

No. 1-09-2595

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 16597
	)	
CALANDRA HULITT,	)	The Honorable
	)	Bertina E. Lampkin,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed defendant's *pro se* postconviction petition when it had no arguable basis in fact or law.

¶ 2 Defendant Calandra Hulitt appeals from the summary dismissal of her *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)).

Defendant contends the circuit court erred in dismissing her petition because her claim—that she was denied effective assistance of trial counsel when counsel waited three years to have her

evaluated for postpartum depression—had an arguable basis in law and fact. She further contends that she received ineffective assistance of appellate counsel because counsel failed to raise trial counsel's effectiveness on direct appeal. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the July 7, 1999 death of the victim, her 2 ½ year-old daughter Moneka.

¶ 4 The State's theory of the case was that defendant, who had delivered her third child six days before the victim's death, was unable to sleep because the victim was making noise. In order to quiet the victim, defendant tied the victim's hands and feet together, stuffed a sock in her mouth and wrapped tape around her mouth and neck. The victim subsequently suffocated to death. The State supported this theory at trial with, *inter alia*, defendant's signed statement in which she admitted that she caused the victim's death and described the circumstances leading up to it.

¶ 5 Prior to trial, defendant indicated that she planned to present the testimony of psychologist Dr. Robert Smith during her case-in-chief. Three years after the victim's death, Smith interviewed defendant and several of her family members regarding defendant's mental and physical condition at the time of the offense. At the time of the victim's death, defendant had recently given birth to her third child and was living under strained financial circumstances. Ultimately, Smith determined that although defendant was not legally insane at the time of the offense, she was suffering from the "mental disease" of postpartum depression and as a result was "unable to appreciate the danger of her actions."

¶ 6 The State moved to bar defendant from presenting a defense of diminished capacity and/or postpartum depression, as neither was a recognized defense in Illinois. Defendant

responded that she did not intend to raise an insanity defense or ask for a guilty but mentally ill instruction; rather, she intended to raise a reasonable doubt defense. Defendant further argued that Smith's testimony related to her state of mind at the time of the offense and was intended to show that she had acted recklessly, rather than intentionally or knowingly.

¶ 7 At a subsequent hearing on the motion, the trial court stated that the best way to determine whether a person had postpartum depression was to do "medical testing" of that person. The court then noted that Smith did not evaluate defendant until 2002, and inquired whether defendant was evaluated for postpartum depression before 2002. Defense counsel answered in the negative. After hearing argument, the trial court determined that defendant was impermissibly trying to resurrect, through Smith's testimony, a section of the insanity defense statute stricken by the legislature. In other words, Smith's opinion made it sound as if defendant was unable to appreciate the criminality of her conduct even though she was not insane. The court then noted that defendant's postpartum depression was not relevant to the issue of intent, as given defendant's circumstances at the time of the offense, "anyone with any sense" could understand that she would be depressed, and thus, psychological evidence that defendant was depressed was unnecessary. The court finally noted that Smith had not opined that defendant's postpartum depression negated her ability to form the intent to kill. Ultimately, the court granted the State's motion to bar a diminished capacity and/or postpartum depression defense and did not allow Smith to testify.

¶ 8 The evidence at defendant's jury trial established, in part through defendant's signed statement, that defendant, who had given birth to a male infant approximately a week earlier, bound and gagged the victim in order to keep the victim quiet. The jury convicted defendant of

first degree murder and she was sentenced to 30 years in prison.

¶ 9 On appeal, defendant contended that the trial court erred when it excluded Smith's testimony regarding the effect of postpartum depression on defendant's mental state because his testimony would have supported her theory that she lacked the mental state required for a murder conviction and had acted with the less culpable mental state of recklessness.

¶ 10 Initially, this court found that Smith's testimony was unnecessary because defendant's circumstances at the time of the victim's death were such that a jury would be more than capable of determining, based upon common knowledge, whether defendant was depressed and whether she acted recklessly, rather than knowingly or intentionally, as a result. See *People v. Hulitt*, 361 Ill. App. 3d 634, 638-39 (2005). In any event, Smith would not have been able to testify as to defendant's state of mind at the time of the offense because he evaluated her three years later. This court then noted that Smith's opinion indicated that as a result of mental illness, defendant was unable to appreciate the danger of her actions toward the victim on the night of the offense and characterized his opinion as a statement of diminished capacity rather than of recklessness. However, as the defense of diminished capacity was not recognized in Illinois and could not be raised as an affirmative defense, defendant could not raise it "in the guise of a reasonable doubt argument." *Hulitt*, 361 Ill. App. 3d at 640-41. Ultimately, this court determined that the trial court did not abuse its discretion in barring Smith's testimony and affirmed defendant's conviction.

¶ 11 In June 2009, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that her trial counsel was ineffective for failing to properly present psychiatric evidence and for waiting years to have defendant evaluated for postpartum depression. The trial court summarily

dismissed the petition.

¶ 12 On appeal, defendant contends that she received ineffective assistance of trial counsel because counsel waited three years to have defendant evaluated for postpartum depression when defendant's intent and state of mind at the time of the offense were crucial to the defense theory at trial. Defendant further contends that she was denied effective assistance of appellate counsel because counsel did not raise this issue on direct appeal.

¶ 13 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of her constitutional rights in the proceedings which resulted in her conviction. 725 ILCS 5/122-1 (West 2008). At the first stage of a postconviction proceeding, a defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). "Unless positively rebutted by the record, all well-pled facts [in the petition] are taken as true" at the first stage. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84 (2001).

