

FIRST DIVISION  
November 10, 2014

No. 1-13-0547

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2088
	)	
WILLIE THOMAS,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Justices Cunningham and Harris concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Summary dismissal of defendant's postconviction petition was proper where it was not arguable that defendant's trial counsel was ineffective for failing to seek disclosure of a police officer's surveillance location.
- ¶ 2 Defendant Willie Thomas, who was convicted of possession of between 1 and 15 grams of heroin with intent to deliver and possession of less than 1 gram of cocaine with intent to deliver, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). On appeal, defendant

contends that his petition presented an arguable claim of ineffective assistance of counsel where his trial hinged on the observations and credibility of a surveillance officer and his attorney failed to seek disclosure of the officer's surveillance location due to a mistaken belief that this information was absolutely privileged.

¶ 3 For the reasons that follow, we affirm.

¶ 4 At trial, Chicago police officer Jason Acevedo testified that at 11:25 a.m. on January 8, 2011, he conducted surveillance of a vacant lot at 1658 South Drake Avenue, in Chicago, from a stationary position about 25 to 50 feet away. Officer Acevedo was in plain clothes, but was wearing a bulletproof vest and badge. He saw defendant, whom he identified in court, standing on the sidewalk in front of a vacant lot at that address. A second man stood 10 to 15 feet from defendant. Officer Acevedo testified that the second man was black and was wearing a black jacket, blue jeans, a black and light brown shirt, and a winter hat.

¶ 5 As Officer Acevedo watched, two men approached defendant and engaged him in conversation. Defendant directed them to the man in the black jacket. After the two men gave an unknown amount of money to the man in the black jacket, defendant walked through the vacant lot to the rear of 1659 South Central Park Avenue. There, defendant bent down to the bottom of a garbage can in the alley, moved the can, and manipulated some small items. Then he returned and tendered small items to the waiting men. Officer Acevedo stated that there were multiple garbage cans in that location, but he could see which one defendant walked to.

¶ 6 Some time later, Officer Acevedo saw another man approach defendant. As before, defendant directed the buyer to the man in the black jacket, and the buyer gave the man in the

black jacket money. Then defendant walked to the same garbage can, reached under it, retrieved a small item, walked back to the buyer, and gave him a small item.

¶ 7 At this point, Officer Acevedo radioed his partner, Officer Daniel Honda, and described to him what he had seen. Officer Honda picked him up in an unmarked car and the two officers drove to 1658 South Drake Avenue, arriving less than a minute and a half after Officer Acevedo broke surveillance. Officer Acevedo saw defendant and the man in the black jacket, got out of the car, and ordered them to approach. The man in the black jacket fled, so Officer Acevedo focused on defendant. Officer Acevedo testified that as he approached defendant from about 25 feet away, defendant began to walk away and then took off running. Officer Acevedo chased defendant through the vacant lot, across the alley, into a yard, and then to the front of a house. He described their pace as "[a] little bit faster than a jog" and "pretty fast," and did not notice anything unusual about the way defendant was running. After apprehending defendant, Officer Acevedo walked defendant back to the alley and met Officer Honda, who had driven across the vacant lot. In the alley, Officer Acevedo directed Officer Honda to the garbage can. Officer Honda bent down and retrieved seven mini Ziploc bags containing suspect heroin and four mini Ziploc bags containing suspect crack cocaine.

¶ 8 Chicago police officer Daniel Honda testified that while Officer Acevedo conducted surveillance, he stayed within a couple of blocks in an unmarked car. About 11:40 a.m., in response to a radio transmission, he picked up Officer Acevedo at a "location" and drove to the 1600 block of South Drake Avenue. As the officers approached, defendant and the other man fled. Officer Honda testified that he drove through the vacant lot to the alley and Officer Acevedo got out and chased defendant on foot. When Officer Acevedo returned to the alley, he

directed Officer Honda to a particular garbage can. Officer Honda could see a clear plastic bag sticking out from underneath the can. He retrieved the bag, which contained seven bags of suspect heroin and four bags of suspect crack cocaine.

¶ 9 The parties stipulated to the chain of custody of the recovered items. They also stipulated that forensic evidence would establish that 1.1 grams of the white powder substance contained heroin and 0.1 gram of the rocky substance contained cocaine.

¶ 10 Defendant testified in his own defense. He walked with a cane and needed assistance getting to the witness stand. He explained that he sustained a gunshot wound to his pelvis in 1999 and had not been able to run, bend down, or do "normal motions" since that time. On cross-examination, defendant admitted that he did not always use the cane and was not using it on the day in question. He stated that he would not use the cane during physical therapy, but instead, would walk along the walls. Defendant denied having been in the alley prior to his arrest and denied having gone to a garbage can that day.

¶ 11 The parties stipulated to impeachment evidence consisting of defendant's prior convictions for forgery in 2010, possession of a controlled substance in 2006 and 2002, and possession of a controlled substance with intent to deliver in 2005.

¶ 12 Following closing arguments, the trial court found defendant guilty of possession of between 1 and 15 grams of heroin with intent to deliver and possession of less than 1 gram of cocaine with intent to deliver. In the course of doing so, the court stated that it found Officer Acevedo very credible and defendant unbelievable. The trial court noted that there was "some minor discrepancy" between the two officers' testimony as to when Officer Acevedo got out of the police car and began to chase defendant, but did not find the discrepancy to be significant.

