2019 IL App (1st) 171143-U

SECOND DIVISION
September 30, 2019

No. 1-17-1143

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 12-CR-2331
	)	
VERNON WALKER,	)	The Honorable
	)	William H. Hooks,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court erred in summarily dismissing petitioner's *pro se* postconviction petition, where petition presented an arguable constitutional claim for ineffective assistance of trial counsel.

¶ 2 Petitioner Vernon Walker, who was convicted in a bench trial of being an armed habitual criminal, possession of a controlled substance with intent to deliver, and possession of a controlled substance, appeals from the trial court's summary dismissal of his *pro se* petition for

postconviction relief under the Post-Conviction Hearing Act.[1] 725 ILCS 5/122-1 *et seq.* (West 2016). He contends that the trial court erred in doing so because his petition presented an arguable claim that his trial counsel was ineffective for failing to investigate the testimony of and call at trial two witnesses who would have testified that one of them, and not petitioner, was the owner of the gun and drugs that petitioner was convicted of possessing. For the reasons that follow, we reverse and remand for second-stage postconviction proceedings.

¶ 3 I. BACKGROUND

¶ 4 Petitioner's convictions stem from the Chicago Police Department's execution of a search warrant on January 4, 2012, at a second-floor apartment located at 5701 South Throop Street in Chicago. This court previously set forth in detail the facts of this case in our decision in petitioner's direct appeal of his conviction and sentence. *People v. Walker*, 2016 IL App (1st) 143633-U. We state below only those facts necessary to a resolution of the issues in this appeal.

¶ 5 At petitioner's trial, Officer Stephen Inseley testified that on the day at issue, he and other officers entered the second-floor apartment. No occupants were home at that time. The apartment contained three bedrooms, and Officer Inseley was in charge of searching the rear bedroom. It contained a bed, a night stand, and a closet. Upon entering the bedroom, he saw in plain sight on the night stand two clear sandwich bags, each containing a white powder substance and a white rocklike substance, which he suspected to be crack cocaine. Also on the night stand were nine smaller blue-tinted zip-lock bags containing this suspect crack cocaine. Officer Inseley also found on the bedroom floor a bundle of cash totaling $293. He also searched the closet, where he found a handgun wrapped in a white hooded men's sweatshirt. Officer Inseley was alerted by his partner, Officer Jerod Nowak, that he had also found in the bedroom additional cash totaling

[1] Petitioner was also convicted at trial of the unlawful use of weapons by a felon, but this conviction was vacated on direct appeal. *People v. Walker*, 2016 IL App (1st) 143633-U, ¶ 23.

$940 and seven documents with petitioner's name on them. Officer Inseley testified that a police scanner and numerous zip-lock bags were recovered elsewhere in the apartment.

¶ 6 Officer Inseley testified that petitioner was located and taken into custody the next day. At the police station, Officer Inseley read petitioner his Miranda rights. Petitioner waived his rights and proceeded to talk to the police. Officer Inseley stated that petitioner first said to the officers, "how much sh*t did you get out of my crib?" Officer Inseley testified that he responded by asking petitioner, "which crib would you be talking about[?]" He testified that petitioner replied, "5701 South Throop." Officer Inseley testified that petitioner next said to him "that the work was his, [but] that the heater was not." Officer Inseley testified that, based on his 15-plus years of experience as a police officer, he understood petitioner to mean that the suspect narcotics, or "work," were his, but the gun, or "heater," was not. Officer Inseley then warned petitioner that the gun would be sent to the state crime lab for fingerprint testing and, after a few moments, petitioner admitted to him that the gun was also his and that he wanted to cooperate with police. On cross-examination, Officer Inseley affirmed that, while he did not make any notes or recordings during his conversation with petitioner, he memorialized it in a written narrative supplemental report attached to his police report, which he prepared and signed soon after the conversation took place. He also admitted that petitioner was not asked to write out his statement, nor to review or sign anything with respect to his statement. He also admitted that, when petitioner was taken into custody, no keys were recovered from him that operated any of the locks of the apartment at 5701 South Throop Street.

¶ 7 Officer Nowak testified that he was also involved in searching the rear bedroom of the apartment with Officer Inseley. Officer Nowak opened the night stand drawer and recovered $940 in cash and seven documents bearing petitioner's name. Officer Nowak identified these as

petitioner's birth certificate, his Social Security card, a mailed envelope with his name on it, a payment slip bearing his name, an insurance card bearing his name, and two traffic citations with his name on them. On cross-examination, officer Nowak noted that, while all of the documents bore defendant's name, none of them contained an address of 5701 South Throop Street. The only documents that bore any addresses were the envelope and the two traffic citations, and the address listed on them was on South Paulina Street.

