2021 IL App (1st) 17-2257-U

SECOND DIVISION
February 2, 2021

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court of
Respondent-Appellee,	)	Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 08 CR 13128 (02)
KEITH PIKES,	)	
	)	
Petitioner-Appellant.	)	The Honorable
	)	James B. Linn,
	)	Judge Presiding.
	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in summarily dismissing the petitioner's *pro se* petition for postconviction relief where the petition made an arguable claim of trial counsel's ineffectiveness.

¶ 2 The petitioner, Keith Pikes, appeals from the circuit court's summary dismissal of his *pro se* petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2018)). The petitioner contends that the circuit court erred in dismissing his *pro se* postconviction petition where that petition, supported by signed and notarized affidavits of two

alibi-witnesses, presented an arguable constitutional claim of ineffective assistance of trial counsel for counsel's failure to present an alibi defense. For the following reasons, we reverse and remand.

¶ 3 II. BACKGROUND

¶ 4 Because the record before us is voluminous, we set forth only those facts relevant to the determination of the issues raised in this appeal. A detailed record of everything that transpired in the trial court has already been set forth in the petitioner's direct appeal of his conviction and sentence (see *People v. Pikes*, 2012 App (1st) 102274, *rev'd and remanded* 2013 IL 115171, *aff'd on remand*, 2016 IL App (1st) 102274-UB) and we need not restate it here.

¶ 5 Briefly stated, in 2006, the petitioner was charged together with codefendant, Lamont Donegan, for his participation in the August 21, 2006, shooting of the victim, Lorne Mosley. This shooting was precipitated by a feud that had erupted between the Gangster Disciples (of which the victim was a member) and the Four Corner Hustlers (to which the petitioner and Donegan belonged) after another Four Corner Hustlers' member, Victor Parsons, was killed by the Gangster Disciples.

¶ 6 Prior to the petitioner's trial, the State filed several motions *in limine.* First, the State sought admission of evidence that the petitioner and Donegan were members of the Four Corner Hustlers gang, which was in conflict with the Gangster Disciples. The State also sought admission of evidence of a prior incident between Donegan and members of the Gangster Disciples (referred to hereinafter as the scooter shooting). In that incident, which occurred a day or so prior to the victim's murder, Quentez Robinson, a member of the Gangster Disciples, rode a scooter through Four Corner Hustlers territory, followed by other Gangster Disciples in a car. Donegan began shooting at Robinson, who rode off unharmed. The driver of the car struck

Donegan, who later allegedly recruited the petitioner to assist him in exacting revenge for the incident. The petitioner and Donegan allegedly made statements indicating their intention to seek revenge for the scooter shooting incident.

¶ 7 The State also sought admission of certain coconspirator statements made by Donegan prior to and immediately following the victim's shooting. In particular, the State sought to introduce Donegan's statement, made after the murder and in the presence of the petitioner and Deangelo Coleman (a fellow member of the Four Corner Hustlers), that "we got one last night" and "it's about time they got one." In addition, the State sought to introduce Donegan's description of how he and the petitioner performed the drive-by shooting, namely, that: (1) the petitioner drove himself and Donegan slowly on Corliss Avenue near some Gangster Disciples; (2) Donegan shot outside his window from the car; (3) Donegan had wanted to shoot at the Gangster Disciples on foot but his foot had been injured; and (4) Donegan wanted revenge for his injury. The trial court granted the State's motions permitting the introduction of both Donegan's statement and evidence of the scooter shooting.

¶ 8 At the petitioner's subsequent jury trial (held simultaneously but separately from Donegan's), the State first presented eyewitness testimony by three Gangster Disciples members: Quentez Robinson, Herbert Lemon, and Brandon Merkson.

¶ 9 Robinson testified that the Gangster Disciples and the Four Corner Hustlers were in a feud and that their territories ran along Corliss Avenue. After describing the scooter shooting at length Robinson acknowledged that he was present during the subsequent drive-by shooting of the victim. Robinson testified that on that night he saw a silver box-type car driving toward him with the back window down. He then observed a hand stick out the window and start shooting.

Robinson heard 12 to 15 shots from two different guns. Robinson jumped to the ground and did not see who was shooting but saw that the victim had been shot.

