2019 IL App (2d) 160591-U
No. 2-16-0591
Order filed June 25, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 09-CF-1505 |
| MICHAEL DELANEY, | ) | Honorable Daniel Guerin, |
| Defendant-Appellant. | ) | Judge, Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where the trial court summarily dismissed postconviction petition alleging ineffective assistance of trial counsel based on the failure to present evidence of defendant's post-traumatic stress disorder (PTSD) and involuntary intoxication at the time of the offense, this court need not consider whether dismissing the PTSD-related claim was error because a remand is necessary for further postconviction proceedings on the claim related to involuntary intoxication.

¶ 2 Defendant, Michael Delaney, fatally stabbed Michael Scalzo and was found guilty of first-degree murder. See 720 ILCS 5/9-1(a)(1) (West 2008). At sentencing, defendant made multiple assertions that trial counsel had rendered ineffective assistance, but the trial court did not inquire into his claim. On direct appeal, we affirmed the conviction and remanded the cause

for an inquiry into his ineffectiveness claim, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. Delaney*, 2015 IL App (2d) 130573 (*Delaney I*).

¶ 3 On remand, defendant alleged, *inter alia*, that he had been treated for post-traumatic stress disorder (PTSD) before and after the offense and that trial counsel acted unreasonably in omitting the evidence because it would have supported a verdict of second-degree murder based on imperfect self defense. The inquiry court found no possible neglect, and we affirmed the decision. *People v. Delaney*, 2017 IL App (2d) 160102-U (*Delaney II*).

¶ 4 While *Delaney II* was pending, defendant, with the assistance of counsel, petitioned for postconviction relief. He alleged ineffectiveness of trial counsel for (1) failing to investigate and present a defense of involuntary intoxication based on the combined effects of alcohol and psychotropic medications and (2) failing to pursue the PTSD strategy. The postconviction court summarily dismissed the petition as frivolous and patently without merit, and defendant appeals.

¶ 5 The State argues that the ineffectiveness claim related to involuntary intoxication (1) is forfeited because counsel failed to raise it on direct appeal or during the *Krankel* inquiry and (2) fails to state a claim because the petition does not allege that defendant was suffering from unexpected and unwarned side effects of the prescription medications and alcohol. We hold that the postconviction court erred in summarily dismissing the claim related to involuntary intoxication because the petition states the gist of a constitutional claim.

¶ 6 The State also contends that the ineffectiveness claim related to PTSD (1) is barred by *res judicata* because both the inquiry court and this court have determined that omitting the evidence was a matter of trial strategy, (2) is forfeited because defendant did not raise the issue on direct appeal, and (3) lacks merit because the omission was not prejudicial. We need not consider whether the postconviction court erred in summarily dismissing the claim because we hold that it

was error to summarily dismiss the involuntary intoxication ineffectiveness claim. We reverse the summary dismissal order and remand the cause for further postconviction proceedings.

¶ 7 I. BACKGROUND

¶ 8 A. Trial

¶ 9 As we have done in defendant's prior appeals, we summarize the evidence supporting the guilty verdict because defendant's allegations of ineffectiveness are based on trial counsel's alleged failure to investigate and present certain exculpatory evidence. Edita Pranckute met defendant in November 2008. They began a dating relationship in early 2009, moved in together in April 2009, and broke up on June 17, 2009, after Edita revealed that she had begun dating Jonathan Nkhoma (John). Two days later, on June 19, 2009, defendant fatally stabbed John's friend, Michael, in the parking lot of the home that Edita and defendant had shared.

¶ 10 Edita described her breakup with defendant as "very civil," as defendant allowed her to store her belongings in the apartment until she settled in somewhere. Edita spent the rest of that day at the home of her next door neighbor, Ryan Busic. John arrived at Ryan's apartment after work, and John and Edita spent the night at Ryan's apartment, with defendant next door. During the evening, Edita heard noises outside Ryan's apartment, and each time she opened the door, she found a bag of her belongings sitting in the hallway.

