

No. 1-11-0943

**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 JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 25693
	)	
CRISINO BRAVO,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE SIMON delivered the judgment of the court.  
Harris, P.J., and Quinn, J., concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* postconviction petition when the affidavit attached met the "arguable" *Strickland* test for first stage petitions.
- ¶ 2 Defendant Crisno Bravo appeals from 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 2010)). On appeal, defendant contends the trial court erred in dismissing his petition because his claim had an arguable basis in law in fact. Specifically, defendant claimed that he was denied effective assistance of counsel when, although he informed trial counsel that his confession was the result of physical

coercion, threats and other "ill treatment" by police officers, counsel failed to file a motion to suppress. Defendant further contests the imposition of certain fees. We reverse and remand.

¶ 3 Defendant and codefendant Filiberto Bravo were arrested and charged with, *inter alia*, first degree murder after the September 2001, shooting death of the victim Juan Olmeda.<sup>1</sup>

¶ 4 Prior to trial, defendant filed a motion to suppress his statements because he was not informed of his *Miranda* rights, and a motion to quash his arrest. After the motion to quash arrest was denied by the trial court, the defense withdrew the motion to suppress statements. At trial, defendant's videotaped statement was admitted without objection.

¶ 5 The evidence at defendant's bench trial established, through the testimony of witness Jose Gusman and defendant's inculpatory statement, that defendant was upset after an altercation with the occupants of a Chevy Impala, believed to be members the LaRaza gang, so he got a gun from the trunk of his car.<sup>2</sup> Later, as codefendant drove, defendant shot the gun four times at a red car which he believed contained LaRaza gang members. He also fired twice at a blue car. Gusman, who was also in the car, testified that after the shooting he emptied the gun and disposed of the shells. Although the defense argued that codefendant was the actual shooter, presented the testimony of certain alibi witnesses, and posited in closing argument that defendant had made a false confession, the trial court ultimately found defendant guilty of first degree murder and aggravated discharge of a firearm. Defendant was sentenced to 20 years for the first degree murder conviction and to an additional 25 years because he had personally discharged a firearm during the offense.

¶ 6 Defendant then appealed alleging, *inter alia*, that he was denied the right to present a defense where the court denied his counsel's motion for a continuance to locate a witness who would have

---

<sup>1</sup>Codefendant, defendant's cousin, is not a party to this appeal.

<sup>2</sup>Although defendant's videotaped statement is not included in the record on appeal, the record contains a transcript of defendant's statement.

testified that codefendant was the shooter. Defendant also contended that he was denied effective assistance of counsel by counsel's failure to locate and subpoena this witness. This court affirmed defendant's conviction. *People v. Bravo*, No. 1-06-3466 (2008) (unpublished order under Supreme Court Rule 23).

¶ 7 In December 2010, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that he was denied effective assistance of trial counsel when counsel failed to file a motion to suppress defendant's coerced statement. Specifically, defendant alleged that he told trial counsel at their first meeting that he had been harassed, intimidated, and physically assaulted during his interrogation. Defendant then followed counsel's instructions to write everything down and gave this document to counsel. However, when counsel filed a motion to suppress statements, counsel did not raise this issue. After the defense's motion to quash arrest was denied, counsel then withdrew the motion to suppress statements and told defendant's family that it was a waste of time to proceed with the motion as it was duplicative of the motion to quash arrest. Attached to the petition was defendant's statement detailing how he was pushed, choked, punched, kicked and denied access to a lawyer and the bathroom while being interrogated by detectives. Also attached was defendant's affidavit in which he averred, in pertinent part, that after telling his attorney about his treatment by the police he followed his attorney's instructions to write everything down and gave his attorney a written statement detailing the circumstances of his interrogation. However, counsel did nothing with this information.

¶ 8 The circuit court summarily dismissed the petition as frivolous and patently without merit. The court also assessed defendant \$105 in fees pursuant to section 22-105 of the Code of Civil Procedure (the Code) (735 ILCS 5/22-105 (West 2010)).