¶ 10 Lemon next testified consistently with Robinson. He stated that during the scooter shooting, he was in the car that was following Robinson on the scooter when Donegan shot at Robinson, and that the car then struck Donegan and drove away. Lemon was also present during the victim's murder on August 21. That night, Lemon saw a gray box-type car coming toward him and heard shots coming from it. Lemon looked inside the car and saw the petitioner driving and Donegan in the passenger seat. He averred that he saw them both shooting as the car drove past. Lemon later picked the petitioner out of a photo lineup and identified him to police as the driver and one of the shooters; Lemon similarly picked Donegan out of a separate photo lineup and identified him to police as the passenger and the other shooter.

¶ 11 Merkson next testified that there was an ongoing feud between the two gangs and that he was present at both the scooter shooting and the subsequent murder of the victim. With respect to the latter, he averred that he saw a gray box-type car approaching him and, as it slowed down, the occupants of the vehicle begin to shoot. Merkson could not see the driver but did see Donegan inside the vehicle shooting.

¶ 12 The State next called two members of the rival Four Corner Hustlers gang: Vernard Crowder and DeAngelo Coleman. At trial, Both Crower and Coleman testified in direct contradiction to prior statements they had made to the police and the grand jury. At trial, Crowder denied that he, the petitioner and Donegan were gang members and that he saw the petitioner on the day of the victim's murder or heard any gunshots. He acknowledged testifying before the grand jury but asserted he had done so only because the prosecutor agreed to drop a domestic battery charge against him. Crowder denied his entire grand jury testimony. Accordingly, the State presented

the testimony of two assistant State's Attorneys concerning Crowder's grand jury testimony and the handwritten statement he had made to the police. In these, which were consistent with each other, Crowder stated that on the day of the victim's murder, he saw the petitioner standing near an older model, greyish black Toyota car, with Donegan inside it, cleaning it. The petitioner asked Crowder whether he wanted to "go do business" on Corliss Avenue, which Crowder knew meant harming a member of the Gangster Disciples. Crowder declined as he was on probation. The petitioner did not like Crowder's answer, and reminded him that members of the Gangster Disciples had killed one of their own, namely Parsons. Soon thereafter, Crowder heard gunshots coming from Corliss Avenue. Crowder also described that, after the victim's murder, sometime in the fall of 2007, he saw the petitioner, at which time the petitioner told him that he was angry about being shot at during another subsequent incident and complained, " 'Why ain't nobody keeping going over there, finishing what he had left off with,' " which Crowder knew referred to the victim's murder.

¶ 13 At trial, Coleman similarly denied being a gang member, as well as having any knowledge of the scooter shooting or the victim's subsequent murder. In response, the State published Coleman's prior statement to police and impeached him with portions of his grand jury testimony. In his statement to police, Coleman had averred that on the day of the victim's shooting, he had been with the petitioner and Donegan when, during their conversation, Donegan said that someone had to pay for the scooter shooting and that he was going to kill a member of the Gangster Disciples. Coleman recounted that Donegan told them he would steal a car to use for the planned shooting on Corliss Avenue and that he had a "jiggler" key that fit older model Toyotas. He also described the petitioner and Donegan talking about getting "pay back." Later that day, Coleman saw the petitioner first driving an older gray Toyota and then the petitioner

and Donegan cleaning out the same car before Donegan placed guns inside it. Coleman testified that the petitioner took the driver's seat and Donegan the front passenger seat before the petitioner drove away. In addition, in his grand jury testimony Coleman had testified that he saw the petitioner and Donegan on the day after the victim's murder, at which time both the petitioner and Donegan described to Coleman how the murder took place. According to Coleman's grand jury testimony, the petitioner told him that he and Donegan first drove around before proceeding to Corliss Avenue. Once there, they saw a lot of people outside, and so drove slowly down the block, "blasting," or shooting out the window. Donegan described the same to Coleman and told him that they "got one last night. About time we got one." Donegan further explained to Coleman that he had wanted to do the shooting on foot but could not because his foot had been injured in the scooter shooting incident, for which he had been seeking revenge.