¶ 14 A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 15 The scope of a postconviction proceeding is limited to constitutional matters that have not

been, and could not have been, previously adjudicated; issues that could have been raised on direct appeal but were not are procedurally defaulted and issues that were previously decided by a reviewing court are barred by the doctrine of *res judicata*. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007); see also *People v. Scott*, 194 Ill. 2d 268, 274 (2000) (rulings on issues that were raised before the trial court or on direct appeal are *res judicata*, and issues that could have been raised in an earlier proceeding but were not are generally waived).

¶ 16 Here, the record reveals this claim could have been raised on direct appeal because it is based entirely on facts contained in the record. Thus, as this issue could have been raised on direct appeal, but was not, it is forfeited for purposes of the instant proceeding. *Harris*, 224 Ill. 2d at 124. Defendant, however, seeks to avoid the procedural bar of forfeiture by arguing she received ineffective assistance of appellate counsel because counsel failed to raise this issue on direct appeal.

¶ 17 When reviewing the summary dismissal of a postconviction petition which alleges the ineffective assistance of counsel, this court must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. This test applies equally to claims of ineffective assistance of appellate counsel. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 37. Therefore, a defendant who contends that she was denied effective assistance of appellate counsel by counsel's failure to argue an issue on direct appeal must show that the failure to raise the issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed. *Dobbey*, 2011 IL App (1st) 091518, ¶ 37. Unless the underlying issue is meritorious, a defendant cannot establish that she was prejudiced by counsel's

failure to raise it on direct appeal. *Dobbey*, 2011 IL App (1st) 091518, ¶ 37.

¶ 18 Here, defendant contends that the circuit court erred when it dismissed her petition because appellate counsel's failure to argue on direct appeal that trial counsel was ineffective when counsel did not have defendant evaluated for postpartum depression in a timely manner constituted ineffective assistance. In other words, defendant contends that it is arguable that if the trial court had been provided with a contemporaneous evaluation of defendant, the court would have denied the State's motion *in limine* and permitted Smith to testify at trial. The State, on the other hand, contends that because Smith's testimony was excluded as legally insufficient, it is irrelevant when the evaluation took place.

¶ 19 Because a motion *in limine* invokes the circuit court's inherent power to admit or exclude evidence (*People v. Williams*, 188 Ill. 2d 365, 369 (1999)), a court's ruling on a motion *in limine* is a matter within the court's discretion; this determination will not be reversed absent an abuse of that discretion. *People v. Nelson*, 235 Ill. 2d 386, 420 (2009).

¶ 20 Generally, the question of whether a defendant acted intentionally, knowingly, or recklessly is a question to be resolved by the trier of fact. *People v. Jones*, 404 Ill. App. 3d 734, 744 (2010). Expert testimony is admissible only when such testimony is necessary to explain matters beyond the common knowledge of the ordinary person and will help the fact finder to reach a conclusion. *People v. Raines*, 354 Ill. App. 3d 209, 220 (2004) (expert testimony is not admissible on matters of common knowledge unless the subject is difficult to understand and explain).

¶ 21 Here, defendant contends that she was denied effective assistance of appellate counsel because counsel did not raise the issue of trial counsel's failure to have defendant evaluated for

postpartum depression in a timely manner on direct appeal. In order to succeed on this claim, defendant must establish that the failure to raise this issue was objectively unreasonable and that she was prejudiced by this action, *i.e.*, if this issue had been raised on direct appeal her conviction would have been reversed. *Dobbey*, 2011 IL App (1st) 091518, ¶ 37.

¶ 22 The record reveals that Smith's testimony was not barred based upon the timing of the evaluation; rather, the trial court barred the testimony because "anyone" could understand how a woman with three small children and no financial resources could be depressed and could determine whether defendant had acted intentionally or recklessly. Here, after an examination of the contents of Smith's proposed testimony, the trial court determined that it was not necessary to explain matters beyond the common knowledge of an ordinary person (*Raines*, 354 Ill. App. 3d at 220), and attempted to improperly remove the determination of intent from the fact finder (*Jones*, 404 Ill. App. 3d at 744). Assuming that Smith would have reached the same conclusions following a contemporaneous evaluation of defendant, there is no reason to believe that the trial court would have analyzed Smith's proposed testimony differently or denied the State's motion in *limine* and permitted Smith to testify. In the case at bar, defendant cannot establish how the three years between the offense and Smith's evaluation prejudiced her when the court did not rely upon the timing of the evaluation when barring Smith's testimony, and, therefore, her claim of ineffective assistance must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (failure to satisfy either part of the *Strickland* test defeats a claim of ineffective assistance).

¶ 23 As defendant is unable to show prejudice based upon trial counsel's failure to have her evaluated in a timely manner, her claim of ineffective assistance of appellate counsel similarly fails based on her inability to show a reasonable probability that her conviction for first degree

murder would have been reversed if this issue had been raised on direct appeal. See *Dobby*, 2011 IL App (1st) 091518, ¶ 37 (unless the underlying issue is meritorious, a defendant cannot establish that she was prejudiced by counsel's failure to raise it on direct appeal). Consequently, as defendant has failed to show that she received ineffective assistance of appellate counsel when counsel did not raise the issue of trial counsel's effectiveness on direct appeal, even though the issue could have been raised, this issue is forfeited for the purposes of this proceeding (see *Harris*, 224 Ill. 2d at 124), and the circuit court properly dismissed defendant's petition.

¶ 24 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.