2018 IL App (2d) 150863-U
No. 2-15-0863
Order filed July 18, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EUGENE I. OBIAZI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 09-CF-2809 Honorable Theodore S. Potkonjak, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition: the untimeliness of the petition was not due to defendant's culpable negligence, as he had tracked the status of his direct appeal, had reasonably waited for a ruling on his petition for rehearing, and had not received effective notice of that ruling; defendant made a substantial showing that counsel was ineffective for failing to investigate and call witnesses, as the witnesses could have corroborated an uncorroborated defense and created a credibility contest that might have resulted in an acquittal.

¶ 2 Defendant, Eugene I. Obiazi, appeals the second-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He asserts (1) that the untimeliness of his petition was not the result of any culpable negligence on his part, and

(2) that he set out a substantial claim of ineffective assistance of counsel when he alleged that defense counsel had unreasonably failed to call one potential witness and unreasonably failed to investigate another. He therefore argues that the court erred both in ruling that the petition was untimely and in ruling that defendant's ineffective-assistance claim failed to make a substantial showing of a constitutional violation. We agree. We hold that the untimeliness of defendant's petition was the result of circumstances beyond his control and that there was thus little or no negligence on defendant's part. We also hold that defendant made a substantial showing of a violation of his right to effective assistance of counsel. We thus reverse the trial court's dismissal of defendant's ineffective-assistance claim and we remand the cause for further proceedings under the Act.

¶ 3 I. BACKGROUND

¶ 4 A jury found defendant guilty of one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The primary issue at trial was whether defendant ever had possession of a weapon that the police found in a back yard.

¶ 5 The State's case was built around the testimony of three Waukegan police officers: Officer Joshua Tran, Officer Angela Biegay, and Sergeant Edgar Navarro. In defendant's opening argument, defense counsel asserted that the case against defendant was fabricated to cover for brutality against defendant committed by Beigay and Tran:

> "What *** you are going to hear [is] that these officers, Officer Biegay and Officer Tran, wrote two reports on July 16th, and one of the reports that they wrote was a regular police narrative that talked about what they did. The other report that they wrote on the same date, same time, was a use of force report where they used force on [defendant] because what they did and what really happened is what Officer Biegay is

going to say. He ignored her verbal commands. I deployed my ECD [('Electronic Control Device')], Taser, and what she is not going to be able to tell you is when you told him to put his hands up, did you see anything in his hands? ***

And what happens next is she shot him with that Taser. And *** she is going to say, well, he didn't go down. And then she dry-stunned him ***. Then Tran is going to come around and say, well, he looks like he is getting up, and he shoots him with the Taser. And then he says *** [it's not] really working, and he zaps him again. And he says he won't get off of his left hand. *** [S]o he hits him again ***.

Now, when they get him up *** guess what? There is no gun, ***. *** And they are going to say that there was a gun found in the back of 2739 [Wall Avenue] and say, you know what? That was [defendant's] gun.

What this is is an injustice. What this is is brutality ***."

¶ 6 Tran, the first witness, was part of the "Significant Incident Group." On July 16, 2009, at about 12:45 a.m., he received a call on his cell phone from someone he knew. The caller reported a loud argument in the area of 2735-2739 Wall Avenue in Waukegan; Tran later admitted that the caller merely directed him to "Dana and Wall," with no further detail, and that the area was not part of any investigation. He drove to the indicated area in a police car, an Impala that had hidden lights and no exterior markings. (Navarro said that the car had "city plates" and a spotlight on the driver's side.) Biegay was in the front passenger seat; Navarro was in the back seat. Further testimony established that all three were in "tactical" dress: ballistic vests with police markings and utility belts, but otherwise civilian clothing.

¶ 7 They arrived and pulled up "on the west side of the street." (We note that Wall Avenue runs east-west.) When they arrived, Tran did not hear anyone arguing. However, he saw a

man—he identified him in the courtroom as defendant—and a woman—later identified as Nykiedra Coburn—standing in the driveway of 2739 Wall Avenue. Defendant was standing behind the open door of a dark gray vehicle parked "at an angle."