¶ 11 John went to work the next morning, and Edita stayed in Ryan's apartment and watched television with him. Several times, defendant knocked on Ryan's door and asked Edita to return various items. In the afternoon, Edita went to defendant's apartment to calm him because he seemed to be getting angry, but after an hour he just grew angrier. Edita returned to Ryan's apartment, and John arrived soon thereafter. Ryan's girlfriend, Carrie Fernandes, was also there.

¶ 12 Edita testified that defendant began "constantly" knocking on the door, and each time he entered he would ask for things like cigarettes and beer. The last time defendant entered, he angrily told Edita, "I will kill you bitch. I will kill you first, and then I will kill John." Carrie told defendant to leave and not come back. Defendant left. Defendant's threats caused Carrie to ask John and Edita to find somewhere else to spend the night. A short time later, Bill Murphy, a friend of John and Ryan, came to Ryan's apartment. Bill allowed Edita and John to spend the night at his apartment.

¶ 13 Around 5:30 a.m. the next day, John left Bill's apartment to drive to work, but he and Edita found that three tires on her car had been slashed. Near the fourth tire was a broken blade from a steak knife that Edita recognized from the apartment she had shared with defendant.

¶ 14 John got a ride to work from his boss, and Edita spent the day in Bill's apartment. Around noon, defendant knocked "aggressively" on the door, but Bill and Edita remained quiet. Bill later left for a doctor's appointment, and Edita stayed in the apartment.

¶ 15 Around 5 p.m., John returned from work, and he and Edita ordered a pizza. Bill returned to his apartment a short time later, but left at 5:45 p.m. to visit Michael. Edita remained in Bill's apartment.

¶ 16 The parking lot of the apartment building had several single-car garages, including Michael's garage, where John and Bill often hung out with their friend. On the date of the murder, Bill, Michael, and John were in the garage with another friend, Fred Slaughter. Defendant walked over and asked for a beer and then a cigarette. Michael refused both times. Defendant then looked at John and asked him for "daps," meaning bumping fists in greeting. Bill heard John say, "I don't have anything for you." Bill recalled that defendant responded by

saying something like, "I can see this isn't my crowd here, don't trip. I've always got something on my hip." John recalled that defendant angrily said "Well, I take it nobody wants me here."

¶ 17 Bill and John testified that defendant left the garage and called John a "bitch." John stood from his chair, put down his beer, and he and defendant began "exchanging words." Defendant pulled out a knife and said, "John I'm going to kill you." John testified that he saw the knife handle, which had been hidden behind defendant's back, under his shirt. John asked defendant to put down the knife and fight with his fists. Defendant turned and yelled at John as he walked across the parking lot toward the entrance of the apartment building. Bill heard defendant yell, "I'm going to kill you motherf******," and then defendant entered the building.

¶ 18 Paul Neumann lived in an apartment, next door to Michael, in an adjacent building. On the evening of the incident, Paul was in his apartment with his friends, Troy Beavers and Eric Jackson. Around 6 p.m., they heard arguing and yelling outside, and Troy recognized Michael's voice. The men went outside and saw John and defendant arguing. Paul recalled hearing defendant say he had a gun and would kill John.

¶ 19 When defendant entered his building, Troy, Paul, and Eric joined Michael, Bill, John, and Fred in the garage. From 6:30 p.m. to 7:30 p.m., the group talked in the garage. Periodically, defendant would step outside, talk angrily, yell, and gesture at the group. Paul recalled defendant saying things like, "f*** you motherf******, I'm going to kill somebody, I'm going to kill you." Defendant did not direct his threats to any one person, but to the group in general.

¶ 20 Around this time, Edita was in Bill's apartment and heard a "prolonged scraping" on the door. Edita remained quiet and did not go to the door. About 7 p.m., Edita heard someone pounding on the door at the same time someone else was buzzing Bill's apartment from the

vestibule. Edita did not answer the door or the buzzer. She heard defendant "screaming" in the hallway and running up the stairs.

