

Nos. 1-15-2241 and 1-15-3208 (consolidated)

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 and Respondent-Appellee,)	Cook County.
)	
v.)	No. 10 CR 6649
)	
CHARLIS HARRIS,)	Honorable
)	Domenica A. Stephenson
Defendant and Petitioner-Appellant.)	and Stanley J. Sacks,
)	Judges Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred the judgment.

ORDER

¶ 1 *Held:* First-stage dismissal of postconviction petition is reversed, and this matter is remanded for second-stage postconviction proceedings, where a number of defendant's claims of ineffective assistance of trial counsel were not frivolous or patently without merit. However, the denial of defendant's motion for corrected mittimus and sentence is affirmed, where the sentencing statute was not ambiguous and defendant was therefore not entitled to additional sentencing credit.

¶ 2 In these consolidated appeals, defendant and petitioner-appellant, Charlis Harris, appeals from both the first-stage dismissal of her postconviction petition (appeal no. 1-15-2241) and the denial of her motion seeking a corrected mittimus and sentence reflective of additional sentencing credit (appeal no. 1-15-3208). While we affirm the denial of defendant's motion for

Nos. 1-15-2241 and 1-15-3208 (consolidated)

corrected mittimus and sentence, we reverse the dismissal of defendant's postconviction petition and remand for further proceedings with respect thereto.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged by indictment with attempted first degree murder, heinous battery, aggravated discharge of a firearm, aggravated unlawful use of a firearm (AUUW), and defacing the identification marks of a firearm. Each count related to actions defendant had allegedly undertaken on or about March 24, 2010. The matter proceeded to a bench trial in November and December of 2012.

¶ 5 The trial proceedings and the evidence presented at trial were fully set out in our prior order, and need not be fully restated here. See *People v. Harris*, No. 1-12-0643 (2014) (unpublished order under Supreme Court Rule 23). It is sufficient to note that the trial court was presented with two different versions of the incident that occurred on March 24, 2010.

¶ 6 In defendant's version, she was attacked by the victim, Serretta Rogers, and Ms. Rogers' adult daughter, Keonna King, two weeks prior at a restaurant. Defendant was stabbed by Ms. Rogers during that altercation, and as a result defendant was treated at Advocate Trinity Hospital for a two-centimeter wound to her forehead.

¶ 7 Defendant and her own daughter were subsequently taunted and sprayed with mace by Ms. Rogers at that same restaurant on March 24, 2010. Defendant, thereafter, followed Ms. Rogers home solely in an attempt to get her license plate and call the police. Once there, Ms. Rogers and her family aggressively confronted defendant and her daughter, armed with a hammer, knife, bat and a golf club. After defendant was stabbed in the arm by Ms. King and Ms. Rogers threatened defendant's daughter with a hammer, defendant acted only in self-defense by

Nos. 1-15-2241 and 1-15-3208 (consolidated)

dousing Ms. Rogers with a caustic drain cleaner, firing a bullet in the air to ward off the other attackers, and striking the windows of Ms. Rogers's car with her own hammer.

¶ 8 In the State's version of events, both defendant and Ms. Rogers had been involved in a relationship with the same man, Jason Smith. A rivalry and animosity had developed between the two women, and this situation ultimately led to a physical confrontation on March 13, 2010. Two weeks later, defendant was still angry and upset about the prior incident and it was she who initiated a confrontation with Ms. Rogers at the restaurant on March 24, 2010. Defendant then followed Ms. Rogers home, repeatedly striking Ms. Rogers's car with her SUV and, ultimately, nearly pinning Ms. Rogers inside of her vehicle. Defendant then doused Ms. Rogers twice with drain cleaner, shot a bullet in her direction, and struck the windows of Ms. Rogers's car with a hammer. All of this was done in retaliation for the fact that Ms. Rogers and her daughter previously were victors in the physical altercation with defendant over defendant's and Ms. Rogers's respective relationships with Mr. Smith.

