SIXTH DIVISION
Order filed: March 16, 2018

No. 1-15-1969

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 8457
	)	
BRIAN DEBLASIO,	)	Honorable
	)	Gregory R. Ginex,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's first-stage dismissal of the defendant's *pro se* postconviction petition because he failed to show that, but for his appellate counsel's failure to challenge the admission of hearsay statements at trial, it is arguable that the outcome of his appeal would have been different.

¶ 2 The defendant, Brian Deblasio, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erred in dismissing his petition because he presented an arguable

claim of ineffective assistance of appellate counsel based on counsel's failure to raise a meritorious claim on direct appeal. For the following reasons, we affirm.

¶ 3 Following a jury trial, at which the defendant elected to represent himself, he was convicted of residential burglary (720 ILCS 5/19-3(a) (West 2008)). He was sentenced, based on his criminal record, as a Class X offender to 26 years' imprisonment. On direct appeal, this court affirmed the defendant's conviction over his challenge to the sufficiency of the evidence to sustain his conviction. See *People v. Deblasio*, 2014 IL App (1st) 121765-U. Because we set forth the facts on direct appeal, in this case, we will only lay out the facts that are necessary to resolve the issue raised on appeal. See *Deblasio*, 2014 IL App (1st) 121765-U, ¶¶ 3-19.

¶ 4 The evidence at trial showed that, on May 26, 2008, just before 11 a.m., the defendant was driving a black Lincoln Town car when he struck a vehicle near the intersection of Chicago Avenue and William Street in River Forest. The defendant drove away from the scene before ultimately abandoning his car in the 900 block of Jackson Avenue. According to the State, he then entered a nearby home by removing a window screen from the back porch and stole jewelry, a laptop computer, foreign currency, and $1,500 in cash. After he left the home, he hailed a taxicab, which drove him to a hotel in Cicero where he was ultimately apprehended. At the time of his arrest, the defendant was in possession of the jewelry, the laptop computer, foreign currency, and $1,200 in cash.

¶ 5 The testimony at trial revealed that, at just before 11 a.m., on May 26, 2008, River Forest police officer Rann responded to a call of a hit-and-run accident near Chicago Avenue and William Street. Two witnesses provided Rann with the license plate number of the car that left the scene, which he discovered belonged to a Lincoln Town car owned by the defendant. The

witnesses also described the driver who left the scene as a white male, bald, and between the ages of 30 and 40 years old.

¶ 6 Nearby, Clayton O'Brien returned to his parent's home in the 900 block of Jackson Avenue after attending a local Memorial Day parade. He was sitting on his parent's porch when a car, driving erratically, pulled up to the curb and parked. The driver, whom O'Brien identified in court as the defendant, exited the vehicle and quickly walked away, looking over both shoulders as he left. When Rann arrived on the scene to investigate, O'Brien approached Rann and described the driver as being a white male, 30 to 40 years old, 5 feet, 7 inches tall, with a crew cut or shaved head, wearing wire-rimmed glasses, and Army cargo shorts.

¶ 7 About this time, Marta Jorgensen saw a white male carrying a delivery bag over his shoulder in the driveway of a home on the 900 block of Jackson Avenue. She described the man as being 35 years old, 5 feet, 8 inches tall, with a shaved head, and wearing Army fatigue shorts and wire-rimmed glasses.

¶ 8 Less than a block away, Carolyn Young observed a man carrying a messenger bag and "lurking" in the driveway of the Pelzer home. She described him as a white male in his forties who was five feet, seven inches tall with a medium build and a crew-cut haircut. Mary Duffy Pelzer and her family had left their home, located on the 900 block of Monroe Avenue, to attend the annual Memorial Day Parade at 11 a.m. When they returned home from the parade, they saw a large police presence and a tow truck three houses away from them. Pelzer soon noticed that the window to their back porch was open and that the screen had been removed. In addition, she discovered muddy footprints throughout the home that had not been there before the family left for the parade. Fearing that the individual might still be in the home, the family went outside and called the police.