¶ 21 About 7 p.m., John went to check on Edita in Bill's apartment. At the entrance of the building, John encountered defendant, who asked to talk. John refused, and defendant replied "John, nobody wants to talk to you. Get out of here." Defendant brandished a steak knife, and John left.

¶ 22 John returned to the garage and described what had just happened. The group decided that Edita should be moved to Michael's apartment. The group walked toward Bill's apartment, and Michael carried a baseball bat. Troy, Bill, and John noticed blood smeared on the wall and the handrail of the vestibule. On the door to Bill's apartment were the freshly-carved words "will kill." The men escorted Edita to Michael's apartment and returned to the garage.

¶ 23 Defendant stepped out of his building again, and Michael said he would "rectify" or "try to diffuse" the situation. Bill, Troy, and Paul testified that Michael walked "calmly" over to defendant. Troy saw Michael extend his hand for a handshake, and Paul heard Michael tell defendant to take his dispute with John someplace else because it did not involve the rest of the group. Troy and Paul saw Michael turn toward the garage, and defendant turned toward his building. Troy heard defendant say "What the f*** did you say?" Defendant then charged at Michael, who was walking away.

¶ 24 Michael turned around, defendant punched him in the face, and Michael punched defendant twice. Defendant pulled Michael's shirt over his head and hit him in the chest and ribs. Michael and defendant separated, and defendant ran past the door to his building. The group ran to Michael and saw that he had been stabbed in the side. The police were called,

defendant was arrested, and Michael was transported to a hospital, where he died a few hours later.

¶ 25 Wheaton police officer Jason Scott testified that he transported and booked defendant. Defendant asked to call his "fiancé," and the telephone call was recorded on video, which was played for the jury. Defendant left a message stating, "Uh, Edita, this is Mike. Hey you go ahead and have everything in that apartment. I ain't coming home for a long, long time, if I come home again. Alright, I love you, and I hope you come see me."

¶ 26 Defendant testified in his own defense, generally denying the allegations that he threw Edita's clothes in the hallway, slashed her tires, brandished a knife, threatened anyone, or carved "will kill" in the door. Defendant admitted that, around 8:30 p.m. on the date of the incident, he exited his apartment to smoke a cigarette. He grabbed his key and wallet off the kitchen counter, and he also grabbed a knife that was nearby.

¶ 27 According to defendant, Michael jumped from his seat and started yelling obscenities at defendant. Michael and John ran from the garage toward defendant. Defendant dropped his key and wallet and was very afraid. Michael struck defendant and yelled "What the f*** is your problem, what's going on with you?" Defendant did not hear everything that was said, because he fell back and partially lost consciousness when Michael struck him repeatedly in the head. Defendant began fighting back.

¶ 28 According to defendant, John pulled Michael away twice, momentarily. It did not occur to defendant to run away because he was "incoherent" and not "in a thinking capacity." Michael attacked defendant a third time, and when John pulled Michael away again, John yelled "he's been stabbed!" Defendant did not realize that he had stabbed Michael. Defendant ran away

because he had lost his key and was afraid. Defendant claimed he was just defending himself and denied any animosity toward Michael or any intent to injure or kill him.

¶ 29 The jury found defendant guilty of first-degree murder and that he committed the offense in a cold, calculated, and premeditated manner. Defendant filed a motion for a new trial, which was denied.

