

No. 1-12-2900

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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. 03 CR 26273
)	
DANIEL McGREGORY,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Court did not err in summarily dismissing post-conviction petition claiming ineffective assistance of counsel based on a failure to investigate and call witnesses in support of lesser included offenses, where affidavits in support of claim that lesser-included offense instructions should have been given are rebutted by defendant's own trial testimony.
- ¶ 2 Following a jury trial, defendant Daniel McGregory was convicted of first degree murder and sentenced to 45 years' imprisonment. We affirmed on direct appeal. *People v. McGregory*, No. 1-08-1117 (2010) (unpublished order under Supreme Court Rule 23). Defendant now

appeals from the summary dismissal of his August 2012 *pro se* post-conviction petition, contending that it stated the gist of a meritorious claim that trial counsel rendered ineffective assistance by not investigating or calling witnesses who would have given testimony supporting a lesser-included offense of second degree murder. However, the affidavits are rebutted on a decisive matter by defendant's own trial testimony so that summary dismissal of the petition was not erroneous.

¶ 3 The evidence at trial was that defendant fatally shot William Harris on October 29, 2003, as witnessed by Harris's girlfriend Katherin Hillmann. Hillmann testified that, as she and Harris stood in a parking lot at about 8 p.m., she saw defendant walking towards them and pointed this out to Harris. When Harris turned around, and without Harris or defendant speaking, defendant pulled out a gun and fired. Harris fled with defendant in pursuit and still firing. After one of defendant's shots, Harris fell to the ground. Defendant fled as a patrolling police officer, signaled by Hillmann, fired at him. Hillmann described Harris as weighing about 220 pounds.

¶ 4 Detective Lawrence Connor responded to the report of a shooting with suspect description, arrested the fleeing defendant near the scene, and saw a .357-caliber revolver at the scene that another officer recovered. Hillmann and the officer who fired at defendant identified defendant in a lineup, and after the lineup defendant admitted to Detective Connor that he shot Harris. Defendant then gave a written and videotaped statement to Detective Connor and Assistant State's Attorney Steven Krueger.

¶ 5 The statements were to the effect that defendant and Harris had been friends for several years until about two weeks prior to the shooting, when defendant won \$100 from Harris in gambling and Harris punched defendant twice, requiring six stitches. Defendant saw Harris and

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another man in a parking lot at about 7:30 p.m. on October 29, and when he saw Harris point towards him presumed they were discussing him. Defendant left, retrieved his gun, and returned to the parking lot. Without saying anything, defendant drew his gun and Harris fled. While Harris had carried a gun previously, defendant did not see a gun that evening. Defendant pursued Harris and fired two shots, the second causing Harris to fall to the ground. Defendant fired at the prostrate Harris, then fled and discarded his gun when he heard gunshots.

¶ 6 Gunshot residue was found on defendant's hand after the shooting. While a 9-millimeter shell casing was found at the scene, testing revealed that the bullets removed from Harris's head and arm were fired by the recovered .357-caliber revolver. Harris weighed 245 pounds at death.

¶ 7 Defendant testified that he knew Harris for years, and that he weighed about 150 pounds while Harris weighed about 240 pounds at the time of the shooting. As he and Harris gambled together, he saw that Harris sometimes carried a gun. On October 18, they were gambling when defendant won. Harris punched defendant twice in the face, demanded his money back, took the money, and left. While defendant was treated at the hospital, receiving stitches, he did not report the matter to the police or ask hospital staff to do so. Harris was not armed that day and did not threaten to kill defendant.

¶ 8 On October 29, defendant saw Harris drive past his home more than once. That evening, on his way to a liquor store, defendant saw Harris and another man in a parking lot; the man saw defendant and pointed him out to Harris. Defendant left, retrieved his gun (a .357-caliber revolver) for protection because he believed Harris would kill him, and went back the way he came. In the parking lot, he saw Harris, a woman, and three or four men. Harris "looked at me, he said 'I'm going to beat the f*** out of you, boy.' That's when I pulled my gun out and I shot

him." Harris fled, with the others fleeing a few feet behind, and defendant pursued them and fired his gun again. His shots struck Harris in the shoulder and arm, but not the head. While defendant did not see Harris or anyone else holding a gun, he heard gunshots as he pursued Harris. He admitted that, as he fired three shots at Harris, Harris was fleeing him and "never turned around to confront" him nor drew a gun, nor did he see anyone following him as he pursued Harris. Defendant fled, discarding his gun as he ran, because he could hear that someone was shooting at him. He denied intending to kill Harris but admitted being upset about the earlier incident, admitted telling ASA Krueger that he was angry about that incident and that he is a kind person unless someone "crosses" him, and admitted that Harris had "crossed" him.

