profile. The male profile was entered into the DNA database, but again no match was found.

¶ 12 Nicolas Richert, a forensic scientist for the Illinois State Police, also testified as an expert in forensic DNA analysis. Richert testified that in late December 2006, he received information that a possible association had been made between the male DNA profile found in C.G.'s vaginal swabs and defendant, who was living outside of Illinois at the time. C.G. could not positively identify defendant as her attacker. A buccal saliva sample was collected from defendant. Richert tested and compared the paperwork from the sample corresponding to defendant's DNA with the profile collected from C.G. Richert concluded that defendant might be the donor of the male profile in the vaginal swabs.

¶ 13 On January 3, 2007, Detective Okon of the Chicago Police Department obtained a photograph of defendant which had been taken many years ago and included it in a photo array with the pictures of seven other men. On January 6, 2007, Detective Okon showed the photo array to C.G., but C.G. was not able to make an identification. Detective Okon arrested Cunningham outside Illinois pursuant to a warrant on August 29, 2007, and transported him back to Illinois. Later that night, C.G. viewed a lineup which included defendant and four other men, but again was not able to identify defendant.

¶ 14 The parties stipulated that on August 30, 2007, Investigator Fred Bonke collected a buccal saliva swab sample from defendant, which he turned over to Ralph Vucko, another investigator. Vucko then submitted the swab to the Chicago Police Department. Based on DNA testing, defendant was charged with multiple counts of aggravated criminal sexual assault.

¶ 15 The only pre-trial DNA motion filed by defense counsel was a motion for a *Frye* hearing on the ground that the Y-STR analysis performed on the oral swab sample taken from defendant was not generally accepted in the scientific community. This motion was denied.

¶ 16 Kelly Biggs, a forensic scientist for the Illinois State Police, testified as an expert in DNA and forensic biology. Biggs performed a polymerase chain reaction (PCR) analysis on the buccal swab samples collected from defendant. With this type of testing, DNA is isolated from a sample and quantified and amplified, so that many copies are made of the profile for analysis and testing. A machine analyzes the DNA and generates a printout with numeric values at 13 loci for the scientist to interpret. Since contamination can occur during the extraction process, a reagent blank, or sterile swab, is processed alongside the DNA sample being tested. When Biggs processed the first buccal swab collected from Cunningham, she did so with eight other DNA standards from other cases, as well as one reagent blank. A low level amount of DNA was found in the reagent blank. Biggs's supervisor instructed her to see if she could determine if the source of the contamination could be identified, and Biggs determined that the blank was contaminated by another standard which was extracted at the same time as defendant's buccal swab.

¶ 17 Biggs then re-ran the test using the second buccal swab collected from defendant. Biggs did not detect any DNA in the reagent blank during this second test. Biggs determined that the DNA profile from C.G.'s vaginal swab matched the DNA profile found in defendant's buccal swab. Using an FBI computer program called "Pop-Stat," Biggs determined that the profile which matched on the samples could be expected to occur in one in 410 quadrillion black individuals, one in 100 quintillion white individuals, and one in 270 quintillion Hispanic-background individuals.

¶ 18 Brian Schoon, a forensic scientist for the Illinois State Police, testified as an expert in DNA analysis. Schoon testified that in March of 2008, he received portions of the DNA samples collected from the swabs previously tested in the case, in order to quantify how much DNA was in the samples through a process called qualitative polymerase chain reaction (QPCR). Schoon

determined there was a small amount of male DNA compared to female DNA in the oral swabs. Schoon also determined that there was a very little amount of DNA in the jeans sample, and that the dye from the jeans could affect testing and render it unreliable. Schoon preserved the oral swab sample because he thought it might be suitable for Y-chromosome short tandem repeat testing (Y-STR).