¶ 9 Officer Fries arrived at the Pelzer home and did a walkthrough to ensure that no one remained inside. He then dusted the open porch window for fingerprints, and photographed the muddy footprints in the home as well as a foot impression he noticed outside of the home. The family then walked through their house and discovered that some items were missing, including Pelzer's jewelry, her son's laptop computer, $1,500, and foreign currency from the Bahamas and Europe.

¶ 10 Meanwhile, River Forest police commander O'Shea responded to a residential burglar-alarm call on the 900 block of Jackson Avenue, a quarter of a block away from the Pelzer home. When he arrived, the door to the residence was open. O'Shea checked the house to ensure that there had been no foul play. At that point, he learned of an abandoned car a few houses down. He investigated the car, which he learned was a black Lincoln Town car belonging to the defendant, and then returned to the residence. At the home, he noticed a tan plastic bag near the bushes. Inside of the bag, he found a magazine and an owner's manual for a Lincoln Town car, both with the defendant's name on them. He turned those items over to Officer Rann.

¶ 11 Four blocks from the Pelzer home, River Forest police officer Bowman was on patrol when a taxicab driver, Tammer Darwish, flagged down his squad car. According to Bowman, Darwish asked him if he was investigating any burglaries in town because Darwish believed that he had picked up a passenger who may have been involved.[1] Darwish described the passenger as a white male in his thirties; he had a shaved head and was wearing shorts. Bowman then showed Darwish a picture of the defendant and Darwish confirmed that the defendant was the passenger. Darwish also told Bowman that the defendant was carrying a laptop computer, possessed several

[1] Darwish did not testify at trial. Officer Bowman testified to the contents of their discussion over the defendant's objection.

different foreign currencies, and made “suspicious” phone calls. According to Bowman, Darwish stated that the defendant had him drive to a laundromat and then return for him in 10 minutes. When Darwish returned, he drove the defendant to the Karavan Hotel in Cicero.

¶ 12 Following the information received from Darwish, Fries and several other officers went to the Karavan Hotel in Cicero. A clerk at the hotel provided the officers with the defendant’s room information. Fries noticed the defendant check the window of that room a couple of times and open the door to “peek out.” The officers went to the room and placed the defendant under arrest. The defendant was wearing army fatigue shorts, glasses, and a black backpack. Fries described the defendant as having “really short, almost balding” hair. Officers recovered $1,200 in cash from the defendant’s pocket, a Walgreens bag containing syringes, and a newspaper clipping containing five tinfoil packets of a white powdery substance. Inside of the defendant’s backpack, police found jewelry and foreign currency from the Bahamas and Europe. Fries asked the defendant where the Pelzers’ laptop computer was, but he denied having it. The defendant later told River Forest police officer Carroll that the laptop was hidden under a dresser in the hotel room, where it was ultimately recovered by Cicero police officer Perry.

¶ 13 The defendant’s shoes were tested against a digital image of a partial footwear impression from the scene. According to Illinois State Police forensic scientist Stevens, the impression was not made by the defendant’s left shoe, and while the right shoe shared similarities to the impression, she “could not make an identification or elimination [of the defendant’s] shoes.” Additionally, only one latent print recovered was suitable for comparison and that print matched Pelzer’s husband.

¶ 14 The defendant testified that, on May 26, 2008, he picked up his brother, Frank, and drove to River Forest so that Frank, who once owned a landscaping company, could talk to a former

client about money. The defendant dropped Frank off near a convenience store on Harlem Avenue and they agreed to meet there later. He then left, intending to visit his father in Franklin Park. The defendant had taken heroin, which caused him to "nod" off, and hit a car. He drove away, but his car developed a flat tire. The defendant exited the car and left panicking because he was on heroin and had drugs on him. He went to a restaurant for 20 minutes, tried to make a phone call on a pay phone, and then returned to the convenience store where he dropped off his brother.

¶ 15 After three hours, Frank arrived at the convenience store with a bag. Frank stated that he wanted to buy drugs from his dealer on the west side of Chicago. He gave the defendant the bag, which contained the items stolen from the Pelzer home, and told him he was giving him money to rent a hotel room at the Karavan Hotel. The defendant was not aware that the contents of the bag were stolen. He flagged down a taxicab driver who drove him first to Pulaski Road and Ogden Avenue, where he purchased drugs with the money in his brother's bag, and then to the Karavan Hotel.