¶ 8 Stipulations were presented that the contents of the sandwich bags and zip-lock bags recovered from the night stand tested positive for cocaine in the amount of 124.9 grams. The parties also stipulated to the presentation of two certified copies of conviction for petitioner to support the charge of armed habitual criminal.

¶ 9 Petitioner testified on his own behalf. He denied telling the officers at the police station that the drugs or the gun found in the apartment were his or that was interested in cooperating. He testified that, as of January 4, 2012, he lived at 8419 South Paulina Street, had been living there for the previous ten years, and shared that residence with his mother, father, and younger brother. He testified that his cousin, Darryl Walker, lived at the apartment at 5701 South Throop Street, along with two women, Tanika Smith and Candice Smith. He testified that, one day about two to three weeks prior to January 4, 2012, he had gone to that apartment to watch a game. That day, he had with him a folder containing his birth certificate, Social Security card, and various documents to prove his residency because he had come from replacing his lost driver's license. He testified that he put that folder containing his documents in a drawer in the kitchen. Petitioner denied ever living at 5701 South Throop Street, having keys to the apartment, or knowing that the drugs and gun were there. On cross-examination, petitioner testified that he did not know that his folder of documents had been recovered from a drawer in the bedroom.

¶ 10 Petitioner's mother, Jacquelyn Washington, testified that she lives at 8419 South Paulina Street and that petitioner had lived with her at that address for the last 20 years. She admitted that, although petitioner has always lived with her at that address and maintained it as his residence, he sometimes spent the night elsewhere and did not come home. She further testified that she did not know anyone who lived at 5701 South Throop Street and affirmed that no family members, either from her side or her husband's, lived there.

¶ 11 The trial court found petitioner guilty of the offenses of being an armed habitual criminal, possession of a controlled substance with intent to deliver, and possession of a controlled substance. (It also found him guilty of the offense of unlawful use of a weapon by a felon, but that conviction was vacated on direct appeal.) In its colloquy, the court noted some deficiencies in the police investigation, particularly in the recording or memorializing of defendant's statements to police, but it found that both Officers Inseley and Nowak were credible in their testimony. The court discussed at length the significance of the personal documentation of petitioner that the police had found in the drawer in the bedroom. The trial court stated that, although it did not disbelieve petitioner's explanation that he had this documentation to obtain a new driver's license, it did not believe that petitioner would leave documents as important as his original birth certificate and Social Security card at an apartment where he did not live for two weeks without going back to retrieve them. Based on this, the court stated it did not find petitioner's testimony to be credible. Rather, the trial court concluded that, even if petitioner's primary residence was on South Paulina Street, he also maintained an abode at 5701 South Throop Street that he used for the purpose of selling drugs.

¶ 12 The trial court denied defendant's motion for a new trial and sentenced him to concurrent terms of ten years' imprisonment for each conviction.

¶ 13 Petitioner then filed a direct appeal, in which he argued: (1) the trial court erred in denying a motion by him to quash and suppress evidence; (2) the evidence presented at trial was insufficient to support his convictions; (3) the trial court erred at sentencing by considering predicate felony convictions and his silence as aggravating factors; (4) his sentence was excessive; and (5) his conviction for unlawful use of weapons by a felon violated the one-act, one-crime rule. As stated above, this court vacated petitioner's conviction for unlawful use of weapons by a felon. *Id.* ¶ 23. This court affirmed all other challenged aspects of his conviction and sentence. *Id.* ¶ 80. The Illinois Supreme Court denied petitioner's petition for leave to appeal. *People v. Walker*, No. 12451, 77 N.E.3d 85, 412 Ill. Dec. 917 (Ill. Jan. 25, 2017).

¶ 14 Petitioner filed the instant *pro se* petition for postconviction relief, in which he contended that he was actually innocent and that he had suffered a substantial denial of his constitutional rights. Attached to the petition were the signed and notarized affidavits of Habakkuk Hollins, Tanika Smith, Jacqueline Washington, and petitioner. The affidavit testimony of Hollins and Smith was largely similar. Both stated that they had been together at the apartment asleep when the police arrived to execute the search warrant. They stated that the police woke them up, handcuffed them, and placed them in the living room while the apartment was searched. They stated that after the police discovered a gun and drugs, the police asked them whether the gun and drugs belonged to Hollins or to Smith. Both stated that Hollins told the police that the gun and drugs belonged to him. Smith stated that an officer asked her if she stayed at the apartment, and she answered in the affirmative and stated she was the renter. Hollins stated that the police asked where petitioner was, and Hollins stated that he told the police he did not know. Both stated that the officers left with them a search warrant in petitioner's name.

