

No. 1-14-1197

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 2977
	)	
JAMAL BENNETT,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Summary dismissal of defendant's postconviction petition was proper where he failed to make an arguable claim of actual innocence or ineffective assistance of trial counsel.
- ¶ 2 Defendant Jamal Bennett, who was convicted of aggravated criminal sexual assault, armed robbery, and aggravated kidnapping, appeals from the summary dismissal of his petition for relief (petition) under the Post-Conviction Hearing Act (Act). 725 ILCS 5/22-1 *et seq.* (West 2014). On appeal, defendant argues that the trial court erred in dismissing the petition, as it stated the gist of a claim both of actual innocence based on an affidavit from the victim which

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contained a point which was inconsistent with her trial testimony and ineffective assistance of trial counsel for failing to elicit evidence that defendant has a scar on his right index finger to corroborate his testimony that the victim slashed him with a blade cutter. For the reasons that follow, we affirm.

¶ 3 Defendant and his codefendant, Darius Burnett, were each charged with committing several offenses in the early morning hours of January 21, 2007, including multiple counts of aggravated criminal sexual assault, armed robbery, and aggravated kidnapping of B.M. Their trials were severed. Following a bench trial, defendant was found guilty and, ultimately, sentenced to 18 years' imprisonment. On direct appeal, this court affirmed defendant's convictions and sentence. See *People v. Bennett*, 2012 IL App (1st) 101909-U. In *Bennett*, we set forth the trial evidence in detail, which we partially repeat here due to the nature of defendant's present claims.

¶ 4 The victim first testified regarding portions of her criminal history, stating that she had six felony convictions and six misdemeanor convictions for charges ranging from retail theft, to possession of a controlled substance with the intent to deliver. Although a recent charge of escape against the victim was dismissed, she indicated no promises had been made to her regarding that charge in exchange for her testimony in this case. The victim acknowledged that she provided several different aliases and incorrect dates of birth in prior unrelated interactions with the police.

¶ 5 Regarding her attack, the victim testified that around midnight on January 21, 2007, a vehicle with two male occupants pulled in front of her while she was walking near 67th Street and Ashland Avenue. A male exited the vehicle with a .38-caliber revolver. She initially thought

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the man just wanted money, so she gave him \$55, but he ordered her to get into the back seat of the vehicle. When she complied, the driver, whom the victim identified to be defendant, drove around for a while and eventually stopped in an alley near 60th and Honore Streets. The other male, who was pointing the gun at the victim, instructed her to take off her clothes. She complied, and defendant got into the back seat with the victim. Although defendant wanted oral sex, the victim was unable to comply because "he had an awful smell and [she] just started gagging."

¶ 6 Defendant then ordered her to turn around and he raped her vaginally from behind while she was on her knees. The other male then handed the gun to defendant and also raped the victim vaginally. He then retrieved the gun from defendant and said: "I should kill this b\*\*\*\*." Defendant disagreed, and ordered the victim out of the car. Without her clothes, the victim exited the vehicle and the two men drove away. As they were leaving, the victim observed the vehicle's license plate number.

¶ 7 The victim further testified that she was naked and cold, when she knocked on the door of a nearby home. An older woman and a younger woman let her in. They gave her a blanket and some clothes, as well as a pencil to write down the license plate number. The police were called to the house. When they arrived, she told them what happened, described the two men, and gave them the license plate number. She was then taken to a hospital, where she was treated, and rape kits were prepared. At trial, the victim identified photographs of a vehicle located at defendant's home as being the one involved in the incident.

¶ 8 The trial court precluded defense counsel on cross-examination from asking the victim if she had ever worked as a prostitute, finding such testimony would violate the rape shield statute.

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The victim denied telling the police the two men actually took \$50 from her, and that the gun was only "possibly" a revolver. She denied telling the police that when defendant raped her, she was lying on her back and he was standing partially outside the car. She also testified that while she usually carries a knife, she did not have one on the night of the incident.

¶ 9 Mildred Shaw testified that on January 21, 2007, she lived in an apartment on the 6000 block of South Honore Street. Shortly after midnight, Ms. Shaw observed the victim standing naked at her doorstep and let her inside. The victim told Ms. Shaw she had been raped by two men at gunpoint, and one of the men wanted to shoot her, while the other said they should just take her clothes. Ms. Shaw gave her some clothes, and the victim asked her for a pencil to write down the license plate number of the vehicle driven by the two men. The police were called to the scene, and the victim soon left with them.

