

No. 1-14-2349

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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. 10 CR 2949
)	
CESAR CAMAYO,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We reversed and remanded this cause for second-stage postconviction proceedings where defendant's petition presented an arguable claim of ineffectiveness of counsel for the failure to investigate or present testimony from potential witnesses.

¶ 2 Defendant-appellant, Cesar Camayo appeals from the circuit court's summary dismissal of his *pro se* petition for relief (petition) under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2014). On appeal, defendant argues that his petition presented an arguable claim of ineffectiveness of trial counsel for failure to investigate or present testimony from individuals listed in police reports and ineffective assistance of appellate counsel for failure to

challenge the trial court's admission of other crimes evidence on appeal. We reverse and remand this cause for second-stage proceedings.

¶ 3 Defendant was charged, in pertinent part, with two counts of aggravated discharge of a firearm stemming from an incident on January 25, 2010, where shots were fired at an on-duty Chicago police officer.

¶ 4 At the bench trial, Chicago police officer Eric Wier testified that on January 25, 2010, at approximately 3:30 p.m., he was on covert patrol driving an unmarked police vehicle. He was wearing civilian clothing, a bulletproof vest, and his police badge around his neck. As the officer was traveling southbound on the 4700 block of South Throop Street in Chicago, he observed a "grayish" sport utility vehicle (SUV) that was stopped and partially blocking the one-way street. Officer Wier stopped his vehicle approximately five feet behind the SUV. Officer Wier observed defendant, standing outside the passenger side of the SUV, speaking to its occupant through the open passenger door. Officer Wier noticed a distinctive teardrop tattoo under defendant's right eye. After a short time, Officer Wier honked his horn and motioned for the SUV to move. Defendant turned toward Officer Wier and responded by moving his hands forward with his thumbs up and his palms outstretched. Defendant walked to the rear of the SUV, pulled from his coat a blue steel revolver, and aimed it at Officer Wier. As Officer Wier accelerated around the left side of the SUV, defendant moved to the front of the SUV and fired a shot toward Officer Wier. At that point, Officer Wier's vehicle was "even" with the SUV. As Officer Wier fled, he heard another four or five shots being fired toward the rear of his police vehicle. Officer Wier radioed for help. Officer Wier identified defendant in a lineup as the man who fired the shots.

¶ 5 On cross-examination, Officer Wier testified that he had never seen defendant before that date. The day was cloudy and the entire incident lasted about one minute. Defendant was

wearing a dark sweatshirt, but Officer Wier did not know whether the sweatshirt was hooded. Trial counsel, during cross-examination, asked Officer Wier to observe from the witness stand that defendant, as he appeared in court, had a teardrop tattoo on each side of his face.

¶ 6 At trial, the State presented evidence that defendant pled guilty to aggravated battery for the 2006 shooting of a man during an argument, for which he was sentenced to five and one-half years' imprisonment.

¶ 7 After the State rested, the parties stipulated that defendant was taken into custody at 4:58 p.m. on January 25, 2010. The parties also stipulated that lab technician Scott Rochowicz would testify that a gunshot residue (GSR) test was administered on defendant's hands and clothing on that same date at 6:45 p.m. Mr. Rochowicz would also testify that the GSR test results showed defendant may not have: contacted "a PGSR-related item;" been near a discharged firearm; nor discharged a firearm with either hand. Mr. Rochowicz would further testify that, if defendant had discharged a firearm, the particles had been removed by activity, or had not been deposited or detected by the procedure. The defense rested without presenting testimony.

¶ 8 The trial court found defendant guilty of two counts of aggravated discharge of a firearm and sentenced him to two concurrent terms of 10 years' imprisonment. We affirmed that judgment on direct appeal. See *People v. Camayo*, 2013 IL App (1st) 111168-U.

¶ 9 On March 25, 2014, defendant filed the petition which raised numerous claims including that: trial counsel was ineffective for failing to investigate or present testimony from potential witnesses who had been identified in police reports and appellate counsel was ineffective for not raising a challenge to the admission of other-crimes evidence on direct appeal.