¶ 15 Both Hollins and Smith stated in their respective affidavits that the two of them went, along

with Washington, to the Cook County courthouse to speak with petitioner's attorney. This was several months after the execution of the search warrant, according to Hollins. Both Hollins and Smith stated that they spoke with petitioner's attorney in the hallway, that Hollins told petitioner's attorney that the gun and drugs belonged to him (Hollins), and that petitioner's attorney responded that petitioner had already been charged. Hollins added in his affidavit that petitioner's attorney "refuse[d] to have me as a witness."

¶ 16 Washington's affidavit stated in pertinent part that Smith and Hollins had been willing to take the witness stand to give their testimony and wanted to inform the court of the truth in their own words. Washington's affidavit requested that Smith and Hollins be contacted.

¶ 17 Petitioner's affidavit stated that shortly after his arrest and prior to trial, he had spoken with his attorney concerning the drugs and gun found at the house where the search warrant had been served. Petitioner stated that he explained to his attorney that the gun and drugs were not his and that there were witnesses willing to testify to that fact. Petitioner stated that, shortly after that conversation with his attorney, Hollins, Smith, and Washington came to the courthouse and "confirmed my conversation with him." Petitioner stated that his attorney refused to present the witnesses, even after talking to them directly.

¶ 18 Petitioner's postconviction petition set forth three contentions under the heading "Claims of Error." His first contention was that he was actually innocent, as demonstrated by the newly-discovered evidence, specifically the testimony that the gun and drugs that he was convicted of possessing actually belonged to Hollins. His second contention was that he "was denied his 6th Amendment [r]ight to counsel under the United States Constitution where [t]rial counsel failed to investigate the testimony of this petitioners [*sic*], that the apartment at 5701 South Throop did not belong to this Petitioner, neither did the guns and drugs." His third contention was that he

"was denied his Sixth Amendment [r]ight to counsel under [t]he United States Constitution [w]here [t]rial [c]ounsel failed to investigate the testimony of Habakkuk Hollins and Tanika Smith who informed said [a]ttorney, that the apartment belong to Tanika Smith, and the guns and drugs belong to Habakkuk Hollins." The petition stated that the four affidavits attached were incorporated by reference in support of the allegations in the petition.

¶ 19 The trial court entered a written order summarily dismissing the petition. In its order, the trial court focused entirely on petitioner's claim of actual innocence. It included a footnote in its written order that stated, "Petitioner's claim of actual innocence references his attorney's failure to call Habakkak [*sic*] Hollins and Tanika Smith as witnesses, but petitioner has not raised an independent claim of ineffective assistance of trial counsel in the instant post-conviction petition." In summary, the trial court concluded that the evidence that Hollins possessed the gun and drugs was not newly discovered, as it was evidence known to petitioner and his attorney prior to trial. Further, it was not evidence that was so conclusive that it was likely to change the result on retrial, particularly in light of the credible testimony of the police officers, the personal documentation of petitioner's found in the night stand, his various statements to police while in custody, and his mother's testimony that he did not always come home to the residence on South Paulina Street. Petitioner appeals the trial court's summary dismissal of his petition.

¶ 20 II. ANALYSIS

¶ 21 Petitioner's argument on appeal is that the trial court erred in summarily dismissing his post-conviction petition because it contained an arguable claim that his trial counsel was ineffective for failing to investigate the testimony of Hollins and Smith or to call them as trial witnesses. Petitioner points out that he corroborated his ineffective-assistance claim with the signed and notarized affidavits of Hollins and Smith averring that Hollins told petitioner's

attorney prior to trial that he (Hollins), and not petitioner, owned the gun and drugs that the police had found during the execution of the search warrant.