¶ 14 The State next presented physical evidence regarding the murder. Chicago police officer Mark Reno first testified that at about midnight on August 22, 2006, he and fellow officers were investigating the victim's murder when, while driving by an alley between Champlain and Cottage Grove Avenues, they observed several young men in a group begin to run. As officers chased and detained these individuals, Officer Reno recovered a loaded .45-caliber semiautomatic handgun, as well as an ammunition clip that had been thrown by one of them. Forensic testing on multiple shell casings, bullets and bullet fragments recovered from the scene of the murder matched the .45-caliber handgun recovered by Officer Reno. In addition, a fired bullet recovered by the medical examiner from the victim's body during the autopsy also matched that handgun.

¶ 15 Chicago Police Detective Brian Forberg testified that, as the leader of the investigation, he

met with and interviewed Coleman, Crowder, Robinson, Lemon and Merkson. According to Detective Forberg, Coleman, Crowder, and Lemon all positively identified the petitioner and the codefendant as participants in the shooting.

¶ 16 After the State rested, defense counsel presented no evidence or testimony whatsoever, and then waived closing arguments. The jury found the petitioner guilty of first-degree murder but found that the State had failed to prove beyond a reasonable doubt that the petitioner had personally discharged the firearm that caused the victim's death. The petitioner was subsequently sentenced to 27 years' imprisonment.

¶ 17 The petitioner appealed, arguing among other things, that the trial court abused its discretion, when it admitted evidence of the scooter shooting. This appellate court agreed and held that because the State admitted it had no evidence that the petitioner was even present at the scooter shooting, let alone a participant, it had failed to meet the threshold requirement for admission of other-crimes evidence, namely, the petitioner's involvement beyond a mere suspicion. See *Pikes*, 2012 IL App (1st) 102274, ¶¶ 27, 41–41. We therefore reversed and remanded for a new trial. *Id*., ¶ 45.

¶ 18 On appeal by the State, our state supreme court disagreed, reversed our holding and remanded back to us for consideration of the remaining issues that had not been addressed in the petitioner's original direct appeal. See *Pikes*, 2013 IL 115171, ¶ 20. On remand, after addressing those issues, we affirmed the petitioner's conviction and sentence. *Pikes*, 2016 IL App (1st) 102274-UB ¶ 64.

¶ 19 On March 10, 2017, the petitioner filed a *pro se* postconviction petition, alleging ineffective assistance of both trial and appellate counsels. With respect to appellate counsel, the petitioner argued that counsel was ineffective for having failed to argue on direct appeal that the verdicts

were inconsistent. With respect to trial counsel, the petitioner alleged that counsel was ineffective for failing: (1) to object to the accountability instruction; (2) to file a motion to suppress, (3) to challenge the State's case; and (4) to present an alibi defense.

¶ 20 In support, the petitioner attached, *inter alia*, his own affidavit. Therein, the petitioner attested that between 9 p.m. and 2 a.m. on August 20, 2006, he was at Golden Richardson's house for a birthday party.

¶ 21 On March 22, 2017, the trial court noted that while the petitioner's postconviction petition alleged that his trial counsel was ineffective for failing to present an alibi defense, the petitioner did not "have any affidavits" and did not state "what the alibi was, who the witnesses were, or where the alibi took place." The trial court therefore granted the petitioner additional time to submit any missing affidavits. On July 28, 2017, the circuit court noted, "I gave [petitioner] some extra time to submit affidavits. I'm going to review all of this Monday, see if he has new affidavits here."

¶ 22 As shall be explained further below, the petitioner subsequently submitted two alibi affidavits from Golden Richardson and Simone Hancock corroborating his own affidavit. On August 2, 2017, the trial court nonetheless summarily dismissed his *pro se* petition as frivolous and patently without merit. In doing so, the trial court made no mention whatsoever of either the alibi affidavits or the petitioner's allegations regarding counsel's failure to raise an alibi defense.