¶ 19 Karri Brouddus, a forensic scientist with the Illinois State Police, testified over objection as an expert in forensic DNA Y-STR testing. Brouddus testified that she performed Y-STR DNA analysis on the oral swab in August 2008. Y-STR DNA testing looks only at the male Y-chromosome, and thus is useful for isolating male DNA in a sample with only a small amount of DNA. Broaddus detected a Y-STR DNA profile from the DNA extracted from C.G.'s oral swab and from defendant's buccal swab. Broaddus compared the DNA between these two samples and found them to match at all 11 locations she tested. Broaddus acknowledged that more discriminating tests compare DNA at 17 locations, and that a match at only 11 of 17 locations would actually eliminate an individual as a match. Broaddus testified that the Y-STR profile was searched against a database of known DNA profiles and that the profile would be expected to occur in one in 230 unrelated African American males, one in 430 unrelated Caucasian males, and one in 290 unrelated Hispanic males.

¶ 20 Broaddus also used a reagent blank to test for contamination. Broaddus detected a low-level male profile in the reagent blank associated with the DNA extracted from C.G.'s oral swab. Broaddus indicated that the identification of a contamination during Y-STR analysis was not "completely unheard of" because the technique was very sensitive. Broaddus attempted to identify the source of the contamination, but she was unable to match the DNA in the reagent blank with any other sample she was working on, or with DiDomenic, the other forensic scientist

who had extracted the DNA. Broaddus testified that normally she would re-run a test in which contamination was found, but she was unable to retest this sample because it had been entirely consumed by DiDomenic. Broaddus testified that the extraneous DNA did not affect the results of her comparison because she was able to identify two distinct profiles.

¶ 21 Both the State and the defense rested after Broaddus's testimony.

¶ 22 During jury deliberations, the jury asked, "What is a low level profile? Clarify a low level profile? 11:11 or 11:13?" The parties agreed for the jury to be instructed that it had received all of the evidence in the case.

¶ 23 The jury found defendant guilty of five separate acts of criminal sexual assault. The trial court sentenced defendant to natural life in prison as a habitual criminal offender under section 33B-1 of the Criminal Code (720 ILCS 5/33B-1 (West 2000)). On direct appeal, defendant's appellate counsel argued that defendant should receive a new trial because the trial court failed to admonish the jurors in compliance with Illinois Supreme Court Rule 431(b) (Ill. S. Ct. Rule 431(b) (eff. July 1, 2012)). Defendant's convictions and sentences were affirmed on direct appeal.

¶ 24 Defendant filed his *pro se* post-conviction petition on August 30, 2011, arguing that his counsel failed to properly challenge the DNA evidence, specifically that the contamination in the DNA sample gave rise to a reasonable doubt of defendant's guilt.

¶ 25 The circuit court summarily dismissed defendant's petition at the first stage of post-conviction proceedings on October 21, 2011. The written order reflected that the post-conviction petition was dismissed for the reasons given in its oral ruling. In its ruling, the court noted that defendant had not provided documentation to support his claim that the DNA sample was contaminated and had not attached an affidavit from any proposed expert witness. The court

entered judgment on its order of dismissal on October 21, 2011. Defendant's notice of appeal was timely field on November 17, 2011.

¶ 26 ANALYSIS

¶ 27 Defendant argues that the circuit court erred in dismissing his petition for post-conviction relief at the first stage of proceedings where defendant has an arguable claim that his counsel was ineffective in failing to properly challenge the DNA evidence against him.

¶ 28 The State initially argues that defendant forfeited his claim for his trial counsel's ineffectiveness for failing to challenge the DNA evidence based on alleged contamination because he failed to make these arguments in his *pro se* post-conviction petition. Defendant argues that although he did not specifically allege ineffective assistance of counsel based on failure to object to the DNA evidence in his post-conviction petition, he did generally raise ineffective assistance of counsel. Defendant also argues that the claim should not be forfeited because the record "was not fully developed" at trial and because his appellate counsel was ineffective for failing to raise the issue on direct appeal, citing to *People v. Bew*, 228 Ill. 2d 122 (2008). Defendant concedes that his claim of ineffective assistance of appellate counsel on this basis was not raised in his post-conviction petition.

¶ 29 In *Bew*, the Illinois Supreme Court held that the record on direct appeal was insufficient to address any of the defendant's alternative grounds for suppression in support of his ineffective assistance of counsel claim based on failure to file a motion to suppress, but that "even though we find that defendant has, on this record, failed to prove ineffective assistance of counsel, we note that defendant may raise these alternative grounds for suppression under the Post–Conviction Hearing Act ***." *Bew*, 228 Ill. 2d at 135. The Illinois Supreme Court noted with approval the United States Supreme Court's recognition in *Massaro v. United States*, 538 U.S.