¶ 22 The Post-Conviction Hearing Act (725 ILCS 5/122-1(a)(1) (West 2016)) permits a person under criminal sentence to challenge his conviction or sentence by showing that, in the proceedings which resulted in his conviction, there was a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is a collateral attack on a prior conviction that is limited to constitutional matters that were not and could not have been previously adjudicated. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). The action is commenced by the filing of a petition in the circuit court where the original proceeding occurred. *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 23 In a noncapital case, a postconviction action proceeds in three stages. *Id.* This case is at the first stage. At this stage, the trial court independently examines the petition without input from the parties. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). It must summarily dismiss a petition if it determines that "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); see *Tate*, 2012 IL 112214, ¶ 9. A petition should be summarily dismissed under this standard "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. "A petition lacks an arguable basis in law when it is grounded in 'an indisputably meritless legal theory,' for example, a legal theory which is completely contradicted by the record." *Morris*, 236 Ill. 2d at 354 (quoting *Hodges*, 234 Ill. 2d at 16). "A petition lacks an arguable basis in fact when it is based on a 'fanciful factual allegation,' which includes allegations that are 'fantastic or delusional' or belied by the record." *Id.* (quoting *Hodges*, 234 Ill. 2d at 16-17). Further, a petition alleging nonfactual and nonspecific assertions that merely amount to conclusions will not survive summary dismissal. *Id.*

¶ 24 In evaluating a petition at the first stage, the trial court must take the allegations as true and construe them liberally. *Brown*, 236 Ill. 2d at 184. Thus, although the petition must provide some facts about the constitutional deprivation alleged, a limited amount of factual detail is sufficient. *Id.* Legal argument or citation to legal authority is not necessary. *Id.* In considering the petition, the trial court may examine the court file of the proceeding that resulted in the conviction, any transcripts of that proceeding, and any action taken by an appellate court in that proceeding. 725 ILCS 5/122-2.1(c) (West 2016). The summary dismissal of a postconviction petition is reviewed *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 25 A petition that is not subject to summary dismissal advances to the second stage of a postconviction action, where counsel may be appointed for an indigent defendant and where the State may answer or move to dismiss the petition. *Id.*; see 725 ILCS 5/122-4, 122-5 (West 2016). At the second stage, the trial court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *Tate*, 2012 IL 112214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). If no such showing is made, the petition is dismissed. *Id.* If such a showing is made, the petition is advanced to the third stage, at which the trial court conducts an evidentiary hearing. *Id.*; 725 ILCS 5/122-6 (West 2016).

¶ 26 Before turning to the merits of petitioner's argument on appeal, we address an issue of forfeiture. As set forth above, on appeal, the constitutional right that petitioner contends was violated in the underlying proceedings was his right to effective assistance of trial counsel. Although his petition presented a freestanding claim of actual innocence, petitioner's reply brief makes clear that his appeal is based on a claim of ineffective assistance of counsel, not actual innocence. The trial court, in its written order dismissing the petition, analyzed only petitioner's claim of actual innocence. In a footnote in that order, it stated, "Petitioner's claim of actual

innocence references his attorney's failure to call Habakkak [*sic*] Hollins and Tanika Smith as witnesses, but petitioner has not raised an independent claim of ineffective assistance of trial counsel in the instant post-conviction petition." The State, citing the trial court's footnote, contends that petitioner has forfeited any claim of ineffective assistance of counsel because petitioner "failed to raise the claim in his petition."

¶ 27 The Post-Conviction Hearing Act provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2016). However, we agree with petitioner that his *pro se* petition raised a constitutional claim of ineffective assistance of trial counsel. His petition clearly alleged that he "was denied his 6th Amendment [r]ight to counsel under the United States Constitution" in two particulars: (1) because his "[t]rial counsel failed to investigate the testimony of this petitioners [*sic*], that the apartment at 5701 South Throop did not belong to this Petitioner, neither did the guns and drugs," and (2) because his "[t]rial [c]ounsel failed to investigate the testimony of Habakkuk Hollins and Tanika Smith who informed said [a]ttorney, that the apartment belong to Tanika Smith, and the guns and drugs belong to Habakkuk Hollins." Further, the petition specifically cited *Strickland v. Washington*, 466 U.S. 668 (1984), the seminal case involving claims of ineffective assistance of counsel. It additionally stated that the four affidavits attached were incorporated by reference in support of the allegations in the petition. We therefore find that petitioner did not forfeit his claim involving ineffective assistance of counsel.