¶ 16 After his arrest, the defendant confronted his brother, who told him that he would come forward. However, his brother was killed three months later. The defendant did not tell police that his brother was at fault because he did not want his brother to get in trouble and he did not know the full extent of what had happened. The defendant acknowledged that, even after his brother had died, he did not mention his brother's involvement to the investigating detectives, explaining that he was concerned about his father.

¶ 17 On cross-examination, the defendant testified that he was 5 feet, 6.5 inches tall, and that his brother was five years older, almost four inches taller, and did not have a shaved head or wear glasses.

¶ 18 In rebuttal, the State presented a certified copy of the defendant's conviction for the offense of escape by a felon from a penal institution on October 21, 2003.

¶ 19 After argument, the jury found the defendant guilty of residential burglary. The defendant filed a motion for a new trial or for judgment notwithstanding the verdict, which the trial court denied. He was then sentenced, as a Class X offender, to 26 years' imprisonment.

¶ 20 On direct appeal, the defendant's appellate counsel challenged his residential burglary conviction, arguing that the State failed to prove him guilty beyond a reasonable doubt. Specifically, the defendant argued that the only evidence against him, his possession of the stolen items and his presence on the block where the burglary occurred, was insufficient to prove breaking and entering with the intent to commit a theft therein. This court affirmed the defendant's conviction. See *Deblasio*, 2014 IL App (1st) 121765-U.

¶ 21 On April 13, 2015, the defendant filed a *pro se* postconviction petition alleging, *inter alia*, that his appellate counsel rendered ineffective assistance by not challenging the trial court's admission of Darwish's out-of-court statements. In support of this claim, the defendant asserted that Bowman's testimony, in which he related the substance of what Darwish said to him, went well beyond the narrow investigative process hearsay exception. He further argued that the court erroneously allowed hearsay statements "buil[t] the inference that [he] was indeed the one who committed the burglary[.]"

¶ 22 On June 19, 2015, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. The defendant filed a timely notice of appeal.

¶ 23 On appeal, the defendant argues that the trial court erred in summarily dismissing his petition at the first-stage of postconviction proceedings because the petition stated an arguable claim of ineffective assistance of appellate counsel. The defendant claims that appellate counsel

was ineffective for not arguing that the trial court erred when it allowed Bowman to testify to the out-of-court statements made by Darwish.

¶ 24 Under the Act (725 ILCS 5/122-1 *et seq.* (West 2014)), a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 9. A postconviction action is a collateral attack on the judgment rather than a direct appeal from the conviction. *People v. Tate*, 2012 IL 112214, ¶ 8. Where, as here, a postconviction petition does not implicate the death penalty, a trial court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, where the petition in this case lies, the trial court independently reviews the petition, takes all allegations as true, and determines whether the petition is "frivolous or patently without merit." *Id.*

¶ 25 The trial court may summarily dismiss a petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Id.* at 16. A petition has no arguable basis in law or fact if it is "based on an indisputably meritless legal theory or a fanciful factual allegation," such as a legal theory that is "completely contradicted by the record." *Id.* At the first stage, the allegations of fact are considered true "so long as those allegations are not affirmatively rebutted by the record." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47. We must construe postconviction petitions "liberally" and "allow borderline petitions to proceed." *Id.* ¶ 5. Our review of the trial court's dismissal of a postconviction petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 26 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). The *Strickland* standard applies to claims of ineffective assistance of appellate counsel and a defendant raising such a claim " 'must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 21 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010)). Counsel is not obligated to brief every conceivable issue on appeal and " 'it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong.' " *Id.* (quoting *People v. Simms*, 192 Ill. 2d 348, 362 (2000)). Moreover, a defendant must prove that, but for appellate counsel's failure, it is arguable that his conviction or sentence would have been reversed. See *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 37.

¶ 27 After carefully reviewing the record in this case, we find that the defendant has failed to present an arguable claim of ineffective assistance of appellate counsel because he cannot show that, but for counsel's failure to challenge the trial court's admission of Darwish's hearsay statements during Officer Bowman's testimony, it is arguable that his conviction would have been reversed on appeal.