500 (2003), "that ineffective assistance of counsel claims are preferably brought on collateral review rather than on direct appeal" and that "[t]his is particularly true where, as here, the record on direct appeal is insufficient to support a claim of ineffective assistance of counsel." *Bew*, 228 Ill. 2d at 134. Thus, the court indicated that it is preferable for a claim of ineffective assistance to be raised for the first time on collateral review because the record on appeal has not been precisely developed for the object of litigating a specific claim of ineffective assistance of counsel, whereas in a collateral post-conviction proceeding, the record can be developed on the precise ineffective assistance claim made. *Id*. We agree with defendant and with the rationale espoused in *Bew* and decline to find forfeiture of defendant's ineffective assistance of counsel arguments for failure to make the alleged challenges to the DNA evidence based on the failure to raise this claim on direct appeal.

¶ 30 Defendant argues that the record adequately supports his claims and explaining that he did not have access to the DNA test results at the time he filed his petition, citing to *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("[w]hile confined to prison, [a defendant] *** is in no position to develop the evidentiary basis for a claim of ineffective assistance"), and *People v. Smith*, 268 Ill. App. 3d 574, 580-81 (1994). The State argues that the trial court correctly dismissed defendant's post-conviction petition based solely on defendant's failure to attach affidavits as required by the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)). Defendant argues in his reply brief that his "references to the record adequately support his claims and show they are capable of verification under the Act, which the State agrees is the purpose of the evidentiary requirement."

¶ 31 The Act requires that a defendant attach to his petition "affidavits, records, or other evidence to support its allegations or state why the same are not attached" in order to show that

defendant's allegations can be objectively and independently corroborated. 725 ILCS 5/122-2 (West 2010). Defendant attached his own seven-page affidavit, with detailed averments concerning his other grounds for his post-conviction petition, but did not attach any other affidavits or evidence or explain his failure to do so. Rather, defendant argued that ineffective assistance of counsel on this basis was apparent from the record, as the State presented seven DNA expert witnesses, while defense counsel presented none. In its ruling dismissing defendant's petition, the court noted that defendant had not provided documentation to support his claim that the DNA sample was contaminated and had not attached an affidavit from any proposed expert witness.

¶ 32 *Pro se* post-conviction relief petitions require more liberal reading than is applied to formal pleadings prepared by counsel. *Smith*, 268 Ill. App. 3d at 580. The Illinois Supreme Court has cautioned that "[b]ecause most petitions are drafted at [the first] stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *People v. Tate*, 2012 IL 112214, ¶ 9. But while a *pro se* petitioner "need only present a limited amount of detail" in the petition (*People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)) and need not make legal arguments or cite to legal authority (*People v. Porter*, 122 Ill. 2d 64, 74 (1988), he or she must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent. *People v. Delton*, 227 Ill. 2d 247, 255 (2008). "[T]the purpose of section 122-2 is to establish that a petition's allegations are capable of 'objective or independent corroboration.' " *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005), citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002)).

¶ 33 The State argues that the trial court correctly dismissed defendant's petition based solely on the lack of affidavits, and that defendant should have attached affidavits from his own trial

attorneys. We do not find this argument well-taken. The absence of other affidavits may be excused where a post-conviction petition is based on ineffective assistance of counsel and the only other relevant affidavit which could be obtained would be from a defendant's own counsel who is alleged to have been ineffective. *A pro se* defendant's quandary in such circumstances has long been recognized by this court as an exception to the affidavit requirement under section 122-2 of the Act. S*ee People v. Williams*, 47 Ill. 2d 1 (1970). I*n Williams*, the court held that even though the defendant did not explain why his post-conviction petition was unaccompanied by the proper documentation, the petition contained facts from which it could be inferred that "the only affidavit that petitioner could possibly have furnished, other than his own sworn statement, would have been that of his attorney ***." *Id.* at 4. The court stated that "[t]he difficulty or impossibility of obtaining such an affidavit is self-apparent." *Id*. The court held that any construction of the Act requiring an affidavit of a trial attorney addressing his or her own incompetence "would defeat its very purpose by denying petitioner a hearing on the factual issue raised by the pleadings." *Id.* at 4-5. Th*e Williams* court thus reversed the trial court's summary dismissal of the defendant's petition.

