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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 04-CF-2933
)	
DANIEL A. VALERIO,)	Honorable
)	Randy Wilt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly summarily dismissed defendant's postconviction petition, which alleged that appellate counsel was ineffective for failing to argue that the trial court erred in admitting photographs: because the evidence of defendant's guilt was overwhelming such that the alleged error was harmless, there was no reasonable probability that the appeal would have been successful.

¶ 2 Defendant, Daniel A. Valerio, 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)). He contends that his petition states an arguable claim that appellate counsel was ineffective. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2004)), arising out of the shooting death of Juan Vargas. A detailed summary of the evidence presented at defendant's trial can be found in *People v. Valerio*, No. 2-07-0676 (2009) (unpublished order under Supreme Court Rule 23). We briefly summarize it here. On September 3, 2004, 17-year-old defendant fired several gunshots at 17-year-old Vargas, who defendant considered to be affiliated with a rival gang. *Id.* at 2. At the time of the shooting, Vargas was driving a car, and his mother, who was one of three passengers, was sitting in the back seat. *Id.* Vargas's mother testified that she heard gunshots and that Vargas then told her that he had been hit. *Id.* At least two bystanders witnessed the shooting. *Id.* at 3. They testified that they were driving near Vargas's car when they heard gunfire and saw someone extend an arm out of the window of a gray car. *Id.* One witness followed the gray car to a gas station, wrote down the last four digits of the car's license plate number, and called 911. *Id.*

¶ 5 An officer, who was in the area of the shooting, located the suspect car not far from where the shooting had occurred. *Id.* Defendant was one of three individuals in the car. *Id.* As defendant exited the vehicle, the officer saw a gun under the floorboard near defendant. *Id.* In addition, 9-millimeter bullets were found in defendant's pocket. *Id.* at 4. Defendant was taken into custody, and, during an interview with an officer, defendant confessed to shooting Vargas. *Id.* Defendant signed a written confession later that evening. *Id.*

¶ 6 In his written statement, defendant stated that he was a member of the Latin Count gang. *Id.* During the past three years, members of the Latin Kings, a rival gang, would drive by his house, throw up gang signs, and try to intimidate his family. *Id.* On the day of the shooting, defendant's mother told him that Vargas had driven by defendant's house. *Id.* Defendant knew

Vargas to be a “ ‘little wanna be b***h’ ” who “ ‘ended up hanging with the Latin Kings.’ ” *Id.* Defendant’s mother showed him a video (taken by a surveillance camera that his mother had installed at the house) of the car that had driven by the house. *Id.* The video showed a white four-door car with several people in it. *Id.* Later that day, defendant was getting into his friend’s car, along with another friend, when he saw Vargas drive by in the same car that defendant had seen on the video. *Id.* at 5. According to defendant, the people in the white car were “ ‘throwing up the crown’ ” to show that they were Latin Kings. *Id.* Defendant stated, “ ‘[A]s soon as I saw [Vargas] I knew that I wanted to shoot at him.’ ” *Id.* At that point, defendant pulled a gun from his waistband, pointed it out the car window, and fired five or six shots at Vargas’s car and at Vargas. Defendant stated, “ ‘I guess I shot at [Vargas] so that he would stop passing by my house and trying to scare me and my family.’ ” *Id.* According to defendant, he had purchased the 9-millimeter handgun about two weeks prior to the shooting. *Id.*

¶ 7 The forensic pathologist who conducted the autopsy on Vargas testified that the bullet that caused Vargas’s death entered Vargas’s left chest, went through his left lung, then his aorta, then his right lung, and finally lodged beneath his skin on the right side of his back. *Id.* at 2. The trial court allowed into evidence “13 hospital and autopsy photographs” that were taken during the autopsy. The photographs were displayed to the jury on a screen that was 68 inches high and 82 inches wide. Defense counsel had previously objected to the admission of the photographs, arguing that they were “very gruesome” and prejudicial. The trial court overruled the objection. In addition, defense counsel objected to the photographs being displayed on the screen, and the objection was overruled.

¶ 8 The jury found defendant guilty, and the trial court sentenced defendant to a 30-year prison term, plus a 25-year sentence enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)),

for a total of 55 years in prison. Defendant appealed, arguing that he was denied the effective assistance of counsel (as to jury instructions) and that the trial court improperly considered in aggravation the death of the victim, a factor implicit in the offense. We affirmed defendant's conviction but vacated his sentence and remanded for a new sentencing hearing. *Id.* at 22. On remand, the trial court sentenced defendant to a 25-year prison term, plus a 25-year sentence enhancement. Defendant again appealed, arguing that his sentence was excessive. We affirmed. *People v. Valerio*, No. 2011 IL App (2d) 100556-U.

¶ 9 On March 20, 2012, defendant filed a *pro se* petition under the Act, arguing, *inter alia*, that appellate counsel was ineffective for failing to challenge on appeal the admission and enlarged display of the autopsy photographs of Vargas. The trial court denied the petition as frivolous and patently without merit. Defendant timely appealed.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends that his petition states an arguable claim that appellate counsel's failure to challenge the admission and display of the autopsy photographs fell below an objective standard of reasonableness and further that he was prejudiced by counsel's performance because the issue had merit. The State responds that the trial court did not abuse its discretion in admitting the photographs. Further, the State argues that, even if admission of the photographs was error, any error was harmless beyond a reasonable doubt and thus defendant cannot establish a probability that, had appellate counsel raised the issue, the result of the proceeding would have been different.