¶ 8 Defendant looked in the direction of the Impala and started to walk backward. As Tran got out of the Impala, defendant started to run. He first ran around a van, turned east, crossed the yard of the next house, 2735 Wall Avenue, and then turned toward the back yard of that house. Tran pursued. As defendant ran toward the back yard of that house, Tran saw a "black, semi-automatic pistol in his right hand." Tran shouted "gun." A four-foot chain-link fence separated the front and back yards of 2735 Wall Avenue. Defendant crossed the fence. Because Tran was distracted by putting his ECD away and getting his firearm ready, he did not see exactly how defendant crossed. However, he noticed that defendant seemed to get stuck as he crossed the fence. This caused him to fall sideways as he landed on the other side of the fence. Nevertheless, defendant got up and started running again. Tran ran up to the fence and pointed the beam of his flashlight at defendant; he could then see that the gun was still in defendant's right hand. Defendant started "to cut southeast through the back yard of 2735 Wall." (On cross-examination, Tran said that defendant was "beginning to go southwest in the back yard," which is more consistent with the other evidence.) That back yard was bounded on the east and south by a six-foot wooden fence and on the west by another chain-link fence.

¶ 9 In the seconds that Tran stood at the first chain-link fence, Navarro arrived there too. Tran returned to the front of 2735 Wall Avenue. Biegay then "ran around the west side of 2735," with the result that she was then running toward defendant. (Defendant's flight had apparently taken him in a circle around the house at 2735 Wall Avenue.) Tran heard Biegay order defendant to stop; he saw that defendant kept running and that Biegay fired her ECD at

him. Defendant fell; Tran could see that his muscles were not locking up as they would if the ECD's fired prongs had made full contact. Defendant's hands were empty. Defendant continued to move. Biegay attempted to put her ECD in direct contact with defendant's body, but defendant was swinging his arms, which appeared to Tran to be interfering with Biegay's efforts to subdue defendant. Tran therefore fired his own ECD, allowing it to go through its full five-second cycle. (On cross-examination, Tran said that he triggered the ECD a second time for three seconds when defendant did not comply with orders to show his left hand.) The officers then took defendant into custody.

¶ 10 Tran and other officers then started a search for the gun Tran had seen. An officer who had come from another jurisdiction found a black semiautomatic handgun in the southeast corner of the back yard of 2739 Wall Avenue near the chain-link fence that separated that yard from the yard of 2735 Wall Avenue. (This fence was also about four feet high, but it had higher shrubbery growing alongside it.) Another State witness testified that the gun had seven rounds in the magazine and one in the chamber; he found no fingerprints on the gun or the rounds. The parties stipulated that the gun was "operable."

¶ 11 Under cross-examination, Tran admitted that he had not observed any sound or gesture that he could associate with defendant tossing a gun aside. He never saw defendant enter the area in which the gun was found. Further, he did not see a gun when he first had a clear view of defendant during his pursuit and he did not see defendant reach into his clothing. It was only when defendant's path turned toward the back of the lot at 2735 Wall Avenue that Tran saw the gun.

¶ 12 Biegay testified that Tran had parked the police car on the south side of Wall Avenue "just in front of 2735 Wall, right before 2739." She initially noticed only one person, a woman

or girl. Biegay got out of the car, then saw Tran start to run southeast in pursuit of a "second subject" in a white T-shirt. She heard Tran yell, "[S]top, police." She joined the pursuit; she agreed that she went "down the east side of 2735 Wall." As Tran reached the east side, she saw the person in the white T-shirt, defendant, jump a fence on the east side of the house. She then "turned around to go back westbound to see if [she] could possibly cut that subject off," passing in front of 2735 Wall to end up on the west side of that house. Tran ordered defendant to stop and then yelled, "[G]un." As she returned to her starting point, she saw defendant running empty-handed through a back yard and toward a section of chain-link fence. He jumped over a gate and ran toward her. She ordered him to stop and, when he did not, she fired her Taser at him. It "did not appear to take effect." Biegay then used her Taser directly on defendant. As she did so, Tran fired his Taser, which incapacitated defendant. Tran cycled the Taser again when the two had difficulty getting defendant to put his hands behind his back. The only civilians whom Biegay saw at the scene were defendant, the female subject, and "[a] [*sic*] mother of his girlfriend," who came out of the house. She did not know if anyone else was in the house. She said that the gun was found 20 to 25 feet from where she tased defendant.