¶ 34 In *People v. Ramirez*, 402 Ill. App. 3d 638 (2010), the court followed this long-standing exception and held that "the failure to attach independent corroborating documentation or explain its absence may be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *Ramirez*, 402 Ill. App. 3d at 641-42 (citing *People v. Collins*, 202 Ill. 2d 59, 67-68 (2002)). The court held: "The difficulty of obtaining such an affidavit is self-apparent here where defendant claimed that his counsel provided ineffective assistance in advising him about a constitutional violation. Moreover, the trial court must accept as true all well-pleaded facts not

positively rebutted by the record." *Ramirez*, 402 Ill. App. 3d at 642 (citing People v. Crane, 333 Ill. App. 3d 768, 773 (2002)). The court in *People v. Kellerman*, 342 Ill. App. 3d 1019 (2003) similarly held: "Obviously, the defendant could not be expected to obtain an affidavit from his trial counsel stating that the attorney was ineffective. Therefore, we hold that under the narrow exception announced in *Williams*, the defendant's failure to comply with the documentation requirement of section 122-2 did not justify dismissal of his petition." *Kellerman*, 342 Ill. App. 3d at 1028.

¶ 35 The only other affidavit defendant could have possibly obtained to support his argument of ineffective assistance based on failure to retain defense DNA experts would have been an affidavit from a DNA expert, but the logistical and practical improbability of an imprisoned *pro se* defendant obtaining such an affidavit is clearly apparent. To require imprisoned *pro se* defendants to obtain such expert affidavits is too high a bar for merely the first stage of post-conviction proceedings and does not serve the purpose of the Act. While normally a post-conviction petition grounded on ineffective assistance due to failure to present witnesses cannot survive without affidavits from such proposed witnesses, "a petition can survive without such attachments if the defendant's allegation is uncontradicted and supported by the record." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 30 (citing *People v. Johnson*, 183 Ill.2d 176, 191 (1998)). Here, defendant appropriately based his allegation on the record itself and pointed to the fact that the State had retained seven DNA experts, while the defense retained none, which is an uncontradicted allegation and is supported by the record.

¶ 36 We find that defendant's *pro se* post-conviction petition in this case is squarely within the *Williams* exception to the section 122-2 affidavit requirement, as it is similarly based on alleged ineffective assistance of counsel, for which defendant is not required to attach an affidavit from

his own counsel. Dismissal of defendant's *pro se* petition cannot be supported solely on the basis of failure to attach other affidavits or evidence. We thus turn to the merits of defendant's substantive post-conviction argument to determine whether dismissal was nevertheless appropriate based on the petition and the record.

¶ 37 Defendant argues that his claim of ineffective assistance of counsel is substantiated by the fact that the State presented complicated testimony by seven different forensic science experts covering complex scientific processes including RFLP, PCR and Y-STR testing, as well as statistic probability testimony, compared with the dearth of any evidence put on by the defense and the failure to retain any expert for the defense to challenge the State's case. Specifically, on appeal defendant argues that his counsel was ineffective for failing to challenge the following aspects of the DNA evidence: (1) defense counsel did not request Y-STR testing of the vaginal swab sample which was extracted at the same time as the oral swab; (2) defense counsel failed to impeach the State's use of the product rule, which is used to calculate DNA profile frequency probability by multiplying the probabilities of the genotype at each locus of a DNA profile, in cold-case DNA hits such as in this case; and (3) defense counsel failed to file a pre-trial motion to suppress the DNA results based on contamination and degradation in the samples.