¶ 9 In addition, the State also introduced, in rebuttal, a stipulation regarding the testimony of Detective Besteda of the Chicago police department. It was stipulated that Detective Besteda would testify that defendant had made two statements about the incident on March 24 and 25, 2010. Therein, defendant made a number of statements to police inconsistent with her trial testimony.

¶ 10 At the conclusion of the evidence, the trial court found defendant guilty of the charges of heinous battery, aggravated discharge of a firearm, and AUUW. In announcing its ruling, the trial court specifically found defendant's testimony—that she acted in self-defense—to be incredible, while the testimony of the State's witnesses was both credible and corroborated by

Nos. 1-15-2241 and 1-15-3208 (consolidated)

the physical evidence introduced a trial. Defendant's motion for a new trial was subsequently denied, with the trial court again specifically noting these very same justifications for its ruling.

¶ 11 Thereafter, the trial court sentenced defendant to concurrent terms of 5 and 2 years' imprisonment, respectively, for aggravated discharge of a firearm and AUUW. Both of these sentences were to be served consecutively to a sentence of 13 years' imprisonment for heinous battery. Defendant's motion to reconsider that sentence was denied, and she filed a timely direct appeal.

¶ 12 On direct appeal, defendant contended: (1) she was not proven guilty beyond a reasonable doubt of committing the offenses of aggravated discharge of a firearm or heinous battery; (2) her sentences for heinous battery and aggravated discharge of a firearm were excessive and resulted from an improper consideration of sentencing factors; (3) her conviction and sentence for AUUW must be vacated under the principles of the one-act, one-crime doctrine; and (4) the AUUW statute under which she was convicted is unconstitutional. *Harris*, No. 1-12-0643 (2014) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's convictions and sentences for heinous battery and aggravated discharge of a firearm, but vacated her conviction and sentence for AUUW under the principles of the one-act, one-crime doctrine. *Id.*

¶ 13 Pursuant to the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2014)), petitioner thereafter filed a *pro se* postconviction petition contending that—for numerous reasons—her trial and appellate counsel provided ineffective assistance. In addition, defendant filed a motion seeking a corrected mittimus and sentence, contending that a purported ambiguity in section 3-6-3 of the Code (730 ILCS 3-6-3 (West 2014)), entitles her to additional sentencing credit with respect to her conviction for aggravated discharge of a firearm.

Nos. 1-15-2241 and 1-15-3208 (consolidated)

¶ 14 Defendant’s postconviction petition was summarily dismissed at the first stage of proceedings, and her motion for corrected mittimus and sentence was denied. Defendant thereafter filed separate, timely appeals from both decisions. By order of this court, these appeals have been consolidated.

¶ 15

II. ANALYSIS

¶ 16 As noted above, defendant appeals from both the summary dismissal of her postconviction petition and the denial of her motion for corrected mittimus and sentence to reflect additional sentencing credit. We address each issue in turn.

¶ 17

A. Postconviction Petition—Appeal No. 1-15-2241

¶ 18 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 2014). 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.

Nos. 1-15-2241 and 1-15-3208 (consolidated)

¶ 19 While defendant's petition raised claims of ineffective assistance of trial and appellate counsel, we find that this appeal may be resolved solely by a consideration of a number of the allegations with respect to her trial counsel.

¶ 20 To state a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-prong, deficiency and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). 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).

¶ 21 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.

¶ 22 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).

¶ 23 As discussed above, the State and defendant presented evidence at trial supporting two very different versions of the events of March 24, 2010. In finding defendant guilty of a number of the charged offenses, and in denying defendant's motion for a new trial, the trial court specifically found defendant's testimony to be incredible, while the testimony of the State's

Nos. 1-15-2241 and 1-15-3208 (consolidated)

witnesses was both credible and corroborated by the physical evidence. In affirming the trial court's rulings on direct appeal, this court also relied upon the trial court's credibility findings and the fact that defendant's own trial testimony was impeached by her prior statements to police. *Harris*, No. 1-12-0643, ¶¶ 35, 56 (2014) (unpublished order under Supreme Court Rule 23). It is within this context that we consider three of the specific assertions of ineffective assistance of trial counsel raised by defendant in her postconviction petition.