¶ 13 Navarro's testimony was mostly consistent with that of Tran and Biegay. He believed that the call to Tran had directed them to a specific address. Like Tran, he initially saw both defendant and a woman. Navarro saw defendant start running almost as soon as the police car pulled up; he was uncertain who started running first, Tran or defendant. He followed Tran, heard him order defendant to stop, and heard him yell, "[G]un." He saw Biegay run back toward their starting point. As he rounded the northeast corner of the house at 2735 Wall Avenue, he saw Tran "backing out of that area." He saw defendant climb the fence but he hesitated before crossing it himself, as he had to free his hands. He was near the fence that separated 2735 and

2739 Wall Avenue when he next got a view of defendant. Defendant was "kind of mak[ing] a U within that back yard, so *** he [was] going back northbound towards the front of the house." Navarro lost sight of defendant again—apparently when defendant passed to the west of the house at 2735 Wall Avenue—but he expected Tran and Biegay to be in defendant's path. Tran and Biegay stopped defendant directly in front of the gate at 2739 Wall Avenue. The fence at 2735 Wall Avenue did not have a gate in that area. The back yard at 2735 Wall Avenue was bounded on the south by a six-foot wooden fence, on the east by another wooden fence, and on the west—between 2735 and 2739 Wall Avenue—by a chain-link fence. The area in which Navarro saw defendant making a "U" was roughly the area in which officers later found the gun. However, Navarro never saw defendant make any gesture that suggested his tossing the gun aside.

¶ 14 On cross-examination, Navarro said that he had climbed the chain-link fence: he put a hand on top and got his feet into the links. When he saw defendant climb the fence, he did not see anything in defendant's hands. He did not recall defendant falling while crossing the first fence.

¶ 15 Biegay and Tran both filed use-of-force reports after the incident. Neither report described the foot chase or the appearance of a gun.

¶ 16 Officer Brilliasol Jasso of the Waukegan police transported defendant to the police station. Jasso called "rescue" when defendant vomited while he was in the booking room.

¶ 17 The parties stipulated that defendant had a prior felony conviction. Defendant rested without presenting any evidence.

¶ 18 The State argued that its evidence had painted a consistent picture: defendant ran, the officers pursued, Tran saw a gun, and when the officers caught defendant he did not have a gun

but a gun was found close to where the officers had seen defendant running. It further argued that defendant was not seriously attempting to flee but rather was trying to get far enough away to conceal the gun.

¶ 19 Defense counsel argued that the officers' testimony was inconsistent on many points and that the evidence was otherwise weak. Counsel emphasized seven points. One, no two accounts agreed entirely on where defendant and Coburn were standing when the officers arrived. Two, why the officers drove to Wall Avenue was murky. Three, Tran said that he first saw the gun as defendant was turning the (northeast) corner around the house at 2735 Wall Avenue, but, according to Biegay and Navarro, "Tran yelled ['gun'] right in front of 2735." Four, the fact that neither Tran's nor Biegay's use-of-force report described defendant's flight was an indication that the officers made the story up later. Five, if the officers believed that defendant had a gun, all the officers would have had their firearms out rather than their Tasers. Six, the gun was found in a place defendant had never been and it had not disturbed the foliage, as it would have if it had been thrown. Seven, the officers never saw defendant throw anything.

¶ 20 Counsel argued that these weaknesses in the evidence pointed to the conclusion that the officers' testimony was fabricated:

> "Now, why am I telling you this? [*Defendant*] *never ran that way. That never happened.* A person sees the police here, I am going to run directly towards the police ***. ***
>
> Now, then they say he climbed the fence. Now, what did I tell you what they were going to say when he climbed the fence? They are not going to want to say that he used his hands. Not one officer will want to say it." (Emphasis added.)