¶ 38 A circuit court's summary dismissal of a first-stage post-conviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). *De novo* consideration means that we perform the same analysis that a trial judge would perform. *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 22. Under the Post-Conviction Hearing Act, a *pro se* post-conviction petition may be dismissed at the first stage only if it is "frivolous and patently without merit." 725 ILCS 5/122-2.1 (West 2010). First-stage post-conviction petitions are frivolous "only if the petition has no

arguable basis either in law or fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. at 16. The focus is on whether the petition presents " 'the gist of a constitutional claim.' " *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)).

¶ 39 Defendant maintains that the arguable basis for his petition was ineffective assistance of his trial counsel, which fell below an objective standard of reasonableness and prejudiced him. See *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To survive summary dismissal of a post-conviction claim of ineffective assistance of counsel, a petitioner must only show that (1) "it is arguable that counsel's performance fell below an objective standard of reasonableness" and (2) "it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 40 Defendant first argues that his defense counsel failed to investigate whether the vaginal swab sample was contaminated. But merely speculating about the *possibility* that the vaginal swab might have been contaminated because the oral swab reagent had a low level of contamination is insufficient and does not constitute an "arguable basis" to proceed past the first stage of post-conviction proceedings. This court does not recognize challenges to DNA evidence based on the mere *possibility* of contamination. See *People v. Pope*, 284 Ill. App. 3d 695, 702 (1996) ("[T]he mere potential for contamination or differential amplification does not render the PCR-based techniques generally unaccepted by the scientific community."). There must be some basis for such an argument, and here defendant has not shown any. The fact that the control reagent swab for the *oral* swab had low level contamination does not lead to any direct inference that the *vaginal* swab was contaminated. Defendant in fact concedes in his opening brief that

DiDomenic did explicitly testify that he did not find any evidence of contamination when he extracted and quantitated the DNA form the oral and vaginal swabs.

¶ 41 Defendant nevertheless further speculates that "the methods and controls used by DiDomenic when he extracted and quantitated the DNA might not have been sensitive enough to detect the contamination which occurred in this case." Defendant has no support for such a statement, not even in any scientific literature, that the controls used for DNA extraction are not sensitive enough to detect contamination. A reagent blank is used in DNA extraction as a control, just as in Y-STR DNA testing.

¶ 42 There is no arguable basis for defendant to speculate that there was contamination upon extraction when the evidence clearly established that there was none. Defendant's argument has no basis in fact. The trial court correctly stated that defendant had not established any contamination in the evidence used at trial.

¶ 43 Defendant uses this false premise as support for arguing that his trial counsel were thus deficient in not requesting Y-STR DNA testing of the vaginal swab. Defendant argues that "where the last known check for contamination on the vaginal swab sample occurred when DiDomenic extracted and quantitated the DNA material from the swab in 1999, it is arguable that the defense team was deficient in not requesting the swab be analyzed under the Y-STR testing which had discovered contamination on the oral swab sample in 2008." Defendant misstates the evidence. Biggs testified that she used a reagent control for her PCR testing of both of defendant's oral swabs. The first oral swab reagent had some contamination from DNA standards in other cases, and so she re-ran the test on the second oral swab collected from defendant and obtained a profile. Biggs further testified that she then compared the DNA profile from the second, non-contaminated oral swab with the DNA profile obtained by Lambatos from

the vaginal swab and they were a match. The stipulation concerning Lambatos's testimony was that her testing of the vaginal swab yielded a mixture of two DNA profiles, the victim's DNA and a male DNA profile. What defendant neglects to mention is that the stipulation regarding Lambatos's testing of the vaginal swab included the following stipulation: "No other DNA profiles were identified in the extracted DNA from the vaginal swabs." The stipulation also indicated that "[a] proper chain of custody was maintained over the evidence at all times." Thus, defendant's statement that the last known "check" for "contamination" was when DiDomenic performed the extraction process, and any speculation that there was contamination of the vaginal swab in obtaining defendant's DNA profile, are squarely belied by the record. There simply is no evidence that there was any contamination of the vaginal swab at any point in time.

