

NOTICE
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2014 IL App (5th) 120397-U

NO. 5-12-0397

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 04-CF-114
)	
ANDREW SCOTT,)	Honorable
)	Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* Where the allegation of ineffective assistance of trial counsel in the defendant's postconviction petition was not frivolous or patently without merit, the circuit court's dismissal of the petition is reversed and the cause is remanded to the circuit court for further proceedings under the Act.

¶ 2 The defendant, Andrew Scott, appeals the order entered by the circuit court of St. Clair County dismissing his petition for relief during the first stage of the postconviction proceedings. For the following reasons, we reverse and remand.

¶ 3 The defendant's jury trial took place on June 22 and 23, 2009. Evidence presented at trial demonstrated that on January 25, 2004, a fight broke out around 3 a.m. at the nightclub "Four Corners Club," eventually moving into the parking lot. During the

fighting, someone fired a gun, and subsequently a red Cadillac driven by Carmel Brown left the lot. Latisha Samuels and Artimus Collier were among Brown's six or seven passengers. Collier was seated directly behind Brown, and Samuels sat next to Collier. Collier testified that neither he nor Samuels had been shot in the parking lot, prior to entering the vehicle. Approximately three minutes later, a white Chevrolet Caprice pulled up alongside the Cadillac. The defendant, a passenger in the Caprice, testified that he thought he saw someone in the backseat of the Cadillac aiming a gun at him, so he randomly fired multiple gunshots into the Cadillac. After the shots were fired, the Cadillac went off the road. Brown died of a bullet wound to the head, though she also was found to have a gunshot entry wound in her left shoulder and exit wound in her upper left arm. Samuels and Collier were wounded. One bullet struck Samuels in her left leg. Collier suffered multiple gunshot wounds to his abdomen. The jury was instructed on the theories of self-defense and second-degree murder based on an unreasonable belief in self-defense. The defendant was convicted and sentenced for the second-degree murder of Brown, the aggravated battery with a firearm of Samuels, and for armed violence predicated on the aggravated battery of Collier. His conviction and sentence were affirmed on direct appeal. *People v. Scott*, No. 5-09-0468 (2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 The defendant filed a *pro se* postconviction petition on July 11, 2012, alleging that he received ineffective assistance from his trial counsel where his counsel failed to investigate and interview a pertinent witness, because "trial counsel erroneously believed that if [the defendant] was found guilty of 2nd degree murder the remaining charges

against [the defendant] would have been dismissed." The defendant's petition alleged that he made his counsel aware of several witnesses who had information regarding the injuries that Collier received that night, specifically, that "Mr. Collier was shot while outside of the nightclub before he got in the Cadillac in question." The defendant stated that he requested that trial counsel talk to Rodney Roberts, who was a fellow club patron that evening. The defendant claimed that Roberts witnessed Collier being shot outside of the nightclub, and therefore Roberts "had information that would have exonerated [the defendant] of the charges" as to the armed violence offense against Collier. The defendant's petition stated that "trial counsel essentially brushed [him] off and after further discussion on a different issue trial counsel told [him] that if he was found guilty of 2nd degree murder the rest of the remaining charges against [him] would be dismissed."

¶ 5 Attached to the postconviction petition was the defendant's affidavit, which averred that the defendant told his counsel that he had information from potential witnesses who heard Collier say that he was shot at the nightclub, prior to the incident in the Cadillac, and that he also knew of a witness (Roberts) that claimed to have seen Collier get shot before getting in the Cadillac. The defendant stated that when he attempted to convey the names and locations of the witnesses to trial counsel, counsel began discussing a different matter. When the defendant inquired about the remaining charges, "trial counsel informed [him] that [his] best defense was Second Degree Murder, because if [he] won a Second Degree Murder conviction the remaining charges would be dismissed."

¶ 6 Also attached to the petition was an affidavit from Roberts. Roberts stated that he was at the club that evening with Collier and other friends. He noted that the club was shut down in the early morning hours because of a fight, and everyone was told to leave. As the patrons made their way to the cars, gunshots went off and people began to panic. He stated that he saw "my friend, 'Artie' Collier and an unknown male being shot at this time. [Collier] was helped to a red Cadillac that belonged to Sebastian and 5 or 6 other people also got in the vehicle." Roberts stated that Collier was walking and talking after the shooting; because he knew that Collier "would be okay," Roberts decided to go home instead of going to the hospital. He noted that the next day, he heard about another shooting after he left the club, and that the defendant was the perpetrator of the second shooting. He stated that he had known the defendant from school and saw him several times that night, but neither he nor anyone he was with that night had a problem with the defendant. Roberts concluded that "[he] was not sure why or if [the defendant] was the shooter in the second shootin [*sic*], but the shooter at the club was too tall to have been him."