¶ 12 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings that resulted in his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of a postconviction proceeding, the trial court

independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9; *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Tate*, 2012 IL 112214, ¶ 9; *Hodges*, 234 Ill. 2d at 11-12. A petition lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis in fact if it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Id.* at 16-17. We review *de novo* the summary dismissal of a postconviction petition. *Tate*, 2012 IL 112214, ¶ 10.

¶ 13 Claims of ineffective assistance of appellate counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010); *People v. Golden*, 229 Ill. 2d 277, 283 (2008). A defendant raising a claim of ineffective assistance of appellate counsel must show that appellate counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the appeal would have been successful. *Petrenko*, 237 Ill. 2d at 497; *Golden*, 229 Ill. 2d at 283. Thus, at the first stage of proceedings under the Act, a petition alleging ineffective assistance of appellate counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness ("performance" prong), and (ii) it is arguable that, but for counsel's deficient performance, there is a reasonable probability that the appeal would have been successful ("prejudice" prong). *Petrenko*, 237 Ill. 2d at 497; *Hodges*, 234 Ill. 2d at 17. If the petition failed to satisfy one prong of the test, we may reject the claim without considering whether the petition met the other prong. See *People v. Hatchett*, 397 Ill. App. 3d 495, 510 (2009). "If it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Strickland*, 466 U.S. at 694.

¶ 14 We find that defendant’s petition failed to establish the prejudice prong of the test, because, even if we assume that the trial court abused its discretion in admitting the 13 photographs, the overwhelming evidence of defendant’s guilt rendered any such error harmless. See *People v. Becker*, 239 Ill. 2d 215 (2010) (“[W]e need not address the admissibility [of certain statements] as their admission at trial was harmless, assuming, *arguendo*, it was error at all.”)¹ As a result, it is not arguable that, but for appellate counsel’s failure to raise the issue, there is a reasonable probability that the appeal would have been successful.

¹ Here the State introduced 13 photographs regarding the circumstances of the victim’s death; 2 portray the victim on a hospital bed and the remaining 11 were taken during the course of the victim’s autopsy. Autopsy is an extremely helpful forensic tool and photos depicting the evidence gleaned from that process are relevant, material, and probative to any number of issues in a given case. However, autopsy photos, by their nature are gruesome and prejudicial. While the State has the right to present evidence on every element of the case including cause of death, even where the defense is willing to stipulate, that right is tempered by the balancing of the probative value and prejudicial effect. It is the obligation of the trial court to weigh the probative value and prejudicial effect of each photo to determine whether it is admissible and, if so, in what fashion it should be published to the jury.

Although here we find the evidence of defendant’s guilt overwhelming, and thus affirm, we caution that in a closer case displaying such photos on a screen that is nearly six by seven feet might not produce the same result.

¶ 15 “The improper admission of evidence is harmless error if no reasonable probability exists that the verdict would have been different if the evidence at issue had been excluded [citation], such as where the evidence of guilt is overwhelming [citation].” *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 65; see also *People v. Graves*, 2012 IL App (4th) 110536, ¶ 32 (“Error will be deemed harmless and a new trial unnecessary when the competent evidence in the record establishes the defendant’s guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result. [Citation.]” (Internal quotation marks omitted.)). Here, the evidence against defendant was indisputably overwhelming, and, indeed, defendant makes no effort to argue otherwise. Two bystanders witnessed the shooting, and one provided a description of the suspect vehicle. A patrol officer, who had been in the area of the shooting, stopped the suspect vehicle with defendant inside. The officer saw a gun under defendant’s seat, and defendant had bullets in his possession. Defendant confessed to shooting Vargas and explained his motive. In light of this overwhelming evidence, no reasonable probability exists that, had the autopsy photographs been excluded, the verdict would have been different and, thus, any error in admitting the photographs was harmless. Given that the claimed error was harmless, no prejudice resulted from appellate counsel’s failure to raise the issue on appeal. See *People v. Smith*, 341 Ill. App. 3d 530, 547 (2003) (no prejudice resulted from appellate counsel’s failure to challenge the admission of certain evidence where the defendant’s oral confession and positive identification as the perpetrator rendered the evidence overwhelming). Accordingly, we hold that the petition was properly dismissed.

¶ 16

III. CONCLUSION

¶ 17 For the reasons stated, we affirm the summary dismissal of defendant's *pro se* postconviction petition.

¶ 18 Affirmed.

¶ 19 JUSTICE McLAREN, specially concurring.

¶ 20 I specially concur because I wish to emphasize a point which the majority does not address.

¶ 21 The State claims that there was no abuse of discretion in allowing 13 graphic autopsy photographs into evidence when the cause of death was not contested. The majority assumes the admission of the photographs may have been error and decides the case on the prejudice prong. Simply put, it was an abuse of discretion. Luckily for the State, it did not alter the outcome of the case. However, that does not change the fact that it was error and should not be condoned or disregarded.