¶ 30 At the sentencing hearing, the trial court gave defendant the chance to make a statement in allocution. Defendant offered his condolences to Michael's family and reiterated that the stabbing was accidental. Defendant also told the court that his attorney had failed to investigate the case, call particular witnesses, and present evidence that would have supported his defense. Specifically, defendant alleged that he drew and gave to his attorney a diagram of where Michael and John were sitting in the garage and the location of Troy and his girlfriend. Defendant explained that the diagram was important because the police disturbed the crime scene by pulling everything from the garage and moving the chairs. Defendant also asserted that he gave his attorney "a letter showing what was going on" among John, Edita, and defendant. Defendant said the letter showed that his relationship with Edita ended amicably. Defendant argued that the diagram and letter should have been shown to the jury. Defendant also said that he informed his attorney that the police searched his apartment without a warrant.

¶ 31 Finally, defendant restated his denial that he carved anything into Bill's door. He explained that Bill and a neighbor named Jennifer had multiple altercations. Bill allegedly had spent two days in jail for breaking bottles on Jennifer's door, and another time Bill called the police after Jennifer threw something at his door. Defendant argued that the evidence of these altercations should have been presented at trial. The trial court imposed a 55-year prison term, but his complaints about trial counsel went unanswered.

¶ 32 Defendant filed a motion to reconsider the sentence, and at the hearing, he made additional assertions about counsel's ineffectiveness. When the court asked whether he was willing to reimburse the public defender's office for representing him, defendant responded "No, I am not, Judge, because I feel, your Honor, that there was no investigation done by the public defender's office on this case. And *** [trial counsel] withheld evidence that would have cleared a lot of this up." The trial court denied the motion to reconsider but did not address defendant's allegations of ineffective assistance.

¶ 33 B. *Krankel* Inquiry

¶ 34 On direct appeal, we affirmed defendant's murder conviction and sentence, but we remanded the cause for a *Krankel* inquiry into his allegations of ineffective assistance of trial counsel. Defendant was represented by counsel at the *Krankel* inquiry. Inquiry counsel argued, *inter alia*, that trial counsel should have (1) presented evidence that defendant was treated for PTSD before and after the offense, which allegedly would have supported a verdict of second-degree murder based on imperfect self defense and (2) presented evidence that Bill had ongoing disputes with two neighbors, which would have refuted the State's claim that only defendant had a motive and the opportunity to carve the words "will kill" on Bill's door.

¶ 35 Following an inquiry proceeding involving inquiry counsel and trial counsel, the court denied defendant's motion for the appointment of counsel and a full evidentiary hearing under *Krankel*. Defendant appealed, and we affirmed the inquiry court's ruling on September 1, 2017. *Delaney II*, 2017 IL App (2d) 160102-U, ¶ 60.

¶ 36 C. Postconviction Petition

¶ 37 On January 8, 2016, while *Delaney II* was pending, defendant petitioned for postconviction relief. The attorney who represented defendant in the *Krankel* inquiry also filed

the postconviction petition on defendant's behalf and represents defendant in this appeal. The petition alleged that trial counsel was ineffective for (1) failing to investigate and present a defense of involuntary intoxication based on the combined effects of alcohol with Zoloft, Trazadone, and Seroquel, which allegedly were prescribed by his physician and (2) not presenting the PTSD evidence and arguing that the condition negatively influenced his behavior on the date of the offense. The petition was supported by psychological treatment records and by the medical opinions of Dr. Thomas Bristow, a neuropsychologist, and Dr. W. Kip Hillman, a forensic psychologist.

¶ 38 On April 1, 2016, defendant filed an amended petition, which additionally incorporated the opinion of Dr. James O'Donnell, a pharmacologist, that the drugs' toxicity was exacerbated by alcohol in defendant's system. Dr. O'Donnell's report noted defendant's alcohol dependency, PTSD diagnoses, and "recent history of non-compliant use of Zoloft, Trazadone, and Seroquel use, recently reinstated, and more recently the dose was increased (~2 weeks before [the] stabbing)." The report advised that all patients being treated with these medications should be monitored for "clinical worsening, suicidality, and *unusual changes in behavior, especially during the initial few months of a course of drug therapy, or at times of dose changes, either increases or decreases*." (Emphasis in original.) Dr. O'Donnell opined that "[t]he combination of the three psychotropic drugs, Zoloft, Seroquel, and Trazadone, in combination with alcohol, caused an involuntary intoxication rendering [defendant] impaired, and unable to form a deliberate, planned attack on [Michael]."