¶ 21 In rebuttal, the State argued that, if the officers had set out to frame defendant, the evidence would have been more straightforward:

> "If you are making up a story, a complete fabrication to bust a guy, to put a case on that you shouldn't have on him, you are going to lie about a lot more important things than him just running through [a yard]. If you are going to lie about him running through a front yard, if you are going to lie about running through a back yard, you are also going to lie about him having the gun. No officer would take the stand and say they did not see him with the gun, but two officers took the stand and said they did not see him with a gun. Why did they do that? Because that is the truth. *** You don't make up a story and then lie on somebody and make it sound like they have a gun when they don't have a gun and then forget to do the most important lie and put the gun in his hand. That's crazy."
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> * * *
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> *** [I]t is quite an incredible claim to say given the evidence that's been put in at this trial that he was never running in that front yard; that he was never in that back yard; that he never had a gun. I can understand trying to argue that he didn't have a gun, it was a mistake, and that he is an unlucky guy because he happens to be where he was. There was a gun found. But to argue that he was never in the front yard of the neighbor's house over here and that he was never in this back yard is preposterous and has nothing to do with any of the evidence that's been put in at this trial."

¶ 22 About three hours after the jury started deliberating, the court received two relevant notes from the jury. The first stated that one juror would not be able to return on the next business day. The second said:

> "[A]t least one juror is not going to side with the others no matter what is said. This is very clear. What do we need to do? It's either eleven to one or ten to two. It's not going to move."

¶ 23 Defense counsel asked the court to declare a mistrial, but the court sent the jury a note telling the jurors to continue to deliberate. The jury sent a note seeking permission for some jurors to make calls to arrange child-care and the like. Some uncertain time later, the court sent the jurors dinner menus. Shortly thereafter, the jury reached a verdict, finding defendant guilty.

¶ 24 Defendant moved for a new trial, asserting among other things that the court should have granted a mistrial. The court denied the motion. On April 14, 2011, the court entered judgment on the conviction of unlawful possession of a weapon by a felon and sentenced defendant to 12 years' imprisonment. Defendant appealed, again asserting that the court had mishandled the jury's claim of deadlock. We affirmed on November 19, 2012 (*People v. Obiazi*, 2012 IL App (2d) 110580-U).

¶ 25 What occurred next is clear only by consulting this court's own records in conjunction with copies of correspondence attached to defendant's second amended postconviction petition. Among the exhibits to that petition is a copy of a letter from appellate counsel to defendant dated November 20, 2012. That letter informed defendant both that we affirmed his conviction and that counsel was declining to further represent him. The letter also included an insert with information about further legal steps available to defendant, including filing a petition for rehearing and filing a postconviction petition. The insert noted the deadline for some of these actions, including filing a petition for rehearing, but did not say anything about deadlines for filing a postconviction petition. The letter does not indicate that this court was sent a copy, and defendant's case file in this court does not contain a copy.

¶ 26 Defendant mailed a *pro se* petition for rehearing on December 18, 2012, accompanied by what appears to be a proper proof of mailing. We received that petition on December 21, 2012, and we denied it on January 3, 2013. We mailed notice of the denial to appellate counsel but not defendant. Defendant sent us a letter dated "January 8, 2012 [*sic*]." He inquired about the status of his petition and noted that he had not received a file-stamped copy of his petition. A note from this court's clerk implies that we sent defendant a file-stamped copy of his petition on January 14, 2013. We sent him no further correspondence.

¶ 27 Defendant mailed a *pro se* postconviction petition from prison on some unspecified day in September 2013; the proof of mailing associated with the petition is dated September 11, 2013, and the trial court received the petition on September 16, 2013. The court appointed postconviction counsel for defendant; counsel filed an amended petition on May 22, 2015.