¶ 44 Defendant ultimately argues that Y-STR DNA testing of the vaginal swab should have been requested by his trial counsel because "the defense team had nothing to lose by submitting the vaginal swab sample for Y-STR testing." This is an inappropriate argument to make on a post-conviction petition based on ineffectiveness of trial counsel. The relevant inquiry is whether there is an "arguable basis either in law or fact" (*Hodges*, 234 Ill. 2d at 16) that "counsel's performance fell below an objective standard of reasonableness" and "that the defendant was prejudiced" (*Strickland*, 466 U.S. at 687, 694), or whether defendant's petition is "based on an indisputably meritless legal theory or a fanciful factual allegation" (*Hodges*, 234 Ill. 2d at 16).

The reason Y-STR testing was performed on the oral swab was because there was a comparatively small amount of male DNA compared to female DNA in the oral swabs. There was no Y-STR testing on the vaginal swab because Lambatos's testing had already yielded a clear male DNA profile on the vaginal swab, and Bigg's comparison of that profile to defendant's buccal swab DNA concluded it was a match to defendant. There was no need for additional

testing. Defendant's arguments rest on ignoring the fact that the testing of the vaginal swab had already yielded clear profiles. In short, defendant's conjectures are nothing more than fanciful factual allegations – allegations which are belied by the evidence adduced at trial.

¶ 45 Defendant also argues his trial counsel was ineffective in choosing to stipulate to Lambatos's testimony instead of challenging her testimony and cross-examining her. Defendant's claim of ineffective assistance of counsel on this basis has no arguable basis in law or fact and defendant has failed to show that it was objectively unreasonable for counsel to enter into this stipulation, and that the stipulation prejudiced the defense. We see no deficient performance by counsel in stipulating to testimony that *a* profile was obtained.

¶ 46 Defense counsel also was not deficient in "failing" to retain an expert to challenge the State's results. The results of the test were that the likelihood of a random match were so high as to be virtually impossible. Defense counsel performed cross-examination of the experts on the issues raised in this appeal. See *People v. Smith*, 2012 IL App (1st) 102354 (rejecting a similar argument that trial counsel was ineffective for failing to retain defense experts or to challenge DNA evidence, including issues of degradation, where trial counsel performed cross-examination). See also *In re Brandon P.*, 2013 IL App (4th) 111022, ¶ 56 ("Because the record shows that the trial court properly considered the DNA and semen evidence, we conclude that defense counsel's failure to object to the admission of that evidence did not amount to ineffective assistance of counsel ***.").

¶ 47 Such decisions typically amount to trial strategy and do not constitute ineffective assistance of counsel. See *People v. Davis*, 337 Ill. App. 3d 977, 988-89 (2003) (rejecting the defendant's claim of ineffective assistance of counsel where his counsel failed to subject the State's DNA evidence to any adversarial testing, failed to object to hearsay statements offered by

the State, and failed to adopt the cross-examination by his co-defendant's counsel, holding these judgments do not rise to the level of depriving defendant of a defense but "[a]t most, they amount to claims of errors in judgment or matters of trial strategy, which, even if demonstrated, do not support a claim of ineffective assistance of counsel.").

¶ 48 Defendant's trial counsel's strategy may have been to solely attack the State's evidence and the experts' testing. See *People v. Daniels*, 301 Ill. App. 3d 87, 100 (1998) (holding trial counsel was not ineffective for failing to more vigorously oppose DNA evidence: "It appears defense counsel's trial strategy was to use the State's DNA evidence as a weapon to attack the credibility of all forensic evidence."). Alternatively, the "failure" to retain a defense expert could have just as easily been due to the fact that there was no expert who could challenge the test results. We cannot say that defendant's trial counsel's performance fell below an objective standard of reasonableness or was deficient in any manner.

¶ 49 Defendant nevertheless argues that the second reason his counsel was deficient is that they failed to challenge this evidence of statistical probability. Defendant points to an article recognized as persuasive by this court concerning studies showing "systemic problems in a number of 'flagship' DNA laboratories and related horrific tales of reports of false-positive DNA matches." *People v. Wright*, 2012 IL App (1st) 073106, ¶ 85 (quoting Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 414, 421, 424 (2001) ("[R]ecent evidence calls into question the accuracy of using the product rule to convey match probabilities.")). But the article cited does not actually argue that the use of the product rule to calculate statistical probabilities for "cold-case hits" for DNA matches such as defendant's case are more suspect than in cases where a defendant is actually first identified, as defendant suggests. Rather, the article merely discusses an early

attempt by counsel in one "cold hit" case to gain access to a study showing more frequent matching at 9 loci than the FBI's statistical program stated. Murphy, *supra* at 782. The fact remains that use of the FBI's statistical program to calculate the random probability is generally accepted. Defendant cites to no precedent that is on-point to support his contention that failing to object to such DNA statistical probabilities of a random match in the population constitutes ineffective assistance of counsel.

