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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 2060
)	
TONY WILLIAMS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition is reversed, and the petition is remanded for second-stage proceedings, because it raised an ineffective-assistance claim of at least arguable merit.
- ¶ 2 Following a 2013 bench trial, defendant Tony Williams was convicted of three counts of aggravated battery of a peace officer (720 ILCS 5/12-3.05(a)(3) (West 2012)) and sentenced to concurrent prison terms of 12 years. We affirmed on direct appeal. *People v. Williams*, 2015 IL App (1st) 134020-U (unpublished case under Supreme Court Rule 23). Defendant now appeals

from the summary dismissal of his 2016 *pro se* postconviction petition. He contends that his petition stated the gist of a meritorious claim that trial and appellate counsel rendered ineffective assistance by not raising a one-act-one-crime challenge to his multiple convictions based on the same physical act. We reverse the summary dismissal and remand for further postconviction proceedings.

¶ 3 Defendant was charged with three counts of aggravated battery of a peace officer for, on or about December 28, 2012, allegedly knowingly causing great bodily harm to Chicago police officer Robert Lobianco by striking him about the body while knowing he was a peace officer. All three counts alleged that defendant “struck Officer Lobianco about the body” without any further description of, or distinction between, blows. They variously alleged that Lobianco “was performing his official duties,” “was battered to prevent performance of his official duties,” and “was battered in retaliation for performing his official duties.” Defendant was also charged with one count of resisting a peace officer allegedly committed on or about the same date.

¶ 4 The evidence at trial was that Officer Lobianco and another officer, both wearing bulletproof vests and visibly wearing their badges, stopped defendant as he fled the scene of a shooting. Defendant provided his driver’s license upon request but refused to exit his car. Instead, he flung his car door open and leapt out of his car to face Lobianco. When Lobianco told defendant to turn around and put his hands on the car to be frisked, defendant instead shoved Lobianco to the ground, fell on top of him, and bashed his head into the pavement several times. Lobianco experienced unconsciousness, and the medical and photographic evidence showed that Lobianco suffered blunt head injury and had multiple abrasions to his forehead, the bridge of his

nose, and his right cheek bone, as well as soreness in his back and spine, a fractured kneecap, and numb fingers.

¶ 5 On this evidence, the court found defendant guilty as charged, then merged the count of resisting a peace officer into the three counts of aggravated battery of a peace officer. The court found in relevant part that defendant “grabbed Officer Lobianco and started smashing his head into the ground repeatedly until he was basically unconscious. Looking at these exhibits, these are multiple bashings of the head into the ground, obviously.”

¶ 6 The court sentenced defendant on all three counts of aggravated battery of a peace officer to concurrent 12-year prison terms. Trial counsel made an oral motion to reconsider sentence, but did not challenge that defendant was sentenced on all three counts. The motion was denied.

¶ 7 On direct appeal, defendant’s sole contention was an insufficiency of the evidence claim. *Williams*, 2015 IL App (1st) 134020-U, ¶ 2. The appeal did not raise a one-act-one-crime claim.

¶ 8 Defendant filed his *pro se* postconviction petition in January 2016. He argued that trial and appellate counsel rendered ineffective assistance by not raising a one-act-one-crime challenge to his multiple convictions for aggravated battery of a peace officer. He also argued that the State presented perjured testimony at trial.

¶ 9 In March 2016, the circuit court summarily dismissed the petition, finding it without merit. It found that the contradictions between police reports and the testimony of the State’s witnesses did not constitute perjury and moreover were elicited in the trial court. Regarding defendant’s one-act-one-crime claim, the circuit court noted that the resisting count was merged into the aggravated battery counts and concurrent sentences were imposed. It found that

“different theories of aggravated battery” of a peace officer were presented, and that “[e]verything merged for sentencing purposes.”

¶ 10 On appeal, defendant contends that his petition should not have been summarily dismissed because it stated the gist of a meritorious claim: trial and appellate counsel rendered ineffective assistance by not raising, in the trial court or on direct appeal respectively, a one-act-one-crime challenge to his multiple convictions for aggravated battery of a peace officer.

¶ 11 A postconviction petition may be summarily dismissed within 90 days of filing if “the court determines the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition may be summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation, or it is substantially incomplete because it does not include objective or independent corroboration of its allegations. *People v. Allen*, 2015 IL 113135, ¶¶ 24-25. Summary dismissal is inappropriate if the petition alleges sufficient facts to state the gist of a constitutional claim, even if the petition lacks formal legal argument or citations to authority. *Id.* ¶ 24. At the first stage, documented factual allegations are generally accepted as true and construed liberally. *Id.* ¶ 25. We review *de novo* the summary dismissal of a postconviction petition. *Id.* ¶ 19.

¶ 12 The purpose of a postconviction proceeding is to permit inquiry into constitutional issues in the judgment of conviction that were not, and could not have been, adjudicated on direct appeal. *People v. English*, 2013 IL 112890, ¶ 22. While issues that could have been, but were not, raised on direct appeal are forfeited, the doctrine of forfeiture is relaxed if the forfeiture arose from the ineffective assistance of appellate counsel. *Id.*

¶ 13 Claims of ineffective assistance are governed by the familiar two-pronged test, whereby a defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. *People v. Dupree*, 2018 IL 122307, ¶ 44. At the first stage of postconviction proceedings, a defendant must show that counsel's performance was arguably unreasonable and that the defendant was arguably prejudiced. *People v. Brown*, 2017 IL App (1st) 150203, ¶ 24.

¶ 14 Generally, a defendant may not receive convictions for multiple offenses arising out of the same physical act. *People v. Coats*, 2018 IL 121926, ¶ 11. An act is any overt or outward manifestation that will support a different offense, so that a status or state of being is not an act. *Id.* ¶¶ 15, 27. Two offenses with a common act as part of both offenses may support two convictions, even where the common act is the entirety of one of the offenses. *Id.* ¶ 15. Also, multiple related acts may support multiple convictions. *Id.* ¶ 16.

¶ 15 However, multiple convictions are supported only when the charging instrument reflects the State's intent to apportion a defendant's conduct into multiple offenses. *People v. Reese*, 2017 IL 120011, ¶ 80; *In re Samantha V.*, 234 Ill. 2d 359, 378 (2009). "A holding to the contrary would be 'profoundly unfair' and could infringe upon an accused's constitutional right to be informed of the nature and cause of the charges against her so she may prepare a defense." *Samantha V.*, 234 Ill. 2d at 378 (quoting *People v. Crespo*, 203 Ill. 2d 335, 345 (2001)).

¶ 16 Here, the State did not distinguish in the charging instrument between defendant's various blows to Officer Lobianco but alleged in all three counts that he "struck Officer Lobianco about the body." Thus, it is irrelevant that defendant's blows were separate physical acts that *could* support separate charges, as that is not how he was *actually* charged. The only

point of distinction between the three counts was that Officer Lobianco “was performing his official duties,” “was battered to prevent performance of his official duties,” and “was battered in retaliation for performing his official duties.” However, those are not separate physical acts by defendant. Thus, trial and appellate counsel at least arguably rendered ineffective assistance by not so objecting in the trial court or so contending on direct appeal. Defendant’s petition contained a claim of at least arguable merit and should not have been summarily dismissed.

¶ 17 Accordingly, the judgment of the circuit court is reversed and this cause is remanded for second stage postconviction proceedings. 725 ILCS 5/122-4 to 122-6 (West 2016).

¶ 18 Reversed and remanded with directions.