¶ 10 Defendant attached a number of exhibits to his petition, including his arrest photograph and several police reports concerning the incident. The photograph showed defendant, at the

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time of the arrest, had a teardrop tattoo under each eye. As to the police reports, an event query report from the date and time in question stated that there had been shots fired; a silver car was on Throop Street; a description had been given of a male wearing a black hooded sweatshirt with a teardrop tattoo near his eye; and three 16-year-old Hispanic males, wearing black hooded sweatshirts and black pants, had fled southbound, and were wanted in connection for "shots fired." The "original case incident report" described the shooter as a Hispanic male wearing a "black jacket and black jeans, 18 to 20 years old, 145-155 pounds, 5' 6." This report further stated that both the shooter and the "double parked van" fled the scene, and an officer spoke to an individual who heard three to five shots. According to a "field investigation canvass report," two individuals reported hearing three gunshots and seeing two Hispanic males, wearing black "hoodies," walking southbound on Throop Street. A third person heard three to four shots fired, and observed three Hispanic male teenagers drive away in a gray SUV. A "field investigation cleared closed [arrest and prosecution] report" indicated that the victim (Officer Wier), described the shooter as a Hispanic male, with short dark hair, a teardrop tattoo under his right eye, wearing a dark hooded cloth jacket, a red shirt under the jacket, and dark pants. The report stated that "several units" canvassed the surrounding area and defendant was arrested during the canvass. The identifying information of the police officer and all other individuals had been redacted from the reports.

¶ 11 In the petition, defendant explained that, because he obtained the police reports through a request under the Freedom of Information Act (FOIA), the names and contact information of the individuals who spoke to police had been redacted from the reports. The petition also stated that trial counsel failed to respond to defendant's requests for any copies of the police reports which were in counsel's possession.

¶ 12 On June 18, 2014, the circuit court, in a detailed written order, carefully addressed each of the numerous claims raised in the petition and summarily dismissed the petition as frivolous and patently without merit. As to defendant's several claims that trial counsel had failed to conduct an effective investigation of the case, including a claim that counsel had not interviewed individuals who lived or were near the scene of the shooting, the trial court found that the claims were speculative and did not result in prejudice as this court, on direct appeal, when addressing plain error, had found the evidence was not closely balanced.

¶ 13 On appeal, defendant argues that the petition set forth arguably meritorious claims of ineffectiveness of trial counsel for failure to investigate and present testimony of the individuals who made statements to the police and appellate counsel for failure to raise the issue of other-crimes evidence.

¶ 14 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2012). At the first stage of a postconviction proceeding, the circuit court independently reviews the defendant's 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). A petition should be summarily dismissed as frivolous or patently without merit only when it "has no arguable basis in either fact or law." *Id.* at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). 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 indisputably meritless legal theory is one that is "completely contradicted by the record." *Id.* at 16-17. We review the summary dismissal of a postconviction petition *de novo*.

Tate, 2012 IL 112214, ¶ 10. Thus, we review the circuit court's judgment, rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 15 To state a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *i.e.*, deficiency and prejudice. A defendant alleging ineffective assistance of counsel at the first stage of postconviction proceedings must show it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and *arguable* that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (citing *Hodges*, 234 Ill. 2d at 17). While, generally, a defendant must overcome the presumption that counsel's actions were the product of sound trial strategy (*People v. Manning*, 241 Ill. 2d 319, 327 (2011)), we do not consider trial strategy related arguments when reviewing first-stage postconviction petitions. *Tate*, 2012 IL 112214, ¶ 22.

¶ 16 Where, as here, a defendant alleges in his petition that trial counsel was ineffective for failing to investigate or present evidence at trial, the petition must include affidavits and exhibits identifying, with reasonable certainty, the sources, character, and availability of the alleged evidence supporting the defendant's allegations. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Although a defendant is not required to present a notarized affidavit at the first stage, some form of evidence demonstrating that the defendant's allegations are capable of corroboration, must be attached to the petition. *People v. Allen*, 2015 IL 113135, ¶ 34. The failure to attach supporting documentation, or an adequate explanation for the absence of such documentation, is fatal to a postconviction petition and justifies its dismissal. *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002).

¶ 17 Defendant sufficiently explained in his petition why he did not attach affidavits from the potential witnesses. Defendant stated that the names of those individuals who had spoken to the police during the investigation had been redacted under the FOIA (5 ILCS 140/7(1)(d)(iv) (West

2016) (authorizing law enforcement agencies to redact the names of witnesses from any disclosed materials)), and that trial counsel had ignored his requests for the police reports in his possession. We, thus, find that the petition was properly supported by police records which show that three individuals had told the police that they had seen a number people leaving the scene who matched, at least in part, Officer Wier's description of defendant and we will consider this issue.

¶ 18 A trial counsel has the duty to conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A claim of inadequate investigation "is to be judged against a standard of reasonableness given all of the circumstances, 'applying a heavy measure of deference to counsel's judgments.'" *People v. Kokoraleis*, 159 Ill. 2d 325, 330 (1994) (quoting *Strickland*, 466 U.S. at 691). The decision as to what witnesses to call and what evidence to present "may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.'" *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (1993) (quoting *Strickland*, 466 U.S. at 690).