¶ 50 Defendant's reliance on *People v. Watson*, 2012 IL App (2d) 091328, in arguing his counsel was deficient in failing to challenge the statistical probability testimony, is misplaced. In *Watson*, although similar to this case where the only evidence connecting the defendant to the crime was a DNA match, it was only a partial DNA match and defense counsel asked the State's DNA expert only three questions on cross-examination. Defense counsel did not point out through either cross-examination or argument to the jury that the lack of a complete DNA sample was critical because that missing DNA evidence could exclude the defendant as being the one who committed the crime. *Watson*, 2012 IL App (2d) 091328, ¶ 26. This court thus found that defense counsel's representation of the defendant constituted ineffective assistance of counsel because "it was objectively unreasonable for counsel to refrain from pursuing, *in any regard*, a challenge to the *significance*, if any, of the alleged [partial DNA match]." *Id*., ¶ 31 (Emphasis in original). Here, the match to defendant was not a *partial* match; it was a match. This greatly diminishes any purported challenge to statistical probabilities of a random match. Also, in this case defense counsel challenged the DNA evidence wherever possible and engaged in cross-examination. Similar post-conviction ineffective assistance of counsel arguments, based on similar objectively reasonable performance by trial counsel, have been rejected by this court. See, e.g., *People v. Smith*, 2012 IL App (1st) 102354.

¶ 51 Finally, defendant argues that his defense counsel were ineffective because they failed to file a pre-trial motion to suppress the DNA results based on the alleged contamination and degradation in the samples. There is no legal or factual basis for this last argument as well. First, issues such as possible contamination and degradation go to the weight of the DNA evidence, not its admissibility, and so counsel cannot be deficient in failing to move to exclude admissible evidence. See *People v. Johnson*, 318 Ill. App. 3d 281, 287 (2000) (holding that issues concerning the quality of DNA "testing process itself, such as laboratory protocol and the manner in which it was followed, quality control measures, and possible contamination of DNA samples, are matters that go to the weight of the evidence, not its admissibility.").

¶ 52 Also, the evidence in this case established that the DNA match results which were obtained were from the uncontaminated and non-degraded samples. The testimony at trial by the experts explained, in painstaking detail, the steps in each testing process for both the oral and vaginal swab samples. When the first oral swab control reagent indicated some contamination, those results were not used. The second oral swab was tested, the control reagent indicated no contamination, and the result was a match to defendant. The vaginal swab test indicated no contamination, upon extraction by DiDomenic, and upon Biggs's PCR test of the vaginal swab, which matched defendant. The mixed fraction of the oral swab was degraded and was not used, and the sample from C.G.'s jeans was insufficient and likewise was not used. Defendant's challenge based on use of "contaminated" or "degraded" samples is refuted by the actual evidence in this case, which was clearly explained at trial. As such, defendant's speculations have no arguable basis in fact. The trial court properly dismissed defendant's post-conviction petition.

¶ 53 CONCLUSION

¶ 54 Defendant's post-conviction petition based on ineffective assistance of his trial counsel for failing to request Y-STR testing of the vaginal swab sample, failing to impeach the State's use of the product rule, and failing to file a pre-trial motion to suppress the DNA results based on contamination and degradation in the samples had no arguable basis in law or fact and was properly dismissed. There is no arguable basis for defendant to speculate that there was contamination of the vaginal swab when the evidence clearly established that there was none, there was no Y-STR testing on the vaginal swab because PCR testing had already yielded a clear match to defendant, and the testimony at trial by the experts explained, in painstaking detail, the steps in each testing process for both the oral and vaginal swab samples which were the ones actually tested, and these samples were not contaminated or degraded.

¶ 55 Affirmed.