2012 IL App (2d) 100979-U
No. 2-10-0979
Order filed February 6, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 03-CF-1360
MIGUEL A. GARCIA,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition at the first stage where defendant's allegations, taken as true, did not present even an arguable basis for a claim of ineffective assistance of counsel.

¶ 1 On appeal from the order dismissing his postconviction petition at the first stage, defendant raises one issue: Whether his postconviction claim of ineffective assistance of counsel based upon his attorney's allegedly erroneous advice that he not testify was not frivolous or patently without merit and should have proceeded to the second stage. We hold that the trial court properly dismissed defendant's petition at the first stage.

¶ 2 BACKGROUND

¶ 3 Defendant was convicted of unlawful possession of more than 900 grams of cocaine with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2002) and sentenced to 24 years' imprisonment. We affirmed defendant's conviction and sentence on direct appeal. *People v. Garcia*, No. 2-07-0671 (2009) (unpublished order under Supreme Court Rule 23). On May 11, 2010, defendant filed the instant *pro se* postconviction petition, which the trial court dismissed as frivolous and patently without merit.

¶ 4 The evidence at defendant's jury trial was that, between February 24, 2003, and May 22, 2003, the Du Page County Sheriff's Department and federal Drug Enforcement Administration agents conducted a joint investigation of defendant. Detective Robert Toerpe posed as a drug purchaser and was introduced to defendant by a confidential informant referred to as "Smith." Detective Toerpe negotiated a purchase of as many as ten kilograms of cocaine from defendant. The negotiations culminated in a transaction in which defendant attempted to sell three kilograms of cocaine to Toerpe for $60,000. Officers made audio and video recordings of defendant throughout the investigation pursuant to state and federal authorizations.

¶ 5 Prior to calling Detective Toerpe as a witness, the State moved *in limine* to allow introduction of a recorded conversation between Toerpe and defendant. The State described the conversation as follows. During negotiations with defendant, Toerpe expressed concern over being robbed of his money during the drug transaction. Defendant responded with sympathy by telling Toerpe that he had once been involved in a drug deal during which someone had tried to rob and kill him, and that "his friend had no choice but to kill the guy." The State argued that the conversation had probative value in that it showed how defendant attempted to alleviate Toerpe's concerns as a drug purchaser.

Defendant's trial attorney successfully opposed the motion. The court found that the conversation would be "extremely prejudicial" and barred it from being introduced.

¶ 6 After the State rested, the following exchange occurred:

> "[THE COURT:] Mr. Garcia, we are now to the point of your case and you do have the right, as I explained to you previously, reinforced again last night and maybe even touched on this morning, you have the right to decide whether you are going to testify or not. Under the statute and the case law, that is a decision that only the defendant can make. So I know you've had opportunities to discuss this with [trial counsel] in the past. I know you've made statements to the Court in the past.
>
> But I'm asking you now on the record, understanding that you have the absolute right to remain silent and understanding that I will give an instruction to the jury that they can make no inference if you elect to remain silent and not testify, conversely, you have an absolute right to testify and come up and do so if you wish to. But it's a decision that only you can make, not your attorney.
>
> So, on the record, Mr. Garcia, do you wish to testify, sir?
>
> DEFENDANT GARCIA: No. I do not wish to testify."

Subsequently, defendant presented no defense witnesses and rested.

¶ 7 The jury convicted defendant. At defendant's sentencing hearing, Sergeant Michael Bocardo of the Chicago Police Department testified regarding the events that were the subject of the conversation between Toerpe and defendant. Bocardo testified that he had participated in the investigation into the death of Sherman Scott, whose body had been found abandoned in an industrial area near Chicago in July 2000. Bocardo had separately interviewed defendant and

Terrence Jones during the investigation, and both had relayed the same story. Defendant and Jones had arranged to sell four pounds of marijuana to Scott and a second individual. Defendant was anxious about the transaction, so he gave Jones a handgun. Defendant and Jones then drove to a McDonald's parking lot, and Scott and the second individual got into the back seat. The two men pulled out handguns, and a struggle ensued. Jones shot Scott in the head, killing him. The second individual fled. Defendant and Jones drove to an industrial area and dumped Scott's body. They then went to a car wash and power-washed the blood from the inside of the car. Defendant gave the car to a friend and told him to dispose of it. Defendant reported the car stolen to the Chicago police, who informed him that the Villa Park Police Department had already located his car and that it had been burned. On cross-examination, Bocardo testified that defendant was never charged with any offense as a result of the investigation.