¶ 39 On June 22, 2016, the trial court dismissed the amended postconviction petition as frivolous and patently without merit. The circuit court clerk mailed defendant notice of the

adverse judgment on June 24, 2016. Within 30 days of the clerk's notice, on July 21, 2016, appellate counsel mailed a timely notice of appeal, which was file-stamped on July 26, 2016.[1]

¶ 40 II. ANALYSIS

¶ 41 A. Post-Conviction Hearing Act

¶ 42 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)).

¶ 43 A petitioner who seeks postconviction relief bears the burden of establishing that a substantial deprivation of his constitutional rights occurred "in the proceedings that produced the conviction or sentence being challenged." *Pendleton*, 223 Ill. 2d at 471; *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004); 725 ILCS 5/122-1(a) (West 2016).

¶ 44 In noncapital cases, like this one, the Act contemplates three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the postconviction court has 90 days to review a petition and may summarily dismiss it based on a finding that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); *Pendleton*, 223 Ill. 2d at 472. If the court does not dismiss the petition within the 90-day period, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2016); *Pendleton*, 223 Ill. 2d at 472.

[1] Two years have elapsed since the notice of appeal. The delay has resulted, in part, from defendant retaining different counsel and the parties requesting several extensions of filing deadlines.

¶ 45 The first stage of postconviction proceedings presents a "low threshold," requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim. *People v. Jones*, 211 Ill. 2d 140, 144 (2004). The court must accept as true and liberally construe all of the allegations in the petition unless contradicted by the record. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 46 A defendant need only allege sufficient facts to state the "gist" of a constitutional claim for his petition to be advanced to the second stage. *Hodges*, 234 Ill. 2d at 9. A petition is frivolous or patently without merit if it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16.

¶ 47 If the petition survives this initial review, the process moves to the second stage, where the petitioner may be appointed counsel, who may amend the petition as necessary. 725 ILCS 5/122-4 (West 2016); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). After counsel has reviewed and amended the petition if needed, the State may file a motion to dismiss or file an answer. 725 ILCS 5/122-5 (West 2016); *Pendleton*, 223 Ill. 2d at 472. If the State moves to dismiss, the postconviction court may hold a dismissal hearing, which is part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 48 A petition based upon matters outside the record is not adjudicated on the pleadings and advances past the second stage to a third-stage evidentiary hearing. 725 ILCS 5/122-6 (West 2016); *Pendleton*, 223 Ill. 2d at 472-73. At an evidentiary hearing, the postconviction court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the [defendant] brought before the court." 725 ILCS 5/122-6 (West 2016).

¶ 49 When a matter is decided without an evidentiary hearing, we review the lower court's decision under the *de novo* standard. *People v. Hommerson*, 2014 IL 115638, ¶ 6 (first-stage summary dismissal); *Pendleton*, 223 Ill. 2d at 473 (second-stage dismissal). *De novo* review shows no deference to the postconviction court's judgment or reasoning. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 50 B. Ineffective Assistance of Counsel

¶ 51 Defendant argues that the trial court erred in dismissing his petition at the first stage of postconviction proceedings because he made a nonfrivolous claim of ineffective assistance of trial counsel. Every Illinois defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and under the Illinois Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Domagala*, 2013 IL 113688, ¶ 36. Claims of ineffective assistance are judged against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36 (citing *People v. Albanese*, 104 Ill. 2d 504, 526 (1984)). To prevail on a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687).