¶ 23 After the petitioner appealed the summary dismissal of his petition to this court, it became apparent that the Clerk of the circuit court (hereinafter the Clerk's office) had lost substantial portions of the petitioner's *pro se* postconviction petition and could not provide them for purposes of this appeal. Accordingly, the State Appellate Defender obtained a copy of that petition from the petitioner himself and supplemented the record with it. However, because the

petitioner no longer had copies of his supporting alibi affidavits, he created a new affidavit attesting to the times and dates he mailed each document to the Clerk's office. In his affidavit, the petitioner attested that on March 1, 2017, he mailed the Clerk's office: (1) his *pro se* postconviction petition; (2) his own affidavit; and (3) an affidavit from alibi witness, Golden Richardson. The petitioner further attested that on May 17, 2017, after the trial court granted him an extension of time, he mailed the Clerk's office an affidavit from a second alibi witness, Simone Hancock. The mail form provided by Western Illinois Correctional Center, the facility where the petitioner was housed at this time, corroborated the petitioner's statements that he sent mail to the Clerk's office on March 1, 2017 and on May 17, 2017.

¶ 24 Because the circuit court could not locate either alibi affidavit, the petitioner asked Richardson and Hancock to recreate them for purposes of this appeal. In their newly created affidavits, both Hancock and Richardson corroborated the petitioner's original affidavit stating that he was at Hancock's house when the crime was committed. Both affidavits attest that August 20, 2006, was Richardson's birthday and that Hancock threw a party for him. The party began around 9 p.m. on August 20 and lasted until the early morning hours of August 21. Both affidavits attest that after the party ended, Hancock drove the petitioner back to his home.

¶ 25 The parties stipulated that these new affidavits and the mail form from Western Illinois Correctional Center be certified by the Clerk of the circuit court and made part of the supplemental record on appeal. With these documents now properly before us we proceed to consider the petitioner's appeal.[1]

[1] While, as part of this stipulation, the State reserved the right to object to these filings if it chose to on appeal, it makes no objection to them in its brief. Nor does the State respond to the petitioner's alternative argument on appeal, that were we not to consider these two alibi affidavits, we would be depriving the petitioner of his constitutional right to appeal. Since the State stipulated to the certification of the two

¶ 26 II. ANALYSIS

¶ 27 The petitioner contends that the trial court erred in summarily dismissing his *pro se* postconviction petition at the first stage of postconviction proceedings. He argues that contrary to the trial court's findings, his petition presented an arguable constitutional claim of ineffective assistance of trial counsel based on counsel's failure to present an alibi defense as attested to by Hancock's and Richardson's affidavits. The petitioner contends that had counsel presented testimony from these two witnesses and argued that the petitioner was not present at the scene during the shooting, it is arguable that the outcome of his trial would have been different. For the following reasons, we agree.

¶ 28 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) provides a three-step process by which a convicted defendant may assert a substantial denial of his or her constitutional rights in the proceedings that led to the conviction. *People v. Edwards*, 2012 IL 111711, ¶ 21; *People v. Tate*, 2012 IL 112214, ¶ 8; see also *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). At the first stage of a postconviction proceeding, such as here, the trial court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)); see also *Tate*, 2012 IL 112214, ¶ 9. At this stage of postconviction proceedings, the court may not engage in any factual determinations or credibility findings. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either

affidavits in the circuit court and is apparently conceding their propriety on appeal, we will treat them as such.

the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing ***.") Instead, the court may summarily dismiss the petition only if it finds the petition to be frivolous or patently without merit. See *People v. Ross*, 2015 IL App (1st) 120089, ¶ 30; see also *Hodges*, 234 Ill. 2d at 10. A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Tate*, 2012 IL 112214, ¶ 9. Our supreme court has explained that a petition lacks an arguable basis where it "is based on an indisputably meritless legal theory or a fanciful factual allegation"—in other words, an allegation that is "fantastic or delusional," or is "completely contradicted by the record." (Internal quotation marks omitted.) *Hodges*, 234 Ill. 2d at 13, 16; *People v. Brown*, 236 Ill. 2d 175, 185 (2010); see also *Ross*, 2015 IL App (1st) 120089, ¶ 31. We review the summary dismissal of a petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 29 Claims of ineffective assistance of counsel, such as the one raised here by the petitioner, are resolved under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, the petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced because of counsel's conduct. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94)).

¶ 30 In the context of a first stage postconviction proceeding, such as the one here, a petitioner need only show that he can arguably meet these two standards, *i.e.*, (1) it is *arguable* that counsel's performance was deficient and (2) it is *arguable* that the outcome of his case would

have been different absent the deficient representation. See *People v. Wilson*, 2013 IL (1st) 112303, ¶ 20; see also *Hodges*, 234 Ill. 2d at 17.