The court also observed that defendant's injury was over 10 years old at the time of his arrest and, noting that defendant did not have his cane with him on the day in question, rejected his testimony that the only time he did not use his cane was at therapy when he would use the walls to walk. Subsequently, the trial court denied defendant's posttrial motion and sentenced him, based on his criminal history, to Class X concurrent terms of 10 and 5 years in prison, respectively.

¶ 13 On appeal, defendant challenged his term of mandatory supervised release (MSR) and certain fines and fees. We affirmed defendant's conviction, sentence, and MSR term; vacated various fines and fees; and modified the fines and fees order to reflect the correct amount of presentence custody credit. *People v. Thomas*, 2013 IL App (1st) 120195-U.

¶ 14 In 2012, while his direct appeal was pending, defendant filed the *pro se* petition for postconviction relief at issue in this case. In the petition, defendant alleged, among other things, that his trial counsel was ineffective for failing to seek disclosure of Officer Acevedo's surveillance location. Defendant asserted that counsel had informed him the State had "surveillance privilege," but he later found out that the State did not have absolute privilege and that counsel should have asked for an *in camera* hearing. Defendant argued that he was deprived of the opportunity to cast doubt upon the officer's testimony. He also asserted that photographs would show Officer Acevedo's view would have been obstructed by a fence because "the garbage can or cans was on the inside of the fence."

¶ 15 The trial court summarily dismissed the petition.

¶ 16 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2008); *People v. Hodges*, 234 Ill.

2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 17 A *pro se* petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 18 On appeal, defendant contends that the trial court erred in summarily dismissing his petition because it presented an arguable claim of ineffective assistance of trial counsel for failing to seek disclosure of Officer Acevedo's surveillance location. Defendant argues it was arguable that counsel performed deficiently because his decision not to seek disclosure was based on a mistaken belief that this information was absolutely privileged. Citing *People v. Knight*, 323 Ill. App. 3d 1117 (2001), defendant asserts that contrary to counsel's belief, disclosure of a surveillance location is almost always required where a prosecution rests almost exclusively on an officer's surveillance testimony. Defendant further argues it was arguable he was prejudiced by counsel's ineffectiveness because, had Officer Acevedo's surveillance location

been disclosed, counsel would have been able to fully probe his ability to observe the events preceding the arrest and cast doubt upon his testimony. He maintains that Officer Acevedo's testimony "was already suspect in two main regards," as (1) there was a discrepancy between his testimony and Officer Honda's testimony regarding exactly when he got out of the car and started chasing defendant, and (2) he did not notice anything unusual about defendant's gait and described his pace as "pretty fast," even though defendant testified that he had not been able to run or do "normal motions" since he had been shot 12 years earlier. Finally, defendant asserts that the allegation in his petition that a fence would have obstructed Officer Acevedo's view of the garbage cans must be accepted as true at this stage of proceedings.

¶ 19 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "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." *Hodges*, 234 Ill. 2d at 17.

¶ 20 In the instant case, we need not determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness. This is because defendant has not presented an arguable claim of prejudice. See *Strickland*, 466 U.S. at 697 (if a claim of

ineffectiveness may be disposed of due to lack of prejudice, a reviewing court is not required to address whether counsel's performance was unreasonable).

¶ 21 Here, even if trial counsel had been successful on a motion to disclose Officer Acevedo's surveillance location, it is not arguable that the outcome of defendant's trial would have been different. The evidence against defendant was very strong. Officer Acevedo, whom the trial court found very credible, testified in detail about two narcotics transactions that defendant engaged in with buyers. See *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007) (the testimony of a single eyewitness is sufficient to sustain a criminal conviction). In each instance, the buyer or buyers approached defendant, who directed them to a nearby man in a black jacket. The buyers gave the man in the black jacket money, and defendant crossed a vacant lot to some garbage cans and retrieved small items from underneath one of the cans. Defendant then returned to the buyers and gave them the small items. After defendant was apprehended, Officer Honda recovered heroin and cocaine from underneath the garbage can.

¶ 22 We disagree with defendant's argument that Officer Acevedo's testimony was "suspect" due to inconsistency between the two officers' testimony as to when Officer Acevedo began to chase defendant and because he did not notice anything unusual about defendant's gait. The trial court noted the discrepancy regarding the timing of the chase but found that it was not significant, and rejected defendant's testimony that his more-than-a-decade old injury prevented him from running. Even if the trial court had heard evidence regarding Officer Acevedo's exact location during surveillance and the existence of a fence near the garbage cans, it would not have changed the trial court's determination that Officer Acevedo was very credible and defendant was unbelievable.



¶ 23 In light of the evidence against defendant, we cannot say it is arguable that defendant was prejudiced by counsel's failure to seek disclosure of Officer Acevedo's surveillance location. Defendant's legal theory of ineffective assistance of counsel is belied by the record. Therefore, the petition lacks an arguable basis in law. See *Hodges*, 234 Ill. 2d at 16. Accordingly, summary dismissal of the petition was proper.

¶ 24 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.