¶ 28 The amended petition included several claims, including one that trial counsel was ineffective for, among other things, failing to call two witnesses: Coburn, who was the other person whom the officers saw when they arrived at Wall Avenue, and one Jimmy Cook, who had a view of the incident from inside the house at 2739 Wall Avenue. The affidavits of Coburn and Cook were attached. Coburn averred that she and defendant "were in a dating relationship." On July 16, 2009, at about 12:45 a.m., she and defendant were standing in the driveway of her house at 2739 Wall Avenue. The police approached defendant and "deployed a taser gun on him." He began to scream. He never ran or made any throwing gesture. Further, at the time of the incident, it was common for people to walk through her back yard and discard "needles, drug baggies, and weapons." Coburn and trial counsel had met and discussed Coburn's potential testimony, but counsel did not call her as a witness although she had been willing to testify. Further, she informed trial counsel that Cook was in her house over the night of July 15-16 and

"m[ight] have some information regarding [defendant's] arrest." Cook averred that he was Coburn's cousin and was visiting his family members at 2739 Wall Avenue on the night of the incident; he had not met defendant until that day. Just after midnight, he heard people outside the house. He looked out the window and saw defendant and police officers. Defendant was on the driveway with his hands in the air. He started backing up, his hands still in the air. An officer fired a Taser at defendant. He did not see defendant run or make a throwing gesture. Trial counsel never contacted him.

¶ 29 The State moved to dismiss all claims. It asserted both that the claims lacked merit and that the petition was untimely.

¶ 30 With leave of the court, defendant filed his second amended petition that alleged that the untimeliness of his petition was not due to any culpable negligence on his part. He attached as an exhibit the letter from appellate counsel informing him of our affirmance of his conviction. Defendant also submitted his own affidavit averring that he had intended to file a petition for leave to appeal to our supreme court if we did not grant rehearing. He further averred that he did not learn that we had denied the petition for rehearing until April 17, 2015, when he was informed of the denial by postconviction counsel. He filed his postconviction petition less than six weeks beyond the deadline imposed by section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2012)).

¶ 31 The court initially ruled that it could not know whether counsel was ineffective for failing to call Coburn and Cook without having heard counsel explain why he did not call them. It thus stated that a third-stage hearing was necessary. However, after all involved expressed uncertainty as to whether a partial denial of the State's motion was proper, the court continued the matter.

¶ 32 The court then granted the State's motion to dismiss in full. It ruled that the petition was untimely and that counsel was not ineffective. At the hearing, the court stated that the petition's untimeliness was not "the fault of anyone else but the defendant." It also rejected defendant's ineffective-assistance claim:

> "[T]he Court again had the opportunity to review the entire file and the Court does recall the trial, even though this is an '09 case, and, again, as in any case in which the allegations of ineffectiveness of counsel are raised, it's the Strickland test ***. And in doing so the Court, in looking at the performance of trial counsel for the defendant at the trial level, *** does not find that the conduct of counsel fell below an objective standard of reasonableness. And, therefore, you don't get to the second prong as to whether the deficient performance prejudiced the defendant. *** Frankly, counsel did a nice job, did an excellent job, frankly, in her [*sic*] defense of the defendant."

Defendant timely appealed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant asserts that the trial court erred in dismissing his ineffective-assistance-of-counsel claim. He contends that the court erred in ruling that the petition was untimely, arguing that he was not culpably negligent when he delayed filing while unsure of the result of his petition for rehearing. He further contends that Coburn and Cook both could have given exculpatory testimony and that trial counsel acted unreasonably and prejudicially by failing to investigate Cook's potential testimony and by failing to use the testimony of either.

¶ 35 When we review the grant of a motion to dismiss at the second stage of proceedings, "we accept as true all factual allegations that are not positively rebutted by the record." *People v. Johnson*, 2017 IL 120310, ¶ 14.

> "[W]hen a petitioner's claims are based upon matters outside the record, [the supreme] court has emphasized that 'it is not the intent of the [A]ct that [such] claims be adjudicated on the pleadings.' [Citations.] Rather, the function of the pleadings in a proceeding under the Act 'is to determine whether the petitioner is entitled to a hearing.' [Citation.] Therefore, the dismissal of a post-conviction petition is warranted only when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *People v. Coleman*, 183 Ill. 2d 366, 382 (1998).