¶ 10 The State then presented testimony from Megan Neff, a forensic scientist employed by the Illinois State Police crime lab. Ms. Neff testified that she developed DNA profiles from the vaginal DNA samples from the rape kits, a blood sample from the victim, and buccal swabs obtained from defendant and codefendant. The semen from the vaginal rape kit contained two profiles. The first major profile matched codefendant, but the second minor profile did not. Defendant could not be excluded as the donor of the minor DNA profile, which would be expected to occur in only 1 in 1.1 billion black, 1 in 11 billion white, and 1 in 1.1 billion Hispanic individuals that were not related.

¶ 11 The trial court subsequently reconsidered its prior ruling regarding the admissibility of several of the victim's prior arrests and convictions as this evidence might evince bias, interest, or motive. The victim then testified regarding additional portions of her criminal history,

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including that she was charged with prostitution sometime between the rape and her trial in this case, and she served three days of jail time. The victim further testified that nothing had been promised to her regarding her prior arrests or convictions. Defense counsel did not cross-examine the victim on any of this additional evidence.

¶ 12 The State called Detective Luis Otero, who testified that on January 21, 2007, defendant identified a picture of the victim as being "the woman that he was with earlier that evening." Detective Peter Schumacher testified he was present when defendant was arrested at his residence, and that a vehicle matching the description provided by the victim, including the license plate number, was located there at the time.

¶ 13 The parties stipulated that Dr. Jehangir Meer would testify he treated the victim for an alleged sexual assault on January 21, 2007. Dr. Meer completed a vaginal rape kit and found no evidence of trauma. While treating her, the victim stated she was raped by two men and that her "assailant used a condom." The parties also entered into a number of stipulations regarding the proper chain of custody for the rape kits and buccal swabs.

¶ 14 After the State rested, defendant moved for a directed finding, which the court denied.

¶ 15 Defendant testified that on the evening of January 20 to January 21, 2007, he was driving with codefendant in the front-passenger seat when they noticed the victim walking down the street. Honking the car horn, the two men tried to get her attention, because she appeared to be a prostitute and codefendant wanted to "pick her up." She ignored them at first. After they pulled around a second time, codefendant asked her if she wanted to make some money and she got into their vehicle. Sometime later, defendant parked in an alley near 61st and Honore Streets, where defendant agreed to go first, "just to get it out of the way." Joining the victim in the back seat,

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defendant gave her \$10 for oral sex. However, after a few seconds, he told her to stop because she was "biting" him. Defendant denied having vaginal intercourse with the victim or ejaculating. Defendant then returned to the driver's seat of the car, turned up the music, and sent a text message to his girlfriend, while codefendant had sex with the victim in the back seat. She was never fully undressed and, at most, she pulled her pants down.

¶ 16 Defendant testified that, shortly thereafter, the victim began complaining and asking for more money, which the two men did not have. Defendant then told her to get out of the car, but the victim began swinging a "box cutter" around. Defendant eventually "yanked" the victim out of the car, and at that time, the box cutter, and a hat containing the money he had given her, fell on the ground. Defendant saw codefendant take the money from the hat, and the two men drove away. Defendant stated that neither he nor codefendant was armed with a gun that night, and that he never heard codefendant say: "Shoot the b\*\*\*\*."

¶ 17 On cross-examination, defendant stated that he assumed the victim was a prostitute because, having lived in the neighborhood since he was young, he knows "who is who" and he had never seen her in the neighborhood before, so "obviously she had to be working." He did not know how much money, if any, codefendant paid the victim, or how much he took from her hat. Defendant paid the victim \$10 and did not take any money from her. He acknowledged that he told the police the victim was carrying a knife, not a box cutter, and that she dropped the knife when codefendant slapped her. Although he did not tell the police, he now stated that the victim cut him with the box cutter and held up his right hand. The court noted that defendant "[i]ndicat[ed] his index finger \*\*\* on his right hand."

