2014 IL App (1st) 123485-U
No. 1-12-3485
Order Filed September 30, 2014

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 03 CR 17652
v.	)	
	)	
TONY ASHE,	)	
	)	Honorable
Defendant-Appellant.	)	Margaret Mary Brosnahan,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of the defendant's petition for postconviction relief was reversed. The defendant's claim that he was denied the effective assistance of trial counsel had an arguable basis in fact and law.

¶ 2 The defendant, Tony Ashe, appeals from the summary dismissal of his petition for relief pursuant to the Post-Conviction Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, the defendant contends that he raised an arguable claim of the ineffective assistance of trial counsel. We agree with the defendant and remand for second-stage postconviction proceedings.

¶ 3 The defendant, Keith Green, and Natalie Aponte were indicted and charged with the first degree murder of Laura Taylor and the attempted murders of Cynthia Hall and Miranda Carmickle. Ms. Aponte and Mr. Green pleaded guilty to lesser charges, and each received a sentence of 10 years' imprisonment. Both Ms. Aponte and Mr. Green testified against the defendant at trial. The following facts are taken from the trial transcript and this court's order affirming the defendant's convictions and sentences on direct appeal. See *People v. Ashe*, No. 1-08-3581 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 Jury Trial

¶ 5 In his opening statement to the jury, trial counsel stated as follows:

> "I'm not standing up here just because I'm telling you - - I'm his lawyer telling you he didn't do it. The evidence in this case is going to tell you he didn't do it.
>
> He wasn't there. Tony was at a park, and they went and picked him up, Aponte and Green. After the shooting they went and picked him up, and he was arrested within five to ten minutes of being in that car."

¶ 6 On the night of July 13, 2003, Ms. Taylor, Ms. Hall and Ms. Carmickle were seated in a green Cadillac parked at 2430 North Lakeview Drive when a man approached the car and shot into the window. The man then went to the back of the car and shot through the back window. Ms. Taylor died from gunshot wounds, and Ms. Carmickle sustained a gunshot wound to her arm. *Ashe*, order at 2. Prior to the shooting, Ms. Hall noticed a black Cadillac parked on the other side of the street. She recognized the Cadillac as belonging to the defendant. Ms. Hall did not see the shooter's face but noticed that he was wearing surgical gloves and carried a 9-millimeter gun. *Ashe*, order at 3.

¶ 7 Ioan Dragos testified that he observed a man wearing dark clothes and a hooded sweatshirt approach a car and shoot into the passenger-side window and then into the rear window of the car. Mikhail Fiksel testified that he was standing at the corner of Lakeview Drive and Arlington Avenue when he heard shots and saw a black male dressed in a dark brown warmup suit walking quickly up the street. Neither witness saw the man's face. *Ashe*, order at 3. The police obtained the license plate number and the defendant's name from the witnesses at the scene, which led them to the defendant's residence. The defendant, Mr. Green, and Ms. Aponte were apprehended in the black Cadillac a short distance from the defendant's residence. A search of the black Cadillac revealed white latex gloves, one of which had black markings on it, and two weapons: a 9-millimeter hand gun with a defaced serial number and a chrome-plated 25-caliber automatic. *Ashe*, order at 4.

¶ 8 Ms. Aponte testified that she had told the defendant that Ms. Taylor was going to pick up some money on the evening of July 13, 2003, and that Ms. Carmickle, also known as Mia, might be with her. In October 2002, Ms. Carmickle had the defendant arrested for beating her. The defendant told Ms. Aponte to have the women meet her at an address on Lakeview

Drive. Later, the defendant called to tell Ms. Aponte he was coming by to pick her up. *Ashe*, order at 4-5.

¶ 9 Mr. Green testified that on July 13, 2003, the defendant and he were in the defendant's black Cadillac. The defendant had a telephone conversation with Ms. Aponte after which he told Mr. Green to drive to an apartment building on the north side. As Mr. Green parked the Cadillac, he noticed a green Cadillac with a white top parked across the street. The defendant put on surgical gloves and took a 9-millimeter handgun out of the glove compartment. The defendant then got out and went to the trunk of the black Cadillac. Mr. Green observed that the defendant was now wearing construction goggles and a paper mask. He watched as the defendant approached the green and white Cadillac and saw the defendant shoot into the car. The defendant then went to the back of the green and white Cadillac, and Mr. Green heard six or seven more shots. When the defendant returned to the black Cadillac, he told Mr. Green that he shot "Mia." *Ashe*, order at 5-6.

¶ 10 The jury found the defendant guilty of one count of first degree murder and two counts of attempted murder. The defendant was sentenced to a total of 90 years' imprisonment. *Ashe*, order at 6.

¶ 11 Direct Appeal

¶ 12 On direct appeal to this court, the defendant contended that the State violated Illinois Supreme Court Rule 412 (eff. March 1, 2001) when it failed to disclose a statement by Mr. Green that the defendant had engaged in witness tampering and that evidence of other crimes was introduced improperly against him. This court determined that the defendant had forfeited both of his claims of error and affirmed his convictions and sentences. *Ashe*, order at 15.