Our review of such a dismissal is *de novo*. *Johnson*, 2017 IL 120310, ¶ 14.

¶ 36 The court erred in dismissing the petition based on untimeliness. Taking defendant's affidavit as true, defendant's allegations sufficiently support his claim of lack of culpable negligence for purposes of surviving the State's motion to dismiss. Defendant had a reasonable explanation.

¶ 37 In *People v. Boclair*, 202 Ill. 2d 89, 108 (2002), the Illinois Supreme Court held that "the 'culpably negligent' standard contained in section 122-1(c) [of the Act] contemplates something greater than ordinary negligence and is akin to recklessness." We take as true defendant's statement in his affidavit that he did not receive timely notice of the denial of his *pro se* petition for rehearing in this court. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006) ("At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true."). That is sufficient to establish that the trial court was incorrect in ruling that the postconviction petition's late filing was not "the fault of anyone else but the defendant." In any event, our own records show that defendant actively tracked the status of his petition for

rehearing and that this court did not give him personal notice of that petition's denial. We can thus conclude that defendant did not display any negligence "akin to recklessness" in tracking the status of his appeal.

¶ 38 Cases such as *People v. Rissley*, 206 Ill. 2d 403, 420-21 (2003), which address whether a defendant is culpably negligent when he or she follows improper legal advice about the time in which to file a petition, provide little guidance here. Nevertheless, the legal uncertainty existing several years ago concerning filing deadlines was a further complication facing defendant. Section 122-1(c) of the Act does not explicitly give a deadline for the filing of a postconviction petition when the defendant has not filed a petition for leave to appeal to the Illinois Supreme Court (and thus has filed no petition for a writ of *certiorari* to the United States Supreme Court). 725 ILCS 5/122-1(c) (West 2012). Our supreme court provided a final resolution to that uncertainty only in 2017, when, in *Johnson*, it held that the deadline should be based on the deadline of six months after the time for a petition for *certiorari*: specifically, it held that the deadline was six months after the 35 days in which the defendant could file a petition for leave to appeal. *Johnson*, 2017 IL 120310, ¶ 24. To be sure, the *Johnson* court concluded that the uncertainty about the post-appeal deadline was not by itself enough to establish a petitioner's lack of culpable negligence. *Johnson*, 2017 IL 120310, ¶ 30. However, the uncertainty was an added complication for defendant here.

¶ 39 We now turn to the merits of defendant's ineffective-assistance-of-counsel claim. We hold that defendant was entitled to an evidentiary hearing on that claim. We consider a claim of ineffective assistance of counsel under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) as adopted by *People v. Coleman*, 168 Ill. 2d 509, 528 (1995):

> " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction *** resulted from a breakdown in the adversary process that renders the result unreliable.' "

The choice of which witnesses to call is a matter of trial strategy and thus entitled to a presumption that counsel acted reasonably. *E.g.*, *People v. Murray*, 2017 IL App (2d) 150599, ¶ 70; *People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011). That said, a failure to present exculpatory witnesses can amount to ineffective assistance when the witnesses would support an otherwise unsupported defense or if counsel's failure is the result of a lack of preparation:

> " '[C]ounsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense.' [Citation.] Moreover, 'strategic decisions may be made only after there has been a thorough investigation of law and facts relevant to plausible options.' [Citations.] Thus, this court had held that '[t]he failure to interview witnesses may indicate actual incompetence [citation], particularly when the witnesses are known to trial counsel and their testimony may be exonerating [citation].' " *People v. Upshaw*, 2017 IL App (1st) 151405, ¶ 39.