¶ 28 Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland*. To ultimately prevail on a claim of ineffective assistance of counsel, a petitioner must show both that counsel's performance " 'fell below an objective standard of reasonableness' " and that the deficient performance prejudiced the petitioner's defense. *Tate*, 2012 IL 112214, ¶ 19 (quoting

Hodges, 234 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 687-88)). However, a "more lenient formulation" of this standard applies in the first stage to a postconviction petition pleading ineffective assistance of counsel. *Tate*, 2012 IL 112214, ¶¶ 19-20. " 'At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 29 Turning to the question of whether the petition has an arguable basis in fact, the petition and corroborating affidavits incorporated into it allege that after petitioner was arrested and prior to his trial, his attorney spoke to Hollins, Smith, and Washington in the hallway of the courthouse. Hollins and Smith told petitioner's attorney that the drugs and gun that the police had found in the apartment belonged to Hollins. Smith's affidavit states also that they "let him know exactly what took place," which, liberally construing the allegations, appears to be that Hollins and Smith were present when the police executed the search warrant, that Smith told the police that she was "the renter" of the apartment, and that Hollins told the police that the guns and drugs that they found in the apartment belonged to him. The petition alleges that petitioner's attorney refused to present Hollins or Smith as witnesses, even after talking to them directly. It also alleges that petitioner's attorney failed to investigate their testimony that the apartment belonged to Smith and that the guns and drugs belonged to Hollins. At this first stage of postconviction proceedings, these allegations must be accepted as true and construed liberally. *Brown*, 236 Ill. 2d at 184. Upon doing so, we cannot say that these factual allegations are " 'fantastic or delusional' or belied by the record." See *Morris*, 236 Ill. 2d at 354 (quoting *Hodges*, 234 Ill. 2d at 16-17)). Therefore, the petition cannot be summarily dismissed on the basis that it

has no arguable basis in fact.

¶ 30 Turning next to the question of whether the petition has an arguable basis in law, we consider whether petitioner's legal theory that his counsel was ineffective for failing to investigate and present the testimony of Hollins and Smith is itself an "indisputably meritless" legal theory. *Hodges*, 234 Ill. 2d at 19. This focuses on petitioner's theory of defense at trial and whether the alleged testimony of the witnesses would have supported this theory. *Id.*

¶ 31 In petitioner's trial, the State was seeking to establish the offenses of armed habitual criminal, possession of a controlled substance with intent to deliver, and possession of a controlled substance by proving that petitioner possessed, respectively, the gun and drugs that the police had discovered in the bedroom of the apartment at 5701 South Throop Street. As we discussed in greater detail in our decision on direct appeal, this involved showing that petitioner had constructive possession over that contraband, meaning an intent and capacity to exercise dominion and control over the items. *Walker*, 2016 IL App (1st) 143633-U, ¶¶ 42, 53. Petitioner's control over the location where the contraband was found was sufficient to give rise to the inference that he knew the contraband was there and possessed those items. *Id.* (citing *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003).

¶ 32 Petitioner's pertinent theory of defense at trial was that the State had failed to prove beyond a reasonable doubt that he exercised dominion or control over the location where the gun or drugs were found or had knowledge that those items were present there. Specifically, petitioner testified at trial that he had never resided at the apartment at 5701 South Throop Street. He testified that he did not have keys to it. He testified and presented other evidence that he resided at his family's residence on South Paulina Street. He further testified that he had no knowledge of the gun or drugs that were present in the apartment. He denied telling the police that 5701

South Throop Street was his "crib" or that the drugs or gun found inside of it were his. His counsel attacked the credibility of Officer Inseley's testimony that petitioner made these statements, specifically in light of the absence of any recording or memorializing of them. Petitioner contended that the only evidence connecting him to the apartment there was the seven documents bearing his name that the police found in a folder, and none bore the address of that apartment. No other evidence proving his residency there was found anywhere else in the apartment. He contended that the only reason that his birth certificate, Social Security card, and other documents bearing his name were present in that apartment was because it was his cousin's apartment, and he had left them there two or three weeks earlier when he went there to watch a game after using those documents to obtain a replacement driver's license.

¶ 33 Considering this theory of defense, it is at least arguable that the testimony of Hollins and Smith would have supported a defense that petitioner did not possess the drugs or gun that the police found in the bedroom of 5701 South Throop Street. If Hollins had testified at petitioner's trial that the drugs and gun found at the apartment belonged to him, this arguably could have supported a defense that petitioner was not in possession of those same items. If Hollins and Smith had testified that they were present when the police found the items, that Hollins told the police the items belonged to him, and that Smith told the police she was the renter at the apartment, such testimony could arguably have aided in petitioner's defense.

¶ 34 Having concluded that the testimony of Hollins and Smith arguably would have supported petitioner's theory of defense, the next question is whether petitioner's legal theory that his trial counsel was ineffective for failing to investigate their testimony or call them as witnesses is nevertheless indisputably meritless. *Hodges*, 234 Ill. 2d at 20.