¶ 13 Postconviction

Through privately-retained counsel, the defendant filed a postconviction petition. The petition set forth a claim of ineffective assistance of trial counsel in that trial counsel: (1) failed to call an alibi witness; (2) failed to introduce medical evidence that the defendant was physically disabled; and (3) did not call the defendant to testify in his own behalf. In support of his claim, the defendant attached his own affidavit averring that: he would have testified that he was innocent; that he was physically disabled; that he was with Absalom Thomas at the time of the shooting and had informed trial counsel that he had an alibi witness; and that he had doctors who would have testified to his disability. The defendant attached the affidavit of Mr. Thomas who averred that he would have testified that he was with the defendant in Washington Park at the time of the shooting and that the defendant was disabled. Finally, the defendant attached copies of his medical records and the affidavit of Dr. R.L. Adair, confirming his physical disabilities.

¶ 14 The circuit court dismissed the petition as frivolous and without merit. The defendant appeals.

¶ 15 ANALYSIS

¶ 16 I. Standard of Review

¶ 17 We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 18 II. Discussion

¶ 19 The defendant's petition was dismissed at the first stage of postconviction proceedings. At the first stage, a petition that has no arguable basis in law or fact may be summarily dismissed as frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. A

petition has no arguable basis in law or fact where it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 17. Whether the petition is drafted by a *pro se* defendant or by counsel, the frivolous or patently without merit standard applies at the first stage of postconviction proceedings. See *Tate*, 2012 IL 112214, ¶ 12 (rejecting the State's argument that where counsel drafts the petition at the first stage, it should be subject to the second-stage standard requiring a substantial showing of a constitutional violation).

¶ 20 In determining whether a petition is frivolous or patently without merit, the circuit court reviews the petition without any input from the State. *Tate*, 2012 IL 112214, ¶ 9. All well-pleaded facts are taken as true unless positively rebutted by the record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). The court may examine the records and transcripts from the trial and any action taken by the appellate court. 725 ILCS 5/122-2.1(c) (West 2010). Where the claims in the petition are barred by *res judicata* or forfeiture, summary dismissal is appropriate. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 21 Where a defendant raises an ineffective assistance of counsel claim, we address the sufficiency of the petition under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether: (1) counsel's performance fell below an objective standard of reasonableness; and if so (2) did counsel's deficient performance prejudice the defendant. *Hodges*, 234 Ill. 2d at 17; *Strickland*, 466 U.S. at 687-88. Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). At the first stage of postconviction proceedings, a petition alleging the ineffective assistance of counsel 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." *Hodges*, 234 Ill. 2d at 17.

¶ 22 In reviewing trial counsel's performance under the deficiency prong of the *Strickland* test, there is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166 (2006). In scrutinizing counsel's performance, a reviewing court must be highly deferential and careful not to judge the performance utilizing the benefit of hindsight. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003).

¶ 23 Decisions concerning which witnesses to call at trial and what evidence to present are for defense counsel to make and, as matters of trial strategy, are generally immune from ineffective assistance of counsel claims. *Deloney*, 341 Ill. App. 3d at 634. Counsel's representation is not rendered incompetent even where a mistake in trial strategy or in judgment is made by counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). "In fact, counsel's strategic choices are virtually unchallengeable." *Palmer*, 162 Ill. 2d at 476. "The only exception to this rule is where counsel's chosen trial strategy is so unsound that counsel fails to conduct any meaningful adversarial testing." *Deloney*, 341 Ill. App. 3d at 634.

¶ 24 The defendant contends that trial counsel was ineffective for failing to call Mr. Thomas to testify that he was with the defendant in Washington Park at the same time Ms. Taylor was shot and killed, and Ms. Hall and Ms. Carmickle were wounded. The State responds that the defendant forfeited this argument because it could have been raised in his direct appeal. However, where the evidentiary basis for the claim rests upon evidence *de hors* the record, the claim is not forfeited. *People v. Patterson*, 192 Ill. 2d 93, 129 (2000) (claim of trial

counsel's ineffectiveness for not calling alibi witnesses to testify was not forfeited where the witnesses provided affidavits as to what their testimony would have been).