¶ 8 Approximately three years after he was convicted, defendant filed the instant *pro se* postconviction petition, raising seven constitutional claims. On appeal, defendant has limited his argument to one claim. Defendant alleged that he reluctantly made the decision not to testify based on his trial attorney's erroneous advice that doing so would open the door to admission of the conversation between Toerpe and defendant. He alleged that his attorney "would not let [him] testify because [he] would be found guilty for sure." Defendant contended that, had he testified, his attorney could have kept the conversation out of evidence by filing a motion *in limine*. According to defendant, his attorney's allegedly erroneous advice deprived him of an entrapment defense, which was his "only available defense."[1] Defendant asserted that "it was outside the wide range of

[1]Notably, just prior to the start of trial, the court granted the State's motion *in limine* as to unpleaded defenses. Defendant had not disclosed any defenses, and the court barred him from

competence to advice [*sic*] [him] not to testify because of a conversation that would not have been admissible."

¶ 9 Defendant also disclosed the testimony that he contended would have entitled him to a jury instruction on an entrapment defense:

> "[Confidential informant] Smith contacted Petitioner several times trying to obtain Cocaine [*sic*]. Petitioner informed Smith that he does [*sic*] not know where to obtain Cocaine [*sic*]. Smith continued to call Petitioner over ten (10) times insisting that Petitioner's brother could help. Petitioner initially refused to help Smith several times. But, Smith's pressure made Petitioner reluctantly decide to help. Petitioner was only trying to help Smith. Petitioner was not offered money from the drug deal. And, Petitioner was to make no money for helping undercover [*sic*] Toerpe obtain cocaine. Petitioner believes he was set-up [*sic*] and pressured to help Toerpe and Smith obtain drugs. Furthermore, Petitioner would have testified that he never contacted Toerpe to sell drugs; that Petitioner was only a go thru [*sic*] (middle man); and that he only contacted Toerpe in May because Toerpe continued to contact Petitioners [*sic*] mother[2] while Petitioner was away."

Defendant outlined the same testimony in an affidavit attached to his petition. He further stated in the affidavit that he had informed his attorney that he "was not a drug dealer" and that he "wanted counsel to proceed with an entrapment defense." According to defendant, his attorney told him that

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"present[ing] any evidence or argument on statutory defenses."

[2]Defendant's mother was in the car when defendant attempted to sell three kilograms of cocaine to Detective Toerpe. She was convicted in a separate case and sentenced to nine years' imprisonment.

"because [he] was caught on tape the entrapment defense was not available to [him]," and that "this was an open and shut case for the state [*sic*] [and] that [he] had no defense."

¶ 10 On August 3, 2010, the trial court dismissed defendant's petition at the first stage, finding it "frivolous and patently without merit." The court found that some of the issues that defendant raised "were *** raised on direct appeal and rejected," while others were "either matters of trial strategy or issues that ha[d] been waived or forfeited by the defendant." Defendant filed this timely appeal.