¶ 35 Petitioner contends that his counsel's performance arguably fell below an objective

standard of reasonableness where he knew of these witnesses and the nature of their testimony but nevertheless failed to investigate their testimony or call them as witnesses at petitioner's trial. Taking the allegations in the petition and affidavits as true, we agree that this is an arguable position. "Trial counsel has a professional duty to conduct 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). This includes the obligation to independently investigate any possible defenses. *Id.* Where counsel has reason to know that a possible defense is available, the failure to investigate it fully can constitute ineffective assistance of counsel. *Id.* Also, the failure to interview witnesses may be indicative of deficient representation, particularly when witnesses are known to trial counsel and their testimony may be exonerating. *People v. Coleman*, 183 Ill. 2d 366, 398 (1998). Finally, counsel may be deemed ineffective for failing to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). Although the decision about whether to call a witness may ultimately prove to be a matter of trial strategy, which would not support a claim of ineffective assistance, considerations of whether an action is a product of trial strategy is not appropriate in a first-stage proceeding. *Tate*, 2012 IL 112214, ¶¶ 21-22.

¶ 36 Petitioner further contends that it is arguable that his defense was prejudiced by this deficient performance of his counsel. He points out that he was deprived of the opportunity to attempt to prove that " 'someone else committed the crime within which he is charged.' " See *People v. Ward*, 101 Ill. 2d 443, 455 (1984). By contrast, the State contends that the petition fails to show, even arguably, that petitioner's defense was prejudiced from the fact that the purported testimony of Hollins and Smith was not presented at his trial. It contends that, even if evidence

had been presented that Hollins owned the gun and drugs, there is no arguable probability the outcome of the trial would have been different. It points primarily to the evidence that the gun, drugs, zip-lock bags, and cash were found in the same bedroom of the apartment as the seven documents bearing petitioner's name. It also points to the testimony by Officer Inseley that petitioner made a statement referencing his "crib" as being "5701 South Throop" and admitting that the gun and drugs were his. Further, it points out that this court held on direct appeal that the evidence presented at trial was sufficient to prove petitioners' constructive possession of the drugs and gun (see *Walker*, 2016 IL App (1st) 143633-U, ¶ 47), and it argues that even a claim of possession of the drugs and gun by Hollins would be "insufficient to overcome the overwhelming evidence against petitioner."

¶ 37 We find that at this stage, taking the allegations in the petition as true, it is at least arguable that petitioner's defense was prejudiced by the deficient performance of his trial counsel. We discussed and concluded above that it is at least arguable that the testimony of Hollins and Smith would have supported a defense that petitioner did not possess the drugs or gun found by the police in the apartment at 5701 South Throop Street. For the same reasons, we must conclude that there is at least an arguable basis that a reasonable probability exists that outcome of petitioner's trial would have been different if a defense based on the purported testimony of Hollins and Smith been investigated and presented. See *Domagala*, 2013 IL 113688, ¶¶ 36, 43. A "reasonable probability" that the outcome would have been different is a probability sufficient to undermine confidence in the outcome, or, put differently, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Accepting the allegations as true, we cannot say at this stage that they could never satisfy the requisite standard of prejudice in this case.

¶ 38 We reject the State's argument that the evidence at petitioner's trial so overwhelmingly established that he was in constructive possession of the gun and drugs that no defense based on the purported testimony of Hollins or Smith could have had any arguable effect on the outcome. The question before us here is not whether the evidence that was presented at trial was sufficient to convict. Rather, the question is whether trial counsel's failure to investigate and present the testimony of Hollins and Smith, who would have testified among other things that the drugs and gun belonged to Hollins, was arguably sufficient to undermine confidence in the outcome of petitioner's trial. We conclude that at this stage of the proceedings, arguable prejudice to petitioner's defense has been shown.

¶ 39 We thus conclude that petitioner's legal theory that his trial counsel was ineffective for failing to investigate the testimony of Hollins and Smith or call them as witnesses is not indisputably meritless. The petition at issue does not lack an arguable basis in fact or law, and therefore it is not frivolous or patently without merit. As such, the trial court erred in summarily dismissing the petition.

¶ 40 III. CONCLUSION

¶ 41 For the aforementioned reasons, we reverse the trial court's summary dismissal of petitioner's *pro se* postconviction petition and remand this case for further proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(b) (West 2016)).

¶ 42 Reversed and remanded.