¶ 18 It was stipulated that, when the police arrived at Ms. Shaw's apartment, the victim did not identify the gun used by her assailants as a .38-caliber revolver, and stated that the two men had taken \$50 from her, not \$55. Further, two police officers would testify that the victim indicated she was told to lie on her back when defendant raped her, while two other officers would testify that she told them she was on her hands and knees during the rape. The defendant then entered certified copies of the victim's convictions and rested his case.

¶ 19 In rebuttal, the State introduced a stipulation that defendant told Chicago police detective Michael Hughes that, after the victim asked for more money, he and codefendant decided to take their money back.

¶ 20 Despite the challenges to the victim's credibility, the trial court determined her testimony was credible and corroborated by an independent witness. The court noted defendant's contention that the victim cut him, reviewed several inconsistencies in his testimony, and then found defendant and "large portions of [his] testimony incredible." The trial court entered a finding of guilty on one count each of aggravated criminal sexual assault, armed robbery, and aggravated kidnapping. Defendant filed a motion for a new trial, which the court denied.

¶ 21 The trial court sentenced defendant to 42 years' imprisonment, which included a 15-year enhancement for aggravated criminal sexual assault due to the use of a firearm, and a 15-year enhancement for armed robbery due to the use of a firearm. Defendant filed a motion to reconsider sentence, asserting that the 15-year sentencing enhancements were unconstitutional under the proportionate penalties clause of the Illinois Constitution. The trial court vacated the enhancements and sentenced defendant to a total of 18 years' imprisonment.

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¶ 22 Defendant raised several issues on direct appeal, including a challenge to the sufficiency of the evidence. We affirmed his convictions and sentences. See *Bennett*, 2012 IL App (1st) 101909-U.

¶ 23 On December 11, 2013, defendant, through counsel, filed the petition and advanced two claims. First, defendant argued that the victim had given a new statement which was significantly different from her trial testimony, thus, there was newly discovered evidence of defendant's actual innocence entitling him to a new trial. Second, defendant maintained that he was deprived of effective assistance of counsel because his trial counsel failed to elicit physical evidence that defendant had been cut by the victim with a knife or a blade cutter. No affidavit was attached to the December 11, 2013, petition.

¶ 24 The circuit court summarily dismissed the petition on March 25, 2014. In its dismissal order, the circuit court stated that defendant "supplemented his petition with a document entitled 'First Amended Petition for Post-Conviction relief Under the Illinois Code of Criminal Procedure, 725 ILCS 5/122-2.1' " (amended petition) on March 4, 2014. The amended petition is not contained in the record on appeal.

¶ 25 The dismissal order also stated that defendant was relying on a September 12, 2013 affidavit of the victim, B.M., as newly discovered evidence which establishes his actual innocence. The circuit court quoted the relevant part of the affidavit as follows:

"On January 21, 2007, approximately sometime after midnight, I was walking to a gas station located at 66th and Ashland Ave., when I was approached by two African-American males in a vehicle. As I was walking towards the gas station the vehicle pulled into [an] alleyway, preventing me from crossing the alleyway. The smaller of the two



males [codefendant] who was seated in the front passenger seat of the vehicle, produced a gun and ordered me to get in the rear passenger seat of the vehicle, which I complied. I was driven to another location where I was ordered to disrobe. I stated you have to kill me before I take off my clothes, however the smaller of the two males held a gun to my forehead and I complied. The larger of the two males [defendant] operated the vehicle. The larger of the two males exited the vehicle and walked to the rear passenger side of the vehicle where he told me to give him [oral sex]. I attempted to perform oral sex on the larger of the two males while the smaller of the two males pointed a gun at me, however the larger of the two males had an offensive odor, which made me gag and was unable to comply. After I was forced to have sex with the males, the smaller of the two males said repeatedly that they should kill me, however the larger of the two males said don't kill her, let her go. I was forced to exit the vehicle without my clothes which [were] located in the rear window of the vehicle. On my belt was a keychain which had pepper spray. Also in my possession that night were my ID, 2 keys and [\$75] in U.S. currency. The males took the [\$75] from me before forcing me to exit the vehicle. I sometime[s] carried a small knife however I did not have it with me during this incident."

However the affidavit itself is not in the record. Defendant has appealed from the dismissal.