¶ 19 At trial, Officer Wier described the shooter as having a teardrop tattoo under his right eye, and wearing a dark sweatshirt, but he did not know whether the sweatshirt was hooded. The officer also described the vehicle blocking his passage as a "grayish" SUV. On cross-examination, counsel attempted to demonstrate that Officer Wier incorrectly identified defendant as the shooter because defendant actually had two teardrop tattoos: one under each eye.

¶ 20 According to police reports attached to defendant's petition, Officer Wier at the time of the incident described the shooter as a Hispanic male, about 18 to 20 years old, with short dark hair, a teardrop tattoo under his right eye, wearing a dark hooded jacket, a red shirt under the jacket, and dark pants. Defendant's arrest photograph demonstrates that he had two teardrop

tattoos. The police reports also showed that, during a neighborhood canvass conducted shortly after the incident, two different individuals heard three shots fired and had observed two Hispanic males, wearing black "hoodies," walking southbound. The reports also revealed that a third individual reported observing three Hispanic male teens drive away from the area where the incident occurred in a gray SUV, matching Officer Wier's description of the vehicle that blocked his path. The event query report also stated that three Hispanic males were "wanted for shots fired."

¶ 21 The central issue in this case was whether defendant had been misidentified as the shooter. We find that defendant's petition and accompanying documents sufficiently raised an arguable claim that his trial counsel was ineffective, at a minimum, for failing to investigate the individuals who claimed to have observed a number of people at the scene of the shooting who fit Officer Wier's description of the offender or who had observed a vehicle matching the description of the SUV involved in the incident occupied by three Hispanic males leaving the scene.

¶ 22 We next consider the prejudice prong of the *Strickland* test. Prejudice may be shown when, *arguably*, a reasonable probability exists that the proceeding would have had a different result absent counsel's alleged errors. *People v. Harmon*, 2013 IL App (2d) 120439,

¶ 34.

¶ 23 Officer Wier's testimony was the State's only identification evidence. Officer Wier acknowledged that the duration of the entire incident was very brief. There was no physical evidence linking defendant to the crime and no confession. It is arguable that, had trial counsel investigated the individuals who claimed to have seen a number of people at the scene who generally matched Officer Wier's description of the offender, and the individual who observed a

gray SUV, the investigation may, arguably, have led to evidence which would have supported defendant's misidentification defense at trial and, arguably, discredited Officer Wier's identification of defendant. It is thus, also, arguable that an investigation may have changed the outcome of the trial.

¶ 24 In reaching this conclusion, we find unpersuasive the State's contention that defendant cannot make an arguable claim of prejudice under *Strickland* because, in considering defendant's direct appeal, we found that the evidence was not closely balanced for plain error purposes. See *Camayo*, 2013 IL App (1st) 111168-U, ¶ 13 (stating that "[b]ased on the strength and certainty of Officer Wier's eyewitness identification, which was never rebutted or discredited, the evidence cannot be deemed closely balanced for plain-error review"). In making this argument, the State relies on *People v. White*, 2011 IL 109689, which analogized plain error review under the closely balanced prong to the prejudice prong of *Strickland*. *Id.*

¶¶ 132-133.

¶ 25 As correctly maintained by defendant, the issue at the first stage of postconviction proceedings is not whether he was prejudiced but, whether, he was *arguably* prejudiced (*Hodges*, 234 Ill. 2d at 17)—a different, more lenient standard than what this court uses to evaluate plain error and prejudice under *Strickland* on direct appeal. See *White*, 2011 IL 109689, ¶ 133 (citing *People v. Herron*, 215 Ill. 2d 167, 178 (2005) ("defendant in either case must show he was prejudiced: that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, i.e., that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial")).

¶ 26 At the first stage of postconviction proceedings, we must take as true and liberally construe the allegations in the petition. *Allen*, 2015 IL 113135, ¶ 25. Applying this standard to

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the allegations and accompanying documents here, defendant raised an arguable claim that his trial counsel was ineffective for failing to investigate witnesses to support his defense of misidentification. Thus, the petition is sufficient to withstand summary dismissal at the first stage.

¶ 27 Based on our finding that defendant's ineffective assistance of trial counsel claim for failing to investigate or present potential witnesses has arguable merit, the entire petition must be remanded for second-stage proceedings. See *People v. Cathey*, 2012 IL 111746, ¶ 34 (partial summary dismissals not permitted under the Post-Conviction Hearing Act and entire petition must be remanded for second-stage proceedings if petition sets forth a claim of ineffective assistance of counsel which survives summary dismissal). Thus, we need not address defendant's other argument on appeal that the petition sufficiently set forth a claim of ineffectiveness of his appellate counsel.

¶ 28 For the foregoing reasons, we reverse the order of the circuit court summarily dismissing defendant's postconviction petition, and remand for further proceedings.

¶ 29 Reversed and remanded.