¶ 7 The defendant also attached Collier's relevant hospital records. Collier's January 25, 2004, "History and Physical Examination" stated that Collier's "chief complaint" was that "he was shot while he was in the car just prior to being taken to the emergency room at Touchette Hospital." However, under "history of present complaint," the report states: "[Collier] said it occurred in front of Four Corners Tavern. [He] claimed that he heard some shots being fired and 2 of them hit him in the left side of his abdomen. [He] was taken to the emergency room at Touchette Regional Hospital and was found to have a

gunshot wound of the abdomen. One of them apparently did not penetrate but just stayed under the skin. The other one was found to be deep." The report noted that Collier was fully conscious and alert, but smelled of alcohol. Under "abdomen," the physician observed two gunshot wounds, one with a ragged edge and no exit wound, and second one just below the first area that did not penetrate, but created a ragged laceration surrounded by powder. In Collier's "Discharge Summary" report, the "summary" section noted that Collier "stated that he was shot in the car just prior to coming to be taken to Touchette Regional Hospital Emergency Room," but the "history of the present complaint" stated that Collier reported that "he was in front of Four Corners Tavern when he heard some shots, and one of the shots hit him in his abdomen." The report states that "[o]ne [gunshot wound] was superficial and local. Another one was very raggedy and went from the left side of the abdomen to the right side of the abdomen and was felt in the upper abdomen. There was some tenderness in the upper abdomen."

¶ 8 The circuit court dismissed the petition on August 22, 2012, finding that the defendant had failed to assert the gist of a constitutional claim. The defendant appeals from the first-stage summary dismissal of his petition.

¶ 9 The Post-Conviction Hearing Act (Act) allows an individual convicted of a criminal offense to challenge the proceeding in which he or she was convicted under the United States or Illinois Constitution or both. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). The Act contemplates a three-stage process for adjudicating a petitioner's request for collateral relief. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). At the first stage of the proceedings, a petition for relief may be

summarily dismissed within 90 days after its filing if it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). At this stage of the proceedings, all well-pled facts in the petition or accompanying affidavits are taken as true unless positively rebutted by the original trial record, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). Our review of the circuit court's dismissal of the defendant's postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 388.

¶ 10 Initially, the State argues that the defendant's petition is not well-pled, and therefore need not be taken as true, because his claim that trial counsel failed to interview a witness did not set forth specific facts to support that it was based on personal knowledge. Section 122-2 describes what must be contained in a postconviction petition; first, it requires that the petitioner "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2012). The petitioner must also attach relevant affidavits, records, or other evidence supporting his allegations or state why such evidence is not attached, in order to establish that a petition's allegations are capable of objective or independent corroboration. 725 ILCS 5/122-2 (West 2012); *Hodges*, 234 Ill. 2d at 10.

¶ 11 We find the petition to be well-pled. A petitioner at the first stage is only required to present a limited amount of detail, and the allegations are only required to make out a claim that is "arguably constitutional" for purposes of invoking the Act. *Hodges*, 234 Ill. 2d at 9. In his petition and affidavit, the defendant alleged that he requested that trial counsel interview several witnesses, and named Roberts specifically because he believed

that Roberts had information that would have exonerated him from the charges relating to Collier. He states that counsel ignored his request ("brushed [him] off") and "counsel never attempted to investigate this information or contact Roberts." These assertions are specific factual allegations describing his counsel's ineffectiveness. The affidavit from Roberts sets forth the proposed testimony from the supposedly pertinent witness, and the information contained in it is capable of corroboration if an evidentiary hearing is held. Moreover, the facts in the defendant's petition and attached affidavits are not positively rebutted by the trial record. We find that the defendant has met the minimal pleading requirements of section 122-2. See *Coleman*, 183 Ill. 2d at 380-82 ("A petition meeting these requirements, both to substantial allegations of the denial of a constitutional right and as to affidavits, is sufficient to invoke the act." (Internal quotation marks omitted)).

¶ 12 Finding the defendant's petition to be well-pled, we turn to whether the petition's claim of the ineffective assistance of counsel is nevertheless "frivolous or patently without merit" per the statute. See 725 ILCS 5/122-2.1(a)(2) (West 2012). A postconviction petition is considered frivolous or patently without merit if it has "no arguable basis either in law or in fact," *i.e.*, it was based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. Taking the defendant's facts as true, as we must at this stage, we cannot find the petition's allegations to be frivolous or meritless.

