

No. 1-13-1580

**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. 10 MC1 439422
	)	
YOLANDA GARZA,	)	Honorable
	)	Ursula Walowski,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Pursuant to *People v. Boclair*, 202 Ill. 2d 89 (2002), the circuit court may not consider timeliness when determining whether to dismiss an initial postconviction petition during first stage proceedings under the Post-Conviction Hearing Act. The circuit court erred in summarily dismissing defendant's postconviction petition because it had an arguable basis in law and fact where defendant alleged that she was denied the effective assistance of counsel by trial counsel's failure to impeach the victim with a prior felony conviction.
- ¶ 2 Defendant Yolanda Garcia appeals from the summary dismissal of her petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On

appeal, defendant contends the circuit court erred in dismissing her petition because her claims have arguable bases in law and fact. Specifically, defendant contends that she was denied the effective assistance of counsel by trial counsel's failure to impeach the victim with a prior felony conviction, and to prepare her to testify regarding the victim's bias and motive to testify falsely against her. We reverse and remand.

¶ 3 Following a jury trial, defendant was convicted of domestic battery of the victim, her brother Rey Garza, and sentenced to 18 months of conditional discharge. The evidence at defendant's trial established that defendant swore and threw rocks at the victim as he mowed a neighbor's yard. Although the victim testified that he called the police and that the rocks hurt and left red marks on his body, he did not seek medical attention or take any pictures of his injuries. Timothy Metz, whose yard the victim was mowing, also saw defendant throw rocks and debris at the victim which struck the victim's upper body. Christopher Staszak, another neighbor, testified that he heard defendant yelling and saw her throwing what appeared to be rocks at the victim, however, defendant later told him that she had only thrown coins at the victim.

¶ 4 At the close of the State's case, the defense made a motion for a finding for defendant and a judgment of acquittal, which the trial court denied. When the defense indicated that it would not be presenting any witnesses, the court asked defendant whether she understood that she had the right to testify on her own behalf. After defendant indicated that she understood, the court admonished defendant that it was her decision, and hers alone, whether to testify. Defendant indicated that she understood and did not want to testify. The court then inquired whether, over the lunch hour, defendant had thought about her decision and discussed it with counsel. Defendant answered in the affirmative.

¶ 5 The jury ultimately found defendant guilty of domestic battery, and the court sentenced her to 18 months of conditional discharge on September 23, 2011. This judgment was affirmed on appeal. See *People v. Garza*, 2013 IL App (1st) 113136-U.

¶ 6 On July 18, 2012, during the pendency of defendant's direct appeal, she filed a petition for postconviction relief. The petition alleged, *inter alia*, that she was denied the effective assistance of counsel when trial counsel failed to impeach the victim with a prior felony conviction and to prepare her to testify regarding the victim's motive to testify falsely against her. Attached to the petition in support was a certified statement of conviction indicating that in 2006 the victim was convicted of aggravated driving under the influence of alcohol (DUI) and sentenced to 18 months in prison. Also attached to the petition in support was the affidavit of defendant.

¶ 7 In her affidavit, defendant averred that the victim became enraged when she refused to lie about the victim's drinking to an investigator from the Department of Children and Family Services. Defendant further averred that her relationship with the victim worsened when she reported him to the police when he was drunk and causing a disturbance. She finally averred that although she wanted to testify at trial regarding her relationship with the victim and asked trial counsel to prepare her to testify, counsel refused. Consequently, because she was unprepared, defendant declined to testify at trial.

¶ 8 The circuit court summarily dismissed defendant's postconviction petition finding, *inter alia*, that it was untimely pursuant to *People v. Warr*, 54 Ill. 2d 487 (1973). It is from this judgment that defendant appeals.

¶ 9 Initially, we note that the circuit court summarily dismissed defendant's petition, in part, based upon timeliness. Here, because defendant was convicted of a misdemeanor, her postconviction petition was due within six months of the entry of judgment in September 2011 (*People v. Warr*, 54 Ill. 2d 487, 493 (1973)), and she filed her petition approximately ten months later. However, the circuit court may not consider timeliness when determining whether to dismiss an initial postconviction petition during first stage proceedings under the Act. See *People v. Bocclair*, 202 Ill. 2d 89, 101-02 (2002). In a footnote, the State acknowledges that the circuit court improperly dismissed the petition as untimely, but argues that this court may affirm the circuit court upon any basis supported by the record. See *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005).

¶ 10 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 2012). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In *People v. Tate*, 2012 IL 112214, our supreme court stated that first-stage review permits the circuit court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *Tate*, 2012 IL 112214, ¶ 9, quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12; see also *Tate*, 2012 IL 112214, ¶ 9 ("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*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 11 On appeal, defendant first contends that the circuit court erred by summarily dismissing her petition because she was denied effective assistance of counsel when trial counsel failed to impeach the victim with a prior conviction for aggravated DUI.

¶ 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 her. *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 Initially, we reject the State's argument that counsel's decision not to impeach the victim with his prior conviction was a matter of trial strategy that cannot support a claim of ineffective assistance of counsel because 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 postconviction proceedings, when a defendant 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 the claims in

defendant's petition met "the 'arguable' *Strickland* test" applied at the first stage of proceedings under the Act. *Tate*, 2012 IL 112214, ¶¶ 20, 23. If it does, then this cause must be remanded for further proceedings under the Act.

¶ 14 Turning to the allegations contained in defendant's petition, as well as the certified statement of conviction attached in support of the petition, we conclude that defendant's claim has an arguable basis in fact and law. Here, defendant's postconviction allegation cannot be characterized as fantastic or delusional when the certified statement of conviction attached to the instant petition established that the victim was convicted of aggravated DUI in 2006. See *Hodges*, 234 Ill. 2d at 17. Similarly, defendant's legal theory that counsel was ineffective for failing to impeach the victim with this prior conviction is not indisputably meritless when it is not completely contradicted by the record. See *Hodges*, 234 Ill. 2d at 16. At trial, although the victim and two witnesses testified that defendant threw rocks at the victim, the victim was the only person who testified regarding bodily harm, *i.e.*, the red marks on his body caused by the rocks. See 720 ILCS 5/12-3.2(a) (West 2010). Because the impeachment of the victim with his prior aggravated DUI conviction could have affected his credibility and caused the jury to discount his testimony regarding the element of bodily harm, it is at least arguable that defendant was prejudiced by counsel's failure to use this prior conviction to impeach the victim and that counsel's performance fell below an arguable standard of reasonableness. *Tate*, 2012 IL 112214, ¶¶ 23-24.

¶ 15 Based upon our finding above that it is at least arguable that defendant was denied the effective assistance of counsel by trial counsel's failure to impeach the victim with a prior conviction, this court need not reach defendant's claim that she was denied the effective

assistance of counsel by trial counsel's refusal to prepare her to testify. See *Rivera*, 198 Ill. 2d at 374 (the Act does not permit partial dismissals at the first stage). Although we remand this case for second stage proceedings under the Act, we express no opinion as to whether defendant 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, ¶ 26. We likewise leave the question of timeliness for resolution at the second stage of proceedings. *People v. Perkins*, 229 Ill. 2d 34, 48 (2007) (the issue of timeliness is first considered by the circuit court at the second stage of proceedings under the Act).

¶ 16 For the reasons stated above, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings under the Act.

¶ 17 Reversed and remanded.