¶ 31 A. Forfeiture

¶ 32 Before resolving the merits of the petitioner's ineffective assistance of counsel claim, however, we must first address the State's contention that the petitioner has forfeited the issue by failing to argue it on direct appeal.

¶ 33 It is axiomatic that a proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); see *Edwards*, 2012 IL 111711, ¶ 21; *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, any issues that could have been presented on direct appeal, but were not, are forfeited. *People v. English*, 2013 IL 112890, ¶ 22. *Edwards*, 2012 IL 111711, ¶ 21; see also *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006); see also *People v. Towns*, 182 Ill. 2d 491, 502 (1998) (Postconviction proceedings are intended "to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal.")

¶ 34 Nonetheless, "[t]he forfeiture rule applies only where it was possible to raise an issue on direct appeal." *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009). A postconviction claim that depends on matters outside the record" will not be deemed forfeited, "because matters outside the record may not be raised on direct appeal." *Id.*; see also *People v. Harris*, 206 Ill. 2d 1, 13 (2002) ("[W]here the facts relating to the claim do not appear on the face of the original appellate record." the doctrine is relaxed.).

¶ 35 In the present case, the petitioner's claim of ineffective assistance of counsel based on

counsel's failure to raise an alibi defense is clearly based on facts that were not contained the original appellate court record. His claim is entirely premised on the affidavits of two alibi witnesses (Richardson and Hancock), neither of which testified at trial. Under *Strickland*, the substance of these witnesses' testimonies was essential to determining both whether trial counsel's actions were strategic and whether those actions prejudiced the petitioner. Without them, the petitioner was unable to raise this issue on direct appeal. Accordingly, where the petitioner's claim is based on facts *dehors* the original record the petitioner cannot be faulted for failing to raise the issue on direct appeal. The petitioner's claim is therefore not forfeited.

¶ 36 B. Merits of Ineffective Assistance of Counsel Claim

¶ 37 Turning to the merits, we next address the State's contention that the petitioner's claim of ineffective assistance of trial counsel has no arguable basis in law because counsel's decision not to call Hancock and Richardson was a matter of trial strategy. The State argues that the record affirmatively shows that counsel was aware of the alibi witnesses but for strategic, albeit unexplained, reasons chose not to pursue this defense. In support, the State cites to three portions of the trial transcript, which it contends establish that counsel's decision was strategic: (1) counsel's statement at the August 26, 2009, status hearing, that he had "either an alibi or a general denial, depending on witness availability"; (2) the State's acknowledgment of receipt of a list of possible defense witnesses (including Hancock) at the September 29, 2009, status hearing; and (3) a colloquy between the petitioner and the court, which took place immediately after the close of the State's case-in-chief, whereupon at the State's request, the petitioner acknowledged that, as per his defense counsel's representations, "it [wa]s his intention also not to have any [alibi] witnesses called on [his] behalf."[2]

[2] This colloquy reads in full:

¶ 38 The petitioner, on the other hand, argues that considerations of trial strategy are not permitted at the first stage of postconviction proceedings, and that therefore contrary to the State's position, the cited portions of the record in no way affirmatively rebut his contention that counsel's decision not to call any alibi witnesses was "arguably" unreasonable. For the reasons that follow, we agree with the petitioner.

¶ 39 In *People v. Tate*, 2012 IL 112214, ¶ 22, our supreme court unequivocally held that arguments regarding trial strategy, such as the one raised here by the State, are "inappropriate" for the first stage of postconviction proceedings. As our supreme court explained:

> "This argument is more appropriate to the second stage of postconviction proceedings, where both parties are represented by counsel, and where the petitioner's burden is to make a substantial showing of a constitutional violation. The State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced**"** *Id.* ¶ 22.

¶ 40 Since *Tate*, our appellate courts have repeatedly held that arguments regarding trial strategy are premature at the first stage of postconviction proceedings, and that instead, "the only relevant inquiry" at this juncture is whether " 'it is arguable that counsel's performance fell below an objective standard of reasonableness.' " *People v. Burns*, 2015 IL App (1st) 121928, ¶¶ 31- 32 (quoting *Tate*, 2012 IL 112214, ¶ 22).