¶ 11 ANALYSIS

¶ 12 Defendant maintains that the trial court erred in dismissing his postconviction petition at the first stage. Defendant limits his argument on appeal to only one of the constitutional claims he raised in his petition: Defendant argues that his postconviction claim of ineffective assistance of counsel based upon his attorney's allegedly erroneous advice that he not testify was not frivolous and patently without merit and should have survived to the second stage.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a method by which a criminal defendant can assert that a conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A defendant commences proceedings under the Act by filing a petition in the circuit court in which the original proceeding took place. 725 ILCS 5/122-1(a-5) (West 2010); *Hodges*, 234 Ill. 2d at 9. Proceedings are then divided into three stages. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 14 At the first stage, if the trial court determines that a petition "is frivolous or is patently without merit," it can dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. However, a defendant need only present a limited amount of detail at the first stage and need not set forth a claim in its entirety, include legal argument, or cite legal authority. *People v. Brown*, 236 Ill. 2d 175, 184 (2010); *Hodges*, 234 Ill. 2d at 9. A court must take as true all well-pleaded facts unless " 'positively rebutted' " by the record. *Brown*, 236 Ill. 2d at 189 (quoting *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)); *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 40 (same). The allegations in the petition, taken as true and liberally construed, need only present the "gist" of a constitutional claim. *Brown*, 236 Ill. 2d at 184. This is a "low threshold." *Brown*, 236 Ill. 2d at 184; *Edwards*, 197 Ill. 2d at 244.

¶ 15 To present the "gist" of a claim, the petition need only have an " 'arguable basis either in law or in fact.' " *Brown*, 236 Ill. 2d at 184-85 (quoting *Hodges*, 234 Ill. 2d at 16). A petition has no arguable basis in law when it is based upon an "indisputably meritless legal theory," such as one which is "completely contradicted by the record." *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based upon "[f]anciful factual allegations," such as "those that are fantastic or delusional." *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 17.

¶ 16 However, the "low threshold" at the first stage "does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Hodges*, 234 Ill. 2d at 10. The Act requires a defendant to attach to his or her petition "affidavits, records, or other evidence supporting its allegations" or to "state why the same are not attached." 725 ILCS 5/122-2 (West 2010); *Hodges*, 234 Ill. 2d at 10. "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective

or independent corroboration." *Hodges*, 234 Ill. 2d at 10 (quoting *People v. Delton*, 227 Ill. 2d 247, 254 (2008)). " 'Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it 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.' " *Hodges*, 234 Ill. 2d at 10 (quoting *Delton*, 227 Ill. 2d at 254-55). "[N]onfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the *** Act." *People v. Burt*, 205 Ill. 2d 28, 35-36 (2001) (citing *Coleman*, 183 Ill. 2d at 381)).

¶ 17 If a petition survives to the second stage, counsel will be appointed to an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4 (West 2010); *Hodges*, 234 Ill. 2d at 10-11. If the defendant makes a "substantial showing" of a constitutional violation, the petition will proceed to the third stage, at which the trial court will conduct an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *Edwards*, 197 Ill. 2d at 246. Our review of the dismissal of a postconviction petition at the first stage is *de novo*. *Brown*, 236 Ill. 2d at 184.

¶ 18 In reviewing the sufficiency of defendant's postconviction claim of ineffective assistance of counsel, we are guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on an ineffective assistance of counsel claim, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Manning*, 241 Ill. 2d 319, 326 (2011). At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance of counsel is sufficient if it is "arguable" that both prongs were met. *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill.

2d at 17. Ultimately, "[b]oth prongs of *Strickland* must be met, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel." *People v. Theis*, 2011 IL App (2d) 091080, ¶ 13 (citing *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)).

¶ 19 We also review defendant's postconviction ineffective assistance of counsel claim with certain principles in mind. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 13. Furthermore, to ultimately succeed on an ineffective assistance of counsel claim, a defendant must overcome the presumption that counsel's conduct " 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *Coleman*, 2011 IL App (1st) 091005, ¶ 13. For example, "trial counsel's decision[s] regarding the extent of cross-examination, whether to present witnesses, and what defense theory to assert all constitute matters of trial strategy." *People v. Whitamore*, 241 Ill. App. 3d 519, 525 (1993) (citing *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)).