¶ 9 The court denied defendant's request for jury instructions on self-defense and second degree murder. The jury found defendant guilty of first degree murder and that he personally discharged a firearm causing Harris's death. The court sentenced defendant to the minimum 45-year prison term for first degree murder committed by personal discharge of a firearm.

¶ 10 On direct appeal, defendant contended that the trial court erred in denying jury instructions on self-defense and second degree murder. He argued that the evidence showed that "there was a history of violence between the two men, the victim had threatened defendant, the victim occasionally carried a gun, and the victim was with friends and was physically larger than defendant whereas defendant was alone." *McGregory*, No. 1-08-1117, at 9. We found that the court did not abuse its discretion in denying self-defense and second degree murder instructions because there was not even minimum evidence of a danger of imminent harm to defendant at the time of the shooting. *McGregory*, No. 1-08-1117, at 12-13. While defendant testified to a threat of violence from Harris, neither his post-arrest statements nor his trial testimony asserted that

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Harris touched him, approached him, or was even armed on the evening of the shooting.

McGregory, No. 1-08-1117, at 10. Instead, defendant pursued Harris and shot at him. Defendant presented no evidence that Harris moved towards him, so that there was no need to avert an imminent physical danger, and Harris's flight from defendant averted any danger defendant may have believed he presented. *McGregory*, No. 1-08-1117, at 10-11.

¶ 11 In his post-conviction petition, filed in August 2012, defendant alleged in relevant part that trial counsel rendered ineffective assistance by not investigating or calling as witnesses Cleveland Allgood, Robert Barnes, and Ronald Brandon, who would have supported his self-defense claim. He alleged that they would have testified to Harris's prior expressions of his intent to beat defendant, thus establishing Harris's motive to harm defendant. Moreover, he alleged that the witnesses would have testified that Harris and the others "rushed" at defendant as Harris uttered his threat, thus showing that defendant was not the aggressor.

¶ 12 Attached to the petition were the affidavits of Allgood, Barnes, and Brandon averring that Harris had told them that he would beat defendant if Harris or they saw him again. Allgood averred that, on the night at issue, Harris "rushed" towards defendant, "and we was all behind him," as he threatened defendant. As defendant pursued Harris, Allgood pursued defendant and fired a gun to distract him. Barnes averred that Harris "ran towards" defendant with the others following as he uttered his threat. Brandon averred that as Harris was "shouting some nonsense at" defendant, "the guys were already approaching" him.

¶ 13 The court summarily dismissed the petition in September 2012 and this appeal followed.

¶ 14 On appeal, defendant contends that the summary dismissal of his petition was erroneous because he stated an arguably meritorious claim that trial counsel rendered ineffective assistance

by not investigating or calling Allgood, Barnes, and Brandon, who would provide evidence supporting the lesser-included offense of second degree murder based on defendant's unreasonable belief that he needed to use deadly force in self-defense.

¶ 15 A post-conviction petition may be summarily dismissed if it fails to present the gist of a meritorious constitutional claim; that is, if it is frivolous or patently without merit. *People v. Brown*, 236 Ill. 2d 175, 184-85 (2010). In considering a petition at this stage, all well-pled facts must be taken as true unless positively rebutted by the trial record. *Brown*, 236 Ill. 2d at 189. A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact, by being based on an indisputably meritless legal theory or a fanciful factual allegation. *Brown*, 236 Ill. 2d at 184-85. A claim completely contradicted by the record is an example of an indisputably meritless legal theory, while fanciful factual allegations include those that are fantastic or delusional. *Id.* Our review of a summary dismissal is *de novo*. *Id.*