¶ 25 We find *People v. Tate*, 305 Ill. App. 3d 607 (1999), instructive. In *Tate*, the defendant was charged with shooting at a group of people, killing one man and wounding another. Several witnesses identified the defendant as the person who fired shots at a porch where the victims and the witnesses were sitting. The defendant did not testify. Trial counsel's strategy was to emphasize the weaknesses in the identification testimony; the witnesses described the defendant's hat to police but did not otherwise describe the defendant. In addition, trial counsel argued that the witnesses identified the defendant as the shooter because they knew the victims and had been involved in an earlier altercation with the defendant. *Tate*, 305 Ill. App. 3d at 610-12. After the defendant's conviction was affirmed on direct appeal, he filed a postconviction petition claiming that trial counsel was ineffective for failing to call three alibi witnesses: Tanya Hall, Geraldine Tate, the defendant's mother, and Sherry Huntley. According to their affidavits, at the time of the shooting, Mrs. Tate and Ms. Huntley were with the defendant who was on the telephone speaking to Ms. Hall. The State's motion to dismiss was granted, and the defendant appealed. *Tate*, 305 Ill. App. 3d at 610.

¶ 26 This court reversed and remanded for an evidentiary hearing. While noting that counsel's decision as to what witnesses to call was largely a matter of trial strategy, the court observed that "counsel may be deemed to be 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." *Tate*, 305 Ill. App. 3d at 612. This court noted that the testimony of the alibi witnesses would have supported the defendant's theory that he was

misidentified, "and there is no apparent strategic reason for not calling them to testify." *Tate*, 305 Ill. App. 3d at 612.

¶ 27 In rejecting the State's argument that the trial counsel's decision not to call the alibi witnesses was strategic because he interviewed Mrs. Tate and Ms. Hall, this court stated as follows:

> "Although counsel may have determined that the witnesses would not testify truthfully or would not be persuasive due to their close relationship with the defendant, we cannot say as a matter of law that was counsel's reasoning. [Citation.] The record does not reflect whether counsel made a professionally reasonable tactical decision not to call the witnesses or whether, as defendant maintains, counsel failed to call them as the result of incompetence. Once evidence is heard on the issue, the circuit court will be in a better position to determine whether defendant received ineffective assistance of counsel." *Tate*, 305 Ill. App. 3d at 613.

¶ 28 In his opening statement, trial counsel told the jury that the defendant was in a park at the time of the shooting and had been picked up there by Mr. Green and Ms. Aponte shortly before they were stopped by the police. Trial counsel's cross-examination of the witnesses sought to emphasize to the jury that, other than Mr. Green, no one at the scene could identify the defendant as the shooter. While Ms. Hall recognized the defendant's black Cadillac, Mr. Green acknowledged that he was driving the black Cadillac at the time of the shooting. Trial counsel pointed out the inconsistencies in Mr. Green's testimony and suggested strongly to the jury the possibility that Mr. Green, rather than the defendant, was the shooter. In closing argument, trial counsel emphasized the weakness of the identification testimony and that the testimony given by Mr. Green and Ms. Aponte was not credible.

¶ 29 According to his affidavit, the defendant told trial counsel that he was in Washington Park at the time of the shooting and that he had a witness who would testify to that fact. In his affidavit, Mr. Thomas stated that he was with the defendant at Washington Park at the time of the shooting. As in *Tate*, Mr. Thomas's testimony would have supported trial counsel's efforts to persuade the jury that there was reasonable doubt as to whether the defendant was present at the scene of the shootings. Trial counsel's reference to alibi evidence in his opening statement seemed to indicate that Mr. Thomas would be called to testify for the defendant. The fact that after the opening statement there was no further mention that the defendant was in a park at the time of the shooting may indicate that trial counsel made a strategic decision not to call Mr. Thomas to testify. However, as we do not have the benefit from the record before us of trial counsel's thinking, we cannot determine whether counsel's failure to call Mr. Thomas to testify was a reasonable tactical decision or the result of incompetence. *Tate*, 305 Ill. App. 3d at 612.

¶ 30 We agree with the defendant that he has stated an arguable claim of the ineffective assistance of trial counsel for failing to call Mr. Thomas to testify. The defendant's allegation of ineffective assistance of counsel is not based on a "fanciful factual" allegation. The record before us reflects that trial counsel told the jury that the defendant was somewhere else at the time of the shooting and then failed to call Mr. Thomas in support of trial counsel's argument that the defendant was not the shooter. It is also not an indisputably meritless legal theory as it is arguable that, in failing to call Mr. Thomas as a witness, trial counsel's performance was deficient, and it is arguable at this stage of the proceedings that the defendant was prejudiced by the lack of this witness's testimony. See *Tate*, 2012 IL 112214, ¶ 24.

¶ 31 Since the defendant's claim that he did not receive the effective assistance of counsel does not lack an arguable basis in law or fact, his postconviction petition is not frivolous or patently without merit. We remand this case to the circuit court for advancement to the second stage of postconviction proceedings. *Tate*, 2012 IL 112214, ¶ 25. Deciding this case as we do, we need not consider the defendant's remaining allegations relative to his claim of the ineffective assistance of trial counsel.

¶ 32 CONCLUSION

¶ 33 The order of the circuit court dismissing the defendant's postconviction petition is reversed. The cause is remanded to the circuit court for second-stage postconviction proceedings.

¶ 34 Reversed and remanded with directions.