¶ 20 We begin by addressing defendant's contention on appeal that his attorney advised him not to testify based upon the faulty legal analysis that doing so would have opened the door to impeachment with a prior conviction.[3] We agree with the State that defendant's postconviction petition contained no factual allegations to support this argument, although it did contain conclusory statements to this effect. For example, defendant's petition contained the following conclusory heading: "PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS 6TH AMENDMENT [*sic*] WHERE TRIAL COUNSEL INCORRECTLY TOLD PETITIONER THAT IF HE TESTIFY [*sic*] HE WOULD OPEN THE DOOR TO BE

[3]The record reflects that defendant's only prior conviction was for reckless driving in 2000.

IMPEACHED WITH A PRIOR OFFENSE ***." Defendant's petition also concluded that "[c]ounsel's erroneous legal advice concerning possible use of prior convictions if defendant testified amounted to ineffective assistance of counsel."

¶ 21 Even construing it liberally, defendant's petition contained no factual allegations to support these conclusions. All of the factual allegations contained in defendant's petition and in the attached affidavit were that his attorney advised him not to testify because doing so would have opened the door to introduction of his conversation with Detective Toerpe. Defendant explicitly alleged that his attorney told him "that if he testified, a conversation that [he] had with undercover Officer Toerpe would be introduced and used against [him]." Defendant further alleged that his attorney "informed [him] that once 'this information' was given to the jury, the jury would surely convict." In the affidavit attached to his petition, defendant stated:

> "When I finally was able to talk to [trial] counsel ***, he told me that if I testify, the State would use a conversation I had with Toerpe about a past drug deal that went bad. I was never arrested or charged with any crime based on that incident. However, [counsel] said he would not let me testify because I would be found guilty for sure. I reluctantly followed [counsel's] advice.
>
> ***
>
> After the State asked to introduce the earlier conversation about a drug deal that went bad, the Court ruled the statement would not be allowed. Despite the Judges [*sic*] ruling, counsel still insisted that if he allow [*sic*] me to testify, the State would use that statement and I would surely be convicted."

Defendant's allegations were that his attorney told him that "a conversation *** would be introduced and used against" him, that "the State would use a conversation," and that "the State would use that statement." Even liberally construed, defendant's allegations do not suggest that his attorney advised him not to testify because he would be impeached with a prior conviction.

¶ 22 Although defendant was not required to set forth his postconviction ineffective assistance of counsel claim in its entirety, he was required to present "some facts" that were "capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10 (quoting *Delton*, 227 Ill. 2d at 254). With respect to his arguments concerning impeachment with a prior conviction, defendant only asserted conclusions, and alleged no facts capable of objective or independent corroboration. Accordingly, insofar as his postconviction ineffective assistance of counsel claim was based upon this argument, it was proper to dismiss it at the first stage. See *Burt*, 205 Ill. 2d at 35-36 ("[N]onfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the *** Act.").

¶ 23 In his appellant's brief, defendant admits that his petition "could be interpreted to mean" that his attorney advised him that testifying might open the door to "testimony about a drug deal in which defendant participated." However, even after admitting that his petition "could be interpreted" in this manner, defendant offers no coherent argument for how it is even "arguable" that both *Strickland* prongs were met.

¶ 24 Defendant first asserts that he "had an absolute right to testify and a right to correct advice on basic law relating to impeachment," and that the "decision to testify was ultimately his alone." Defendant is correct that the decision whether to testify on one's own behalf belongs to the defendant. *People v. Thompkins*, 161 Ill. 2d 148, 177 (1994). However, it is a decision that should

be made with the advice of counsel. *People v. Smith*, 176 Ill. 2d 217, 235 (1997). Generally, advice not to testify is a matter of trial strategy and will not constitute ineffective assistance of counsel. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009) (citing *People v. DeRossett*, 262 Ill. App. 3d 541, 546 (1994)). Nevertheless, for purposes of surviving the first stage of postconviction proceedings, it may be sufficient to allege that counsel refused to allow the defendant to testify (*Youngblood*, 389 Ill. App. 3d at 217 (citing *DeRossett*, 262 Ill. App. 3d at 546)), or that the defendant would have testified but for counsel's erroneous advice regarding the consequences of testifying (*People v. Seaberg*, 635 Ill. App. 3d 79, 83-84 (1994)).