¶ 24 First, defendant contends that her trial counsel provided ineffective assistance by failing to investigate and present evidence of pretrial statements—documented in police reports—made by Ms. Rogers, Ms. King, and Ms. Rogers' cousin, Kiara Amos. These police reports were attached to the postconviction petition, and were allegedly provided to trial counsel before trial during discovery and obtained by defendant while she was incarcerated in a partially redacted form pursuant to a FOIA request. A review of the police reports indicates that they do in fact include summaries of statements by Ms. Rogers, Ms. King, and Ms. Amos that are in some ways either inconsistent with or less detailed than the trial testimony provided by these three witnesses. Specifically, the descriptions of the number of times and the method in which Ms. Rogers was doused with drain cleaner, and Ms. Rogers' exact location at the time defendant fired a gunshot, were not entirely consistent between and among the various statements and the testimony presented at trial.

¶ 25 Second, defendant complains that although she testified that Ms. Rogers threatened defendant's daughter with a hammer during the March 24, 2010, incident, and while Ms. Rogers testified that she never wielded a hammer, defendant's trial counsel never investigated or presented at trial any possible fingerprint or DNA evidence with respect to a hammer found by the police on Ms. Rogers' lawn after the incident. A review of the record—relevant portions of

Nos. 1-15-2241 and 1-15-3208 (consolidated)

which were attached to the postconviction petition—reveals that an unaccounted-for hammer was found on Ms. Rogers’ lawn, before being photographed, collected and inventoried by the police. While no fingerprint or DNA testing was ever completed with respect to this hammer, defendant’s postconviction petition claims that there is a reasonable basis to believe that evidence tying the hammer to Ms. Rogers would be produced by such testing.

¶ 26 Third, defendant faults trial counsel for failing to investigate and present evidence that a jacket she was wearing at the time of the incident contained “puncture damage” that would have corroborated her testimony that she had been stabbed by Ms. Rogers’ relatives. Defendant’s petition asserts that this jacket was given to her sister, Precious Harris, after the incident. Furthermore, the petition asserts that, while photos of the jacket were provided to trial counsel prior to trial and defendant’s sister was present and available to talk with trial counsel during many pretrial court hearings, trial counsel did not further investigate or present evidence with respect to the jacket at trial. Sworn affidavits executed by defendant and her sister attesting to the veracity of these claims were attached to the petition.

¶ 27 We reiterate that at the first stage of a postconviction proceeding, the threshold for survival is *low*, and a petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. Furthermore, a petition lacks an arguable basis in fact or law only when it is based on an *indisputably* meritless legal theory or a *fanciful* factual allegation. 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. In addition, a defendant alleging ineffective assistance of counsel at the first stage of postconviction proceedings must only show it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and *arguable* that defendant was prejudiced. *Supra*,

Nos. 1-15-2241 and 1-15-3208 (consolidated)

¶¶ 18-20.

¶ 28 Here, defendant's convictions were largely based upon the trial court's weighing of the credibility of the witnesses presented by the State and defendant, and a consideration of how the physical evidence presented at trial either did or did not corroborate that testimony. The allegations contained in defendant's postconviction petition—supported by relevant attachments—speak directly to these issues. While perhaps not in isolation, taken together, we conclude that these allegations satisfy the low standard applicable at the first stage, were not frivolous or patently without merit, and arguably made out a claim of ineffective assistance of trial counsel. *Strickland*, 466 U.S. at 695 (in making a determination of prejudice, the court must examine the totality of the circumstances); *People v. Moore*, 264 Ill. App. 3d 901, 907-08 (1994) (cumulative effect of deficient performance may constitute ineffective assistance). We therefore conclude that the trial court erred in dismissing these allegations of ineffective assistance at the first stage. In so ruling, we necessarily reject two specific arguments raised by the State on appeal.

¶ 29 First, the State contends that the actions defendant complains about with respect to her trial counsel amount to nothing more than virtually unassailable trial strategy. However, while a defendant must ultimately overcome the presumption that her counsel's actions were the product of sound trial strategy (*People v. Manning*, 241 Ill. 2d 319, 327 (2011)), we do not consider arguments related to trial strategy when reviewing first-stage postconviction petitions (*Tate*, 2012 IL 112214, ¶ 22).