Further, because a petition based upon matters outside the record is not to be adjudicated on the pleadings (*Coleman*, 183 Ill. 2d at 382), when the record does not positively show that counsel

had a sound strategic basis for failing to present witnesses, and when the claim is otherwise sufficient, the defendant is entitled to an evidentiary hearing to determine whether counsel *in fact* had a sound strategic basis for the decision. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 40 Here, the affidavits show that two witnesses could have corroborated an otherwise uncorroborated defense. Defense counsel asserted during opening and closing arguments that the police witnesses' testimony about defendant's flight was a complete fabrication. Defense counsel's decision not to present any evidence to support that assertion resulted in an obvious gap in defendant's case. Coburn's affidavit shows that she was willing and able to corroborate the defense, and Cook's affidavit shows that he would have partially corroborated Coburn's testimony. Further, the affidavits suggest that the decision likely was not strategic, as counsel could not have intelligently assessed the persuasiveness of Coburn's and Cook's combined testimony without interviewing Cook. Given that a petition based upon matters outside the record must not be adjudicated on the pleadings, an evidentiary hearing is necessary for the trial court to determine whether counsel in fact had a sound strategic basis for his actions.[1]

¶ 41 Further, defendant's petition adequately pleaded that counsel's unreasonable choice was prejudicial. As we noted, counsel's theory of the case was unsupported by the trial evidence. Had it been supported, the jurors would have been faced with a credibility contest instead of no contest at all. Had they deemed Coburn and Cook credible, they might have acquitted defendant.

[1] The trial court initially suggested as much, but reversed itself when it questioned whether a partial dismissal was available. Although such a dismissal is not available at the first stage of postconviction proceedings, it is permitted at the second stage. *People v. Cabera*, 326 Ill. App. 3d. 555, 564 (2001).

We cannot judge their credibility here—rather, we must take their proposed testimony as true. See *Pendleton*, 223 Ill. 2d at 473.

¶ 42 The State suggests that the trial court was correct to conclude that defense counsel acted reasonably by holding the State to its burden of proof. We do not agree. As explained above, defense counsel planted the seed for a defense and then allegedly failed to present available evidence to support that defense. The record does not indicate counsel's reasons for failing to contact Cook or failing to present Coburn as a witness, so it would be premature to conclude that counsel's actions were rooted in sound trial strategy.

¶ 43 The State, in an argument that goes to both prongs of *Strickland*, contends that, because the strategy that defendant says counsel should have adopted could not have worked, that strategy was itself unreasonable:

> "[T]he proposed testimony in the affidavits from Coburn and Cook directly contradicted all of the State's evidence. In other words, if Coburn and Cook testified at trial, they would have stated that the officers came up to defendant, defendant raised his hands, and the officers subsequently Tased defendant and arrested him. In addition to being highly questionabl[e] and unconvincing, this 'exculpatory' testimony would have created a credibility contest between defendant's biased witnesses and the unbiased police officers, whom all testified that defendant did not stand still and, instead, ran from them. Again, defense counsel's strategy of avoiding this credibility contest and holding the State to its burden of proof was an objectively reasonable and valid trial strategy."

We do not agree. First, counsel in fact relied entirely on the theory that the State calls "questionabl[e] and unconvincing." Thus, if relying on that theory—as opposed to merely holding the State to its burden of proof—was unreasonable, then counsel acted unreasonably

regardless of his decision not to call Coburn and Cook. Moreover, a defense that sets up a credibility contest will almost certainly be better than a defense conspicuously lacking in support. Further, as noted, we must take the proposed testimony as true; an evaluation of the relative credibilities of the police and defendant's proposed witnesses must be made at an evidentiary hearing. In any event, the State greatly overstates the advantage of its witnesses. A jury would view the officers as disinterested only so long as it remained certain that the force used in defendant's arrest was appropriate. Any success by defense counsel in raising a suspicion of a cover-up for brutality might affect the jury's assessment of witness credibility. In sum, the State is correct that calling Coburn and Cook would have created a credibility contest. However, the result of such a contest is not one that can be adjudged on affidavits alone; an evidentiary hearing was needed to decide whether counsel was unreasonable and whether defendant suffered prejudice.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we reverse the dismissal of defendant's ineffective-assistance-of-counsel claim and remand the matter for further proceedings under the Act.

¶ 46 Reversed and remanded.