¶ 25 Initially, we note that we must take as true defendant's allegation that his attorney "would not let [him] testify because [he] would be found guilty for sure" only if it is not " 'positively rebutted' " by the record. *Brown*, 236 Ill. 2d at 189 (quoting *Coleman*, 183 Ill. 2d at 385); *Carballido*, 2011 IL App (2d) 090340, ¶ 40 (same). As we have noted, after the State rested, the trial court thoroughly admonished defendant of his right to testify. The court told defendant that "you have an absolute right to testify and come up and do so if you wish to," and that "it's a decision that only you can make, not your attorney." In response to this admonishment, defendant stated, "I do not wish to testify." Accordingly, defendant's allegation that his attorney "would not let [him] testify" is positively rebutted by the record. Defendant made the choice not to testify after the court admonished him that it was his choice alone to make, not his attorney's choice.

¶ 26 Defendant's allegation that his attorney "would not let [him] testify" is also contradicted by the petition's other factual allegations. In the sentence immediately following his allegation that his attorney "would not let [him] testify," defendant stated that he "reluctantly followed [his attorney's] *advice*." (Emphasis added.) He did not allege that he had no choice in the matter or that he was not

aware that he could testify. Defendant repeatedly alleged in his petition that his attorney explained to him why he should not testify. As we have noted, defendant contended that his attorney told him that, were he to testify, the State would introduce his conversation with Detective Toerpe. Even construing defendant's petition liberally, based on these other factual allegations, we cannot say that it is even "arguable" that counsel's performance was deficient based on counsel's alleged "refusal" to allow the defendant to testify. The allegation is completely contradicted by the record.

¶ 27 Defendant's postconviction ineffective assistance of counsel claim could still survive the first stage if based upon the allegation that his attorney gave him erroneous advice regarding the consequences of testifying. See *Seaberg*, 635 Ill. App. 3d at 83-84 (postconviction allegation that counsel advised the defendant not to testify based on the erroneous analysis that the defendant could be impeached with a prior misdemeanor battery conviction was sufficient to survive the first stage). Defendant maintains that his attorney's advice not to testify was erroneous because "[a]bsent any testimony from the defendant, there [wa]s no way to show entrapment." However, defendant offers no argument as to why it was error to advise defendant that, were he to testify, the State would introduce his conversation with Detective Toerpe against him. Defendant argues that just because "counsel's advice may have been explicable on strategic grounds does not mean that it can be justified on those grounds." Yet, the only argument defendant makes for why his attorney's advice was not "justified" was that without his testimony there was "no way to show entrapment."

¶ 28 Entrapment is a statutory defense. *People v. Bonner*, 385 Ill. App. 3d 141, 144 (2008); 720 ILCS 5/7-12 (West 2010). Section 7-12 of the Criminal Code of 1961 (Code) (720 ILCS 5/7-12 (West 2010)) outlines the defense as follows:

> "A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was predisposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense." 720 ILCS 5/7-12 (West 2010).

As outlined in the statute, when a defendant raises an entrapment defense, the defendant places his or her predisposition to commit the crime at issue. 720 ILCS 5/7-12 (West 2010); *Bonner*, 382 Ill. App. 3d at 145. " 'Once a defendant presents some evidence, however slight, to support an entrapment defense, the State bears the burden to rebut the entrapment defense beyond a reasonable doubt.' " *Bonner*, 382 Ill. App. 3d at 145 (quoting *People v. Rivas*, 302 Ill. App. 3d 421, 432-33 (1998)).

¶ 29 " 'Generally, predisposition is established by proof that the defendant was ready and willing to commit the crime without persuasion and before his or her initial exposure to government agents.' " *Bonner*, 385 Ill. App. 3d at 146 (quoting *People v. Criss*, 307 Ill. App. 3d 888, 897 (1999)).