¶ 16 To state a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Id.* Generally, a post-conviction petition alleging ineffective assistance may not be summarily dismissed if (1) counsel's performance arguably fell below an objective standard of reasonableness and (2) the defendant was arguably prejudiced as a result. *Id.*

¶ 17 Self-defense is an affirmative defense: once a defendant raises it, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense as well as the elements of the charged offense. *People v. Lee*, 213 Ill. 2d 218, 224-25 (2004). The elements of self-defense, of which the State must disprove at least one to defeat a self-defense claim, are that (1) unlawful force was threatened against a person, (2) the person threatened was not the

aggressor, (3) the danger of harm was imminent, (4) the use of force was necessary, (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied, and (6) the beliefs of the person threatened were objectively reasonable. *Id.*, citing 720 ILCS 5/7-1 (West 2012). An instruction on self-defense must be given only where a defendant presents some evidence, however slight, of each of these elements. *People v. Washington*, 2012 IL 110283, ¶ 43; *People v. Sanchez*, 2014 IL App (1st) 120514, ¶ 31.

¶ 18 A person commits second degree murder by committing first degree murder with the mitigating factor that he acted under an unreasonable belief that the killing was justified under an affirmative defense such as self-defense. 720 ILCS 5/9-2(a)(2) (West 2012). The State retains the burden of proving beyond a reasonable doubt all of the elements of first degree murder and, if the affirmative defense is properly raised, the absence of circumstances at the time of the killing that would justify the killing under the affirmative defense; however, the defendant must prove the mitigating factor by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2012).

¶ 19 Here, defendant testified on his own behalf at trial, without the restrictions of his post-arrest statements such as leading questions. He gave a clear and coherent account that he drew his gun and shot at Harris immediately upon Harris verbally threatening to beat him, with no mention of any approach or "rush" by Harris or others with him. While defendant heard someone shooting at him, Harris was fleeing and made no visible effort to draw a weapon or turn on defendant. On direct appeal, we affirmed the denial of instructions on self-defense and second degree murder on the basis that, while Harris may have verbally threatened defendant, he made no physical move to carry out his threat before defendant drew a gun, chased him as he fled, and fatally shot him. We find that defendant's own testimony rebuts the post-conviction affidavits on

the decisive point of whether physical action accompanied the verbal threat before defendant drew his gun and fired. We are not obligated to accept as true the rebutted allegations of the petition and affidavits.

¶ 20 Defendant extensively cites *People v. Hodges*, 234 Ill. 2d 1 (2009), where our supreme court reversed the summary dismissal of a petition raising a claim of ineffective assistance based on three affidavits that arguably supported the defense theory of second degree murder based on an unreasonable belief regarding self-defense. *Hodges*, 234 Ill. 2d at 17-23. However, *Hodges* is distinguishable from the instant case: the affidavits there were not rebutted by the trial record on the decisive point (*see Hodges*, 234 Ill. 2d at 19-21) and thus had to be accepted as true at the first stage of post-conviction proceedings. As stated above, factual allegations rebutted by the trial record are an exception to that rule.

¶ 21 The affidavits here are not contradicted or rebutted insofar as they establish that Harris earlier stated his intent to beat defendant. However, the existence of Harris' verbal threat to beat defendant was not decisive on the instruction issue on direct appeal so that neither is further corroboration of such threats and intention. Similarly, Allgood's averment that he fired his gun to distract defendant corroborates defendant's testimony that he heard multiple gunshots other than his own, but we found it dispositive of the instruction issue on direct appeal that Harris was not presenting an imminent physical danger to defendant when defendant fatally shot him. While the affidavits provide additional non-contradicted evidence, that evidence does not substantively alter our direct appeal decision that the denial of self-defense and second degree murder instructions was not erroneous. In other words, since the trial evidence of Harris's verbal threat and defendant hearing gunshots as he pursued Harris was not found by this court on direct appeal

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to be the slight evidence that would require such instructions, adding corroboration on those points does not change the outcome.

¶ 22 For the aforementioned reasons, we conclude that summary dismissal of the petition as frivolous and patently without merit was not erroneous as contended. Accordingly, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.