"[Assistant State's Attorney] MS. OGAREK: I understand there were a bunch of alibi witnesses that were listed by the defense. Can we just confirm with the [petitioner], had an agreement or at least there has been some discussion those witnesses not be called on that side of the case[?]

THE COURT: [The petitioner], it is your intention also not to have any witnesses called on your behalf is what your lawyer says, is that correct?

THE [PETITONER]: Yes, correct."

¶ 41 Applying this rationale to the instant case, and taking as we must all the petitioner's well-pleaded allegations as true, we find that it is at least arguable that counsel's decision not to call Hancock and Richardson, who attested that they were available and willing to testify at the petitioner's trial, was objectively unreasonable. According to their affidavits, both Hancock and Richardson would have testified that the petitioner was with them for the entirety of the night during which the shooting occurred and therefore could not have been involved in the murder. Because the record provides no insight into why counsel chose not to call either of these witnesses, and we are not permitted to delve into trial strategy at this stage of the postconviction proceedings, we are compelled to conclude that counsel was at least arguably constitutionally deficient. See *Tate*, 2012 IL 112214, ¶ 22 (holding that the trial court erred in summarily dismissing a postconviction petition where the petitioner made an arguable claim that his trial counsel was objectively unreasonable for failing to call several alibi witnesses); See *Burns*, 2015 IL App (1st) 121928, ¶¶ 31- 32 (holding that the trial court erred in summarily dismissing a postconviction petition where the petitioner made an arguable claim that his counsel was objectively unreasonable for failing to call the codefendant as a witness to testify that the petitioner had no idea that while she was waiting in the get-away-car a crime was being committed).

¶ 42 The State nonetheless asserts that even if the petitioner can establish that counsel was arguably unreasonable, in light of the overwhelming evidence presented at his trial, he cannot establish prejudice so as to succeed under *Strickland*. We disagree.

¶ 43 Under the second prong of *Strickland*, the petitioner was only required to show that it is arguable that "but for" counsel's deficient performance, there is a reasonable probability that the result of his proceeding would have been different. *Lacy*, 407 Ill. App. 3d at 457; see also

Colon, 225 Ill. 2d at 135. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004); see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694)).

¶ 44 In the present case, the petitioner has arguably established such a reasonable probability. Contrary to the State's position, the evidence presented at the petitioner's trial was far from overwhelming. The petitioner was convicted on the theory of accountability, the crime occurred at night, and only one eyewitness, Lemon, identified the petitioner as the driver of the vehicle from which shots were fired at the victim. Moreover, no physical evidence tied the petitioner to the crime, and the petitioner did not confess. Coleman and Crowder, the only other witnesses who could testify about the petitioner's involvement in the shooting based on the petitioner's prior comments or subsequent bragging to them, recanted any such statements previously made to the grand jury and the police, claiming that they had been coerced. Under this record, it is undeniable that the introduction of Richardson's and Hancock's testimony that the petitioner was celebrating Richardson's birthday during the entirety of the night when the shooting occurred would have directly contradicted the testimony of the State's sole eyewitness, who placed the petitioner at the scene of the shooting. There can be no doubt then that counsel's failure to present this alibi testimony, arguably could have changed the outcome of the petitioner's trial. See *Tate*, 2012 IL 112214, ¶ 24 (holding that the petitioner was arguably prejudiced by counsel's failure to call two alibi witnesses who would have corroborated the petitioner's affidavit that he was at his girlfriends' house when the crime occurred, and where the State's case against the petitioner consisted of eyewitness testimony, and no physical evidence tied the petitioner to the

crime). The potential for prejudice is even more apparent when considered in the context of counsel's subsequent decision to forgo any closing argument, thereby depriving the jury not only of an alibi defense but of any theory of defense whatsoever.

¶ 45 Accordingly, under this record, we find that the petitioner has presented an arguable claim of ineffective assistance of counsel, and that therefore the petition must proceed to the second stage of postconviction review, where counsel may be appointed to aid the petitioner. *Id.*

¶ 46 III. CONCLUSION

¶ 47 For all the aforementioned reasons, we reverse the trial court's summary dismissal of the petitioner's *pro se* postconviction petition and remand for further proceedings under the Act (725 ILCS 5/122-2.1(b) (West 2018).

¶ 48 Reversed and remanded.