> " 'Several factors are relevant in assessing predisposition in drug cases, including the following: (1) the defendant's initial reluctance or willingness to commit the crime; (2) the defendant's familiarity with drugs; (3) the defendant's willingness to accommodate the needs of drug users; (4) the defendant's willingness to profit from the offense; (5) the defendant's current or prior drug use; (6) the defendant's participation in cutting or testing the drugs; and

(7) the defendant's ready access to a supply of drugs.' " *Bonner*, 385 Ill. App. 3d at 146 (quoting *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006)).

Other factors include "(8) the defendant's engagement in a course of conduct involving similar offenses; and (9) the defendant's subsequent activities." *Bonner*, 385 Ill. App. 3d at 146.

¶ 30 Given the law underlying the entrapment defense, defense counsel's advice not to testify was based on a correct legal analysis. Had defendant testified in support of an entrapment defense, his conversation with Detective Toerpe, as well as Sergeant Bocardo's testimony concerning the events surrounding the death of Sherman Scott, likely would have been admissible to show defendant's predisposition to commit the crime. This evidence would have been relevant to show defendant's engagement in a course of conduct involving similar offenses, and may have been relevant to show his familiarity with drugs and his willingness to accommodate the needs of drug users.

¶ 31 Defendant admits that his testimony concerning entrapment would have "call[ed] into play the issue of predisposition," but he argues that "a history of prior deliveries of a controlled substance is not determinative on the issue of predisposition." Defendant maintains that "predisposition is a fact-driven issue," which also would have "turn[ed] on the defendant's testimony."

¶ 32 Defendant's argument misses the mark. The sole issue on appeal is whether defendant was denied effective assistance of counsel based upon his attorney's advice that he not testify. Merely because defendant would have been able to present evidence that he was not predisposed to commit the crime had he not followed his attorney's advice is irrelevant to this issue.

¶ 33 We also find unavailing defendant's assertion that defense counsel could have kept his conversation with Detective Toerpe out of evidence with a motion *in limine*. Contrary to defendant's characterization of it, a motion *in limine* is not a sword that can be used to fend off unfavorable

evidence while the defendant presents self-serving evidence to the jury unimpeded. While a motion *in limine* may have kept out some of the highly prejudicial evidence—including that defendant was involved in the death of Sherman Scott—it would not have kept out the evidence relevant to predisposition—namely, that defendant was involved in a prior drug transaction involving multiple pounds of marijuana. Moreover, simply because the trial court did not allow the State to introduce the conversation with Toerpe during its case-in-chief does not mean that the court would not have permitted the State to introduce the conversation to rebut defendant's purported evidence of entrapment.

¶ 34 Based on the foregoing, we conclude that it was proper for the trial court to deny defendant's postconviction petition at the first stage. Even though defendant did so "reluctantly," defendant admittedly made the decision not to testify with the advice of counsel. This advice was a matter of trial strategy, and defendant did not allege even minimal facts that, taken as true, set forth an "arguable basis" for the claim that his attorney's advice fell below an objective standard of reasonableness. See *Coleman*, 2011 IL App (1st) 091005, ¶ 34 (holding that the defendant's postconviction claim of ineffective assistance of counsel was "insufficient [at the first stage] to overcome the strong presumption that the advice defense counsel gave was the product of reasonable trial strategy in light of the evidence, not incompetence based on an erroneous understanding of controlling law). Accordingly, defendant's petition was not sufficient to survive the first stage. See *Brown*, 236 Ill. 2d at 185 (a postconviction petition alleging ineffective assistance of counsel will survive the first stage only if it is "arguable" that both *Strickland* prongs were met); *People v. Theis*, 2011 IL App (2d) 091080, ¶ 13 ("Both prongs of *Strickland* must be met, and the failure to satisfy

either prong precludes a finding of ineffective assistance of counsel." (citing *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)).

¶ 35 CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 37 Affirmed.