¶ 52 To establish this deficiency, a defendant must show "that counsel's performance was objectively unreasonable under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36. To then establish that this deficient performance resulted in prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). "[A] reasonable probability that the result would have been

different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004); *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 53 A petitioner is not required to conclusively establish his ineffective assistance claim at the first stage of postconviction proceedings. " 'At the first stage of postconviction proceedings ***, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *People v. Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17)). We do not consider whether counsel's decisions were the product of a reasonable strategy at the first stage. *Tate*, 2012 IL 112214, ¶ 22.

¶ 54 C. Involuntary Intoxication

¶ 55 Defendant's petition alleges that trial counsel rendered deficient performance by failing to investigate and present evidence that he was suffering from involuntary intoxication at the time of the offense. The petition alleges that trial counsel's failure to pursue the strategy was prejudicial because there is a reasonable probability that, had counsel presented the evidence, the jury would have acquitted defendant of first-degree murder.

¶ 56 The petition alleges that, at the time of the offense, defendant's behavior was negatively affected by "the combined effects of psychotropic medications Zoloft, Trazadone, and Seroquel and drinking a large amount of alcohol." The petition contends that trial counsel was aware of evidence to support an involuntary intoxication defense. Specifically, the petition alleges that trial counsel had notes from Family Service and Mental Health Center which indicate that defendant had been prescribed the medications around the time of the offense. Defendant

attached the treatment notes to his petition. One from June 3, 2009, indicated that defendant said he was taking his medications only sporadically. The therapist recommended increasing his Seroquel dosage. A note on June 16, 2009, three days before the offense, confirmed that he had recently resumed taking the medications.

¶ 57 The petition alleges that trial counsel also was aware of witnesses who might testify that defendant appeared intoxicated. A physician who evaluated defendant a few hours after his arrest concluded that alcohol "played a part" in the incident. Other eyewitnesses allegedly commented at the time that defendant "was on something."

¶ 58 Finally, defendant attached to the petition a lengthy report prepared by Dr. O'Donnell on March 30, 2016. Dr. O'Donnell opined that, at the time of the stabbing, defendant was suffering from involuntary intoxication brought about by his ingestion of Zoloft, Seroquel, and Trazodone. Dr. O'Donnell's opinion was informed by defendant's reported alcohol dependency, recent history of noncompliance with medication protocols, and reinstatement of his prescription regimen, which included higher doses of Seroquel starting two weeks before the offense. The report advised that a patient like defendant should be monitored for "*unusual changes in behavior, especially during the initial few months of a course of drug therapy, or at times of dose changes, either increases or decreases*." (Emphasis in original.) "The combination of the three psychotropic drugs, Zoloft, Seroquel, and Trazadone, in combination with alcohol, caused an involuntary intoxication rendering [defendant] impaired, and unable to form a deliberate, planned attack on [Michael]," the report concluded.

¶ 59 Involuntary intoxication is an affirmative defense that exonerates an accused if the trier of fact believes the elements of the defense have been met. *People v. Hari*, 218 Ill. 2d 275, 295 (2006). "A person who is in an intoxicated or drugged condition is criminally responsible for

conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3 (West 2008). The term "involuntarily produced" is not limited to trick, artifice, or force but also includes a drugged condition caused by "an unexpected adverse side effect of a prescription drug that was unwarned by the prescribing doctor, the PDR or the package insert." *Hari*, 218 Ill. 2d at 292-95.

¶ 60 If a defendant has sufficiently raised the affirmative defense of involuntary intoxication, the State bears the burden of proving beyond a reasonable doubt that the defendant was not involuntarily intoxicated such that he lacked substantial capacity to appreciate the criminality of his acts or conform his conduct to the requirements of the law. See *Hari*, 218 Ill. 2d at 295-96.

¶ 61 We accept the involuntary intoxication allegations as true and construe them liberally; they are not contradicted by the record. See *Edwards*, 197 Ill. 2d at 244. In fact, defendant supplemented his allegations with a pharmacologist's expert opinion consistent with his theory. The opinion was supported by treatment notes indicating that, in June 2009, defendant went from taking the medications sporadically to taking them consistently and in higher does, which increased the risk of unusual changes in behavior around the time of the offense.