¶ 26 Where, as here, a petition under the Act does not implicate the death penalty, a circuit court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court examines the petition taking all well-pleaded facts and accompanying affidavits as true (*People v. Peebles*, 205 Ill. 2d 480, 510 (2002)), to determine whether "the petition is frivolous or is patently without merit." *Hodges*, 234 Ill. 2d at 10.

¶ 27 An order dismissing a petition at the first stage must be issued no more than 90 days after the petition is filed and docketed. 725 ILCS 5/122-2.1(a) (West 2014). Where a petition is not dismissed within the 90-day period, it proceeds to the second stage. *People v. Perez*, 2014 IL 115927, ¶ 29. However, the proper filing of an amended petition restarts the 90-day period. *People v. Watson*, 187 Ill. 2d 448, 451 (1999). We review a circuit court's dismissal of a post conviction petition at the first stage *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 28 We first note that the circuit court summarily dismissed the petition on March 25, 2014 more than 90 days after it was initially filed on December 11, 2013. However, the dismissal order stated that defendant "supplemented his petition" with the amended petition on March 4, 2014, within 90-days of the filing of the petition. The amended petition is not contained in the record on appeal and the record does not affirmatively contradict the statement in the order as to the date on which the amended petition was filed. Thus, the only record evidence indicates that the filing of the amended petition restarted the 90-day period, and, we presume the summary dismissal of the petition was timely under *Watson*. See *People v. Carter*, 2015 IL 117709, ¶ 23 (Unless the record affirmatively indicates otherwise, we presumed the trial court knows and follows the law.).

¶ 29 A petition seeking relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12; see also *People v. Tate*, 2010 IL 112214, ¶¶ 9-12 (clarifying that the first-stage standards for *pro se* petitions set out in *Hodges* apply to petitions prepared by counsel). A petition has no arguable basis in law when it is premised on "an indisputably meritless legal theory," such as a legal theory that the record

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contradicts. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is founded on a "fanciful factual allegation," including, factual claims that are "fantastic or delusional" or belied by the record. *Id.* at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010).

¶ 30 Defendant first maintains that he stated the gist of a claim of actual innocence based on an affidavit from the victim, which he argues conflicts with the victim's trial testimony and her statements prior to trial. He contends that these inconsistencies support his actual innocence claim because of their cumulative effect on the victim's "incredible" trial testimony.

¶ 31 Prior to reaching the merits, we address the State's argument that because neither the amended petition nor the victim's affidavit are contained within the record and defendant, as the appellant, had the burden of providing a complete record, we should construe any doubts arising from these omissions against defendant and make every reasonable presumption in favor of the judgment below. See *Carter*, 2015 IL 117709, ¶ 19.

¶ 32 Here, the circuit court's dismissal order identifies the affiant as the victim, the date of the affidavit as September 12, 2013, and quotes the affidavit in "relevant part." Thus, the affidavit's general character and source are contained in the record. See *People v. Johnson*, 154 Ill. 2d 227, 240 (1993) (noting that affidavits supporting a petition at the first stage must identify its sources, character, and availability with reasonable certainty). In addition, the petition which is in the record sets forth the two claims for postconviction relief at issue on appeal. Thus, we find the record is sufficient to review the dismissal of the petition on the merits. In doing so we will take the uncontested "relevant part" of the affidavit as set forth in the dismissal order and the well-pleaded facts of the petition as true. See *Hodges*, 234 Ill. 2d at 9.

¶ 33 "An actual-innocence claim should be treated procedurally like any other postconviction claim." *People v. Coleman*, 2013 IL 113307, ¶ 92; see also *People v. Sparks*, 393 Ill. App. 3d 878, 884 (2009) (where a defendant claims he set forth the gist of a meritorious claim of actual innocence based on newly discovered evidence, the question before the appellate court is whether the petition had no arguable basis either in law or in fact). A freestanding claim of actual innocence in a postconviction petition must be based on new evidence discovered after trial that could not have been discovered earlier through the exercise of due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). In addition, the evidence must be material, noncumulative, and so conclusive in character that it would probably alter the result. *Id.* at 333; *Coleman*, 2013 IL 113307, ¶ 96. Evidence is material if it is relevant and probative of the defendant's innocence, and noncumulative if it adds to the evidence presented at trial. *Id.* ¶ 96. Evidence is conclusive if, considered in light of the evidence presented at trial, it would probably lead to a different result on a retrial. *Id.* "[T]he hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.'" *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008).