¶ 13 The United States and Illinois Constitutions guarantee the right to effective assistance of counsel in a criminal trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are evaluated under the two-prong

test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To prevail under this test, a defendant must demonstrate that his counsel's performance was deficient, and that the deficient performance so prejudiced the defendant that he was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 305 (2006). Under the more lenient formulation of this rule at the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 49.

¶ 14 When a defendant alleges that his counsel's inaction rendered ineffective assistance, he must overcome a strong presumption that his counsel's conduct constituted sound trial strategy and fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 688. Where counsel knows the general thrust of a potential witness's testimony, and believes as a matter of trial strategy that the testimony would be unhelpful or not credible, counsel is not required to interview that witness. *People v. Marshall*, 375 Ill. App. 3d 670, 678 (2007). The State argues that it was reasonable trial strategy to not interview Roberts, as his testimony would have not been helpful or credible because it was contradicted by Collier and the other testifying witnesses. However, in making such strategic decisions, a defense attorney is also required to make reasonable investigations or to make reasonable decisions that make particular investigations unnecessary; this includes the affirmative obligation to explore readily available sources of evidence that may benefit their clients. *People v. Domagala*, 2013

IL 113688, ¶ 38; *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Given the defendant's allegation and the content of Roberts's affidavit, it is at least arguable that the defendant would have benefited from Roberts's testimony. Roberts's statement provided potential impeachment evidence for Collier's testimony that he was shot in the car, not the parking lot as he claimed, and thus would have introduced to the jury a potentially exonerating defense theory: that the defendant's shots into the Cadillac did not cause Collier's injuries, and therefore the defendant should have been acquitted of that charge. See *Morris*, 335 Ill. App. 3d at 81 (finding that the alleged failure by defense counsel to interview a witness may be indicative of ineffective representation, particularly when the record reflects that the defendant told his counsel about an alibi witness prior to trial, and his testimony was favorable). As to the credibility of the potential testimony, it appears, based on the language of Roberts's affidavit, that he was not well acquainted with the defendant but was Collier's friend; Roberts averred he was with Collier that night and had considered going to the hospital with him after he was shot. If Roberts was indeed friendlier with Collier than with the defendant, the defendant's introduction of the favorable affidavit actually increases its credibility and probative value. We also note that it is unlikely that trial counsel could have made a strategic decision about the helpfulness or credibility of Roberts's testimony without investigating or interviewing him. In short, the petition, affidavits, and record raise unanswered questions as to counsel's failure to interview Roberts, and reveal no strategic reason for not interviewing him. It is therefore at least arguable that counsel's failure to interview Roberts fell below an objective standard of reasonable representation.

¶ 15 It is also arguable that the defendant was prejudiced by his counsel's performance. The State argues that in light of the strength of the prosecution's case and minimally probative nature of Roberts's potential testimony, defense counsel's belief that the jury would be convinced by it would have been "delusional." However, "[t]he unlikelihood of a factual proposition does not make that proposition 'fantastic or delusional,' for the unlikely can turn out to be true." *Coleman*, 2012 IL App (4th) 110463, ¶ 48. Roberts's averment, particularly when combined with Collier's statements to hospital staff, would have presented the jury with the *possibility* that the defendant was not responsible for Collier's injuries, and therefore given the defendant the possibility of an acquittal from the armed violence charge. This is sufficient to support our finding that it is at least arguable that the defendant was prejudiced by counsel's performance.

¶ 16 Finally, the defendant argues that he is entitled to additional credit for time served. A defendant is entitled to one day of credit against his sentence for every day, or portion thereof, that he spends in custody prior to sentencing. 730 ILCS 5/5-4.5-100(b) (West 2012); *People v. Andrews*, 365 Ill. App. 3d 696, 699 (2006). This court may modify the mittimus where there is an error in the calculation and the issue is raised on direct appeal from the dismissal of a postconviction petition, even though the error is not a constitutional one. *Andrews*, 365 Ill. App. 3d at 699-700. The State concedes this point, and we hold that the mittimus should be amended to reflect that the defendant was in custody beginning on January 27, 2004, instead of January 28, 2004, so as to grant an additional day of presentence custody credit.

¶ 17 We cannot say that the petition failed to set forth sufficient facts to establish a constitutional violation for purposes of invoking the Act, nor that it was frivolous or patently without merit. We therefore reverse the circuit court's judgment and remand for second-stage proceedings, with directions to the circuit court to amend the mittimus to reflect an additional day of presentence custody credit.

¶ 18 Reversed and remanded with directions.