¶ 62 The petition, complete with citations to *Strickland* and *Hari*, comprehensively alleged ineffectiveness of trial counsel for failing to investigate, present evidence, and argue a potentially viable defense to the charged offense. Defendant's allegations related to involuntary intoxication constitute more than the mere "gist" of a constitutional claim of ineffective assistance of trial counsel. See *Hodges*, 234 Ill. 2d at 9. The postconviction court committed reversible error in declining to advance the entire petition to the second stage of postconviction proceedings. See

*People v. Niffen*, 2018 IL App (4th) 150881, ¶ 25 (the Act does not permit the partial summary dismissal of a postconviction petition).

¶ 63 The State raises two points. First, the State contends that the petition lacks sufficient detail. As mentioned, an involuntary intoxication defense requires proof that the potential side effects of mixing psychotropic medications and alcohol were "unexpected" and "unwarned." *Hari*, 218 Ill. 2d at 292-95. The State argues that, because the petition does not allege the absence of a warning, the defense was unavailable to defendant and trial counsel was not ineffective for not pursuing it. Defendant certainly could have supplemented the petition with an affidavit asserting that the side effects were unexpected and unwarned. Regardless, we disagree with the State that such specificity in the petition and supporting documents is required to survive first-stage postconviction review.

¶ 64 The State takes the petition's allegations out of their procedural context: to survive first-stage dismissal, defendant "need only present a limited amount of detail in the petition." See *Hodges*, 234 Ill. 2d at 9. Defendant need only plead sufficient facts to assert an *arguably* constitutional claim to advance past the first stage of postconviction review, which he has accomplished. See *Jones*, 211 Ill. 2d at 144. If we were to adopt the State's position of requiring a postconviction petitioner to allege every element of a defense that counsel chose not to pursue, we would raise the bar far above the "low threshold" that the first-stage presents. See *Edwards*, 197 Ill. 2d at 244 (postconviction petition need not set forth the claim in its entirety to survive first-stage dismissal).

¶ 65 Moreover, the State has not cited any treatment note showing that defendant was notified of the potential side effects of mixing alcohol with the psychotropic medications. The unexpected and unwarned nature of the side effects is not contradicted by the record (see

*Edwards*, 197 Ill. 2d at 244), and we decline to infer defendant's expectation and awareness of the risk from the absence of evidence to the contrary.

¶ 66 First-stage review involves a "low threshold" because most petitioners initially appear *pro se*, and are not expected to articulate fully-formed legal theories or be aware of the precise bases for their claims. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32. This case presents the circumstance where defendant had the benefit of counsel in preparing his original and amended petitions. At oral argument, the State conceded that an attorney-prepared petition is subject to the same level of scrutiny at the first stage as a *pro se* petition. But one can hardly imagine how a claim this thorough, if filed *pro se*, would have been summarily dismissed. Perhaps the trial court inadvertently viewed this attorney-prepared petition as one subject to second-stage review. Our supreme court has expressly rejected this kind of alteration of the three-stage postconviction structure set forth in the Act.

¶ 67 In *Tate*, the State proposed that a first-stage postconviction petition prepared by an attorney should be required to make a substantial showing of a constitutional violation, which is the standard at the second stage, after the State has entered the litigation. *Tate*, 2012 IL 112214, ¶ 12. However, the supreme court held that "[t]his second-stage standard is inappropriate at the first stage, where the State has no involvement (725 ILCS 5/122-5 (West 2008)) and where the petition cannot be said to be at issue." *Tate*, 2012 IL 112214, ¶ 12. The court rejected the idea that the lower standard should apply to *pro se* petitions and the higher standard should apply to attorney-prepared petitions at the first stage of the proceeding. To do so would "add complexity to a stage where, as noted, the court acts 'strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.' " *Tate*, 2012 IL 112214, ¶ 12 (quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001)).