¶ 9 On appeal, defendant contends that the circuit court erred by summarily dismissing his *pro se* petition because he was denied effective assistance of counsel when trial counsel withdrew the

motion to suppress statements rather than arguing that defendant's confession was procured through physical coercion and threats.

¶ 10 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). 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 2010); *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 this stage. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84 (2001).

¶ 11 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); see also *People v. Tate*, 2012 IL 112214, ¶ 9 (Nov. 29, 2012) ("the threshold for survival is low"). 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.

¶ 12 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "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." *Hodges*, 234 Ill. 2d at 17.

¶ 13 Here, defendant contends his claim that counsel rendered ineffective assistance by failing to pursue the motion to suppress constituted ineffective assistance had an arguable basis in law and fact. Specifically, defendant argues that when he told counsel that his videotaped statement had been obtained through physical coercion, threats, and other ill treatment, counsel told him to write everything down and defendant complied. However, defendant argues that once he gave this information to counsel, counsel did nothing with it.

¶ 14 The State responds that counsel's decision not to proceed with a motion to suppress statements based upon coercion was a strategic decision made by counsel and that a "reasonable inference" may be made that counsel knew that there was no evidence to support defendant's claim of coercion because defendant indicated, in the videotaped statement, that he had given the statement freely and voluntarily.

¶ 15 However, as our supreme court recently stated, such a "strategy argument is inappropriate for the first stage" of proceedings under the Act. *Tate*, 2012 IL 112214, ¶ 22. Rather, arguments regarding trial strategy are more appropriate for the second stage of proceedings under the Act, when a defendant, now represented by counsel, has the burden to make a substantial showing of a constitutional violation. *Tate*, 2012 IL 112214, ¶ 22. The only question before this court in the instant appeal is whether defendant's *pro se* petition met "the 'arguable' *Strickland* test" applied at the first stage of proceedings under the Act. *Tate*, 2012 IL 112214, ¶ 22. If it does, then this cause must be remanded for further proceedings under the Act.

¶ 16 Here, this court concludes that defendant's affidavit attached to his *pro se* postconviction petition meets the arguable *Strickland* test. In defendant's affidavit, he avers that he informed trial counsel of the circumstances of his interrogation, followed counsel's instructions to write the details down, and then gave this document to counsel. At trial, the State's case against defendant rested largely upon the testimony of Jose Gusman, who was in the car with defendant and codefendant at

the time of the shooting, disposed of the gun's shells, and was the only person at trial who identified defendant as the shooter. The defense, on the other hand, argued that codefendant was the shooter and asserted an alibi defense supported by several witnesses. However, in the videotaped statement, defendant indicated that he fired a gun at two different cars. Because this admission could have caused the jury to discount the defense's alibi witnesses and assertion that codefendant was the shooter, it is at least arguable that defendant was prejudiced by counsel's failure to pursue a motion to suppress statements and that counsel's performance, or lack thereof, fell below an arguable standard of reasonableness. *Tate*, 2012 IL 112214, ¶¶ 23-24. Accordingly, defendant's affidavit is sufficient to advance his petition to the second stage of postconviction proceedings.

¶ 17 This court therefore reverses the dismissal and remands this case for second stage proceedings under the Act without expressing an opinion as to whether defendant's affidavit will ultimately make a substantial showing of a constitutional violation, as that is an issue to be determined at the second stage of proceedings. *Tate*, 2012 IL 112214, ¶¶ 25-26.

¶ 18 Defendant next contends that the circuit court erred when it imposed fees in the amount of \$105 pursuant to section 22-105 of the Code (see 735 ILCS 5/22-105 (West 2010)). Based upon this court's finding above that defendant's petition met the arguable *Strickland* test for a first stage petition, we agree with defendant that the \$105 in fees imposed pursuant to section 11-105 must be vacated as these fees may only be assessed for filing a frivolous pleading. 735 ILCS 5/22-105(b)(1) (West 2010). Therefore, this court vacates the fees.

¶ 19 For the reasons stated above, the judgment of the circuit court of Cook County is reversed in part and vacated in part.

¶ 20 Reversed in part and vacated in part; cause remanded for further proceedings.