¶ 34 As noted by the circuit court, the affidavit mirrors the victim's trial testimony as to her kidnapping, robbery, and rape and, most importantly, defendant's involvement therein. Significantly, it reiterates that defendant raped her while another male held her at gunpoint, and that they robbed her. The only noncumulative evidence in the affidavit is B.M.'s statement that the two men robbed her of \$75 instead of \$55. At best, the different dollar amount is relevant to impeach the victim as to the amount of money taken during the robbery. However, at trial defendant impeached the victim on this exact point with her prior statement that she was robbed of \$50. Thus, any impeachment on the point of the amount of money which was taken would be

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redundant. In addition to finding the victim's testimony credible despite the challenges thereto, the trial court found defendant and "large portions of [his] testimony incredible."

¶ 35 We conclude that the non cumulative element of the affidavit is neither material nor so conclusive that it would lead to a different result on retrial. See *People v. Montes*, 2015 IL App (2d) 140485, ¶ 25 (finding evidence that simply contradicts or impeaches a witness is not typically of sufficient conclusive nature to state a claim for actual innocence). As such, we need not address whether the affidavit of the victim constitutes new evidence.

¶ 36 Defendant's actual innocence claim has no arguable basis in law or fact and the summary dismissal of the petition on this ground was proper. See *Hodges*, 234 Ill. 2d at 16.

¶ 37 Defendant next argues that the petition stated the gist of a claim of ineffective assistance of trial counsel based on the failure to elicit evidence that defendant had a scar on his right index finger. He asserts that evidence of the scar would have corroborated his testimony that the victim slashed him with a blade cutter during a dispute over sex and would have "potentially resolved the credibility conflict" between defendant and the victim and resulted in prejudice.

¶ 38 The State argues that defendant did not raise this ineffective assistance claim on direct appeal and thus the claim is forfeited. Where a claim of ineffective assistance of trial counsel is a matter of the trial record, it should be raised on direct appeal. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). An issue that could have been, but was not, determined on direct appeal is forfeited. *Id.*

¶ 39 Here, defendant's claim that his trial counsel provided ineffective assistance is based on an allegation that he has a scar on his hand. At trial, defendant testified that the victim cut him with a box cutter and he then held up his right hand and indicated his index finger. However, the

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trial record does not include any evidence or assertion that defendant had a scar on his right index finger. Thus, whether trial counsel was ineffective for failing to further develop the record regarding a scar on defendant's hand is an issue that could not have been determined on direct appeal and therefore was not forfeited.

¶ 40 Traditionally, to establish ineffective assistance of trial counsel, a defendant must show: (1) that the representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, within the context of first-stage postconviction proceedings, our supreme court has held that a defendant need not conclusively establish these factors. *Hodges*, 234 Ill. 2d at 17. Rather, the *Hodges* court held that a petition alleging ineffective assistance may be summarily dismissed unless it is arguable that counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced. *Id.* The failure to satisfy either prong precludes a finding of ineffectiveness. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76.

¶ 41 We agree with the circuit court that defendant failed to show he was arguably prejudiced by the allegedly deficient performance of counsel. At trial, defendant presented his version of the incident which included that he was cut by the victim. On cross-examination, defendant held up his right hand for the court and testified that the victim cut him with a box cutter. The trial court then noted that defendant "[i]ndicat[ed] his index finger \*\*\* on his right hand." The record further reflects that the trial court later recognized defendant's assertion that the victim cut him in making its credibility determinations. The record establishes the trial court's understanding of defendant's testimony that he was cut by the victim during the incident. However, before finding

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defendant guilty, the trial court expressly found defendant and "large portions" of his testimony to be "incredible."

¶ 42 Defendant has failed to show he was arguably prejudiced by his trial counsel's decision not to "elicit" further evidence as to the existence of any scar to his right index finger. Accordingly, defendant's ineffectiveness claim has no arguable basis in law or fact, and the trial court did not err in summarily dismissing the petition on this ground as well. See *Hodges*, 234 Ill. 2d at 16.

¶ 43 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.