¶ 68 In addition to claiming insufficient specificity in the petition, the State argues that defendant has forfeited his involuntary intoxication ineffective assistance claim by not raising it on direct appeal or during the *Krankel* inquiry. However, Dr. O'Donnell's report, on which the involuntary intoxication theory is based, did not exist at the time of the direct appeal or the January 8, 2016, *Krankel* inquiry. The pharmacologist's report was prepared on March 30, 2016, and submitted to the postconviction court on April 1, 2016. Thus, defendant could not have presented his claim in such detail on direct appeal or during the *Krankel* inquiry.

¶ 69 Finally, our *de novo* review entails no deference to the postconviction court's reasoning, but we note the court's characterization of defendant's conduct as the knowing or voluntary ingestion of "illegal drugs or alcohol" as justifying the summary dismissal of the claim. While defendant's ingestion of alcohol was certainly voluntary, it is the interaction with allegedly legal, prescribed psychotropic medications, not "illegal drugs," that are the basis for his proposed involuntary intoxication defense. The State points to no evidence in the record to contradict defendant's assertion that he ingested the medication lawfully.

¶ 70 We hold that the ineffectiveness claim related to the potential involuntary intoxication defense has an arguable basis in law and fact, and therefore is not frivolous and patently without merit. S*ee Hodges*, 234 Ill. 2d at 16. The claim i*s not* based on an indisputably meritless legal theory or fanciful factual allegations. S*ee Hodges*, 234 Ill. 2d at 16. We emphasize that we offer no opinion on the ultimate merits of the claim, except to say that it should advance beyond the first stage of postconviction proceedings.

¶ 71 D. PTSD

¶ 72 The petition also alleges that trial counsel acted unreasonably by failing to present evidence that defendant suffered from PTSD, which allegedly would have supported the theory

that defendant had an unreasonable belief in the need to defend himself against the victim. In *Delaney II*, defendant claimed that his PTSD was precipitated by an army parachute training incident in 1982, where defendant jumped out of a helicopter and was injured and several other people died. Defendant was diagnosed and treated for PTSD intermittently before the stabbing incident. Inquiry counsel asserted during the *Krankel* inquiry that defendant's PTSD made him more likely to re-experience the precipitating trauma and cause him to be very aggressive and to misperceive threats.

¶ 73 Defendant's postconviction petition asserts that Drs. Bristow and Hillman had prepared psychological treatment records and medical opinions supporting his theory. Defendant claims that the experts would have testified that, without PTSD, he would not have misperceived the threat and acted as the State alleged. According to defendant, the information would have resulted in an acquittal of first-degree murder and, at worst, a conviction of second-degree murder based on imperfect self defense.

¶ 74 Because a remand is necessary to remedy the erroneous dismissal of the ineffectiveness claim related to involuntary intoxication, we decline to address the claim related to PTSD and remand the entire petition for further proceedings. See *Niffen*, 2018 IL App (4th) 150881, ¶ 25 ("Because the Act does not permit the partial summary dismissal of a postconviction petition, we need not address defendant's additional claim that defense counsel rendered ineffective assistance by representing him while under a conflict of interest."). "If a single claim in a multiple-claim postconviction petition survives the summary dismissal stage ***, then the entire petition must be docketed for second-stage proceedings[,] regardless of the merits of the remaining claims in the petition." *People v. Romero*, 2015 IL App (1st) 140205, ¶ 27; see also *People v. White*, 2014 IL App (1st) 130007, ¶ 33 ("We have no need to address any of the other

claims in the petition because partial summary dismissals are not permitted during the first stage of a postconviction proceeding.").

¶ 75 III. CONCLUSION

¶ 76 For the preceding reasons, we reverse the order of the circuit court of Du Page County summarily dismissing the postconviction petition as frivolous and patently without merit. The cause is remanded for further postconviction proceedings consistent with this disposition.

¶ 77 Reversed and remanded.