¶ 30 Second, the State argues that defendant's argument regarding trial counsel's failure to investigate and present forensic evidence with respect to the hammer runs counter to the decision in *People v. Scott*, 2011 IL App (1st) 100122, ¶¶ 30-31. There, this court affirmed a first-stage

Nos. 1-15-2241 and 1-15-3208 (consolidated)

dismissal of a postconviction petition alleging ineffective assistance for the failure to pursue DNA testing on a blue shirt allegedly worn by the shooter in a murder because “the presence or absence of his DNA on the blue shirt is highly relevant to the case as the presence of someone’s DNA other than defendant’s on the shirt suggests that someone else was the shooter.” This court reasoned that because no DNA testing had yet been performed, it was unknown if sufficient DNA remained on the shirt to be tested, and it was unclear that any test results would be exculpatory, any argument regarding exculpatory evidence contained on the blue shirt was speculative and defendant therefore could not establish prejudice under *Strickland*. *Id.* ¶ 31.

¶ 31 We reject the State’s reliance on *Scott* for a number of reasons. First, unnoted by the State, is that the *Scott* decision also relied on the fact that the record in that case showed “the blue shirt was handled by multiple individuals during its recovery and was later placed on defendant’s shoulders during a lineup.” *Id.* The State here points to no such evidence that might call into question the ability to reliably test the hammer for DNA evidence. We further note that defendant here also requested fingerprint testing, an issue unaddressed by the court in *Scott*.

¶ 32 Additionally, the analysis in *Scott* appears to deviate from the relevant first-stage standards we outlined above, as the court appeared to reject the defendant’s argument because he could not “establish” prejudice under *Strickland* and the court could not say—at the first stage—“whether a reasonable probability exists that the result of defendant’s trial would have been different such that defendant was prejudiced.” *Id.* Our supreme court has specifically ruled that these are not requirements to meet the low threshold applicable at the first stage, and are more appropriate considerations at later stages. *Tate*, 2012 IL 112214, ¶ 18-22.

¶ 33 In light of our finding that some of defendant’s claims of ineffective assistance of trial counsel have arguable merit, the entire petition must be remanded for second-stage proceedings.

Nos. 1-15-2241 and 1-15-3208 (consolidated)

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 remaining arguments that her petition sufficiently set forth other claims of ineffectiveness of her trial and appellate counsel.

¶ 34 However, we do note that our finding in no way expresses an opinion on the actual merits of the assertions contained in defendant's postconviction petition, or on whether defendant will ultimately prevail on her ineffective-assistance claims. See *Hodges*, 234 Ill. 2d at 22.

¶ 35 B. Sentencing Credit—Appeal No. 1-15-3208

¶ 36 We next address defendant's contention that her motion for corrected mittimus and sentence was improperly denied, because a purported ambiguity in section 3-6-3 of the Code (730 ILCS 3-6-3 (West 2012)) entitles her to additional sentencing credit with respect to her conviction for aggravated discharge of a firearm.

¶ 37 As defendant herself acknowledges, the exact arguments that she raises here have been considered and rejected by this court on two prior occasions. *People v. Williams*, 2015 IL App (1st) 130097, ¶¶ 59-62; *People v. Williams*, 2017 IL App (1st) 150795, ¶¶ 50-54. We need not restate here the analysis contained in our prior decisions. It is sufficient to note that we decline to depart from the reasoning therein, and therefore reject defendant's appeal from the denial of her motion for corrected mittimus and sentence.

¶ 38 III. CONCLUSION

¶ 39 For the foregoing reasons, we reverse the dismissal of defendant's postconviction petition and remand for second-stage proceedings. We affirm the denial of defendant's motion for corrected mittimus and sentence.

Nos. 1-15-2241 and 1-15-3208 (consolidated)

¶ 40 No. 1-15-2241, reversed and remanded

¶ 41 No. 1-15-3208, affirmed.