¶ 28 Although the hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted (*People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007)), a law enforcement officer "may testify about his conversations with others, such as victims or witnesses, when such testimony is not offered to prove the truth of the matter asserted by the other, but is used to show the investigative steps taken by the officer" (*Simms*, 143 Ill. 2d at 174; see also *People v. Jura*, 352 Ill. App. 3d 1080, 1085 (2004) (explaining that statements

are not inadmissible hearsay when they are offered for the limited purpose of showing the course of a police investigation, but only where such testimony is necessary to fully explain the State's case to the trier of fact)). Moreover, "testimony describing the progress of the investigation is admissible even if it suggests that a nontestifying witness implicated the defendant." *Simms*, 143 Ill. 2d at 174.

¶ 29 The defendant does not dispute that Bowman could have testified that, during the course of his investigation, Darwish told him that the defendant was at the Karavan Hotel. Rather, he contends that Bowman's testimony went beyond the narrow exception to the hearsay rule when Bowman testified to the substance of what Darwish told him about the defendant, including that the defendant had made "suspicious" phone calls. See *People v. Boling*, 2014 IL App (4th) 120634, ¶ 107 (quoting *People v. O'Toole*, 226 Ill. App. 3d 974, 988 (1992) (" '[O]ut-of-court statements that explain a course of conduct should be admitted only to the extent necessary to provide that explanation and should not be admitted if they reveal unnecessary and prejudicial information.' ")); see also *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 35 (noting that, under this exception, "an officer may not testify to information beyond what is necessary to explain his or her actions"). The defendant maintains that the admission of Darwish's out-of-court statements "buil[t] the inference that [he] was indeed the one who committed the burglary[.]"

¶ 30 Even assuming, *arguendo,* that Bowman's testimony went beyond what was necessary to explain his actions and were admitted in violation of the prohibition against hearsay, the defendant is unable to show that, but for counsel's failure to raise the issue, it is arguable that his conviction would have been reversed. The admission of hearsay evidence does not warrant automatic reversal. *People v. Sample*, 326 Ill. App. 3d 914, 924 (2001). Rather, such errors are considered harmless where "there is 'no reasonable possibility the verdict would have been

different had the hearsay been excluded.' " *Id.* at 925 (quoting *People v. McCoy*, 238 Ill. App. 3d 240, 249 (1992)). If the defendant cannot show that it is arguable that his conviction would have been reversed on appeal, the summary dismissal of his postconviction petition must be affirmed. See *Dobbey*, 2011 IL App (1st) 091518, ¶ 37.

¶ 31 In this case, given the evidence presented, there is no reasonable possibility that the verdict would have been different had portions of Bowman's testimony been excluded. As mentioned, even without the alleged substance of Darwish's statements, Bowman could properly testify to the course of his police investigation and the information that was necessary to explain his actions. The course of his investigation pointed him in the defendant's direction. When the police arrived at the Karavan Hotel, they saw the defendant acting suspiciously. After they apprehended him, they found in his possession all of the items stolen from the Pelzer home as well as a messenger bag. This evidence of the defendant's guilt was corroborated by the testimony of Young, who saw someone matching the defendant's description, carrying a bag and "lurking" in the Pelzers' driveway at the time of the incident. In addition, multiple witnesses also saw someone in the area at the approximate time of the burglary who matched the defendant's description and was carrying a messenger bag.

¶ 32 Thus, even if we accept the defendant's contention that Bowman's testimony regarding Darwish's out-of-court statements exceeded the scope of the exception to the point where it could be considered error, such error is considered harmless where, as here, the evidence of the defendant's guilt is overwhelming. See *Sample*, 326 Ill. App. 3d at 925 (quoting *McCoy*, 238 Ill. App. 3d at 249). Given that the defendant has failed to show that his conviction would have been reversed had his appellate counsel challenged the admission of hearsay statements at trial, he cannot show that he was prejudiced. See *Dobbey*, 2011 IL App (1st) 091518, ¶ 37. We, therefore,

find that the trial court did not err in summarily dismissing the defendant's *pro se* postconviction petition.

¶ 33 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.