2021 IL App (2d) 180152-U
No. 2-18-0152
Order filed March 24, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1184
WILLIE B. BURNETT, JR.,	)	
	)	Honorable
	)	Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE Mc LAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition at the first stage where defendant did not provide evidence that his allegations are capable of independent corroboration or explain the absence of such evidence. Affirmed.

¶ 2 Defendant, Willie B. Burnett, Jr., was convicted of first-degree murder by personally discharging a firearm with intent to kill (720 ILCS 5/9-1(a)(1) (West 2014); 730 ILCS 5/5-8-1(d) (West 2014)), unlawful possession of a firearm by a felon (720 ILCS5/24-1.1(a) (West 2014)), and possession of a firearm without having a firearm owner's identification card (430 ILCS 65/2(a)(1) (West 2014)). He previously appealed to this court from his sentence of 35 years' imprisonment

plus a 25-year firearm add-on for the murder and his consecutive sentence of 5 years' imprisonment for unlawful possession of a firearm by a felon. In his direct appeal, defendant asserted that his sentences were excessive. He further asserted that, on his motion to suppress his confession, defense counsel was ineffective for failing to call a clinical psychologist who examined defendant when his fitness was at issue and who suggested that defendant had experienced "a brief psychotic episode." We determined that the sentences were not an abuse discretion. We also held that the record did not establish that counsel's failure to call the psychologist was unreasonable.

¶ 3 At issue in this appeal is whether defendant's *pro se* postconviction petition, in which he argues only ineffective assistance of counsel, should have been summarily dismissed. We determine that it should have been. Accordingly, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant was charged in a nine-count indictment with seven counts of first-degree murder, one count of unlawful possession of a firearm by a felon, and one count of possession of a firearm without having a firearm owner's identification card. The first-degree murder charges all related to the May 5, 2014, shooting death of James Tilson.

¶ 6 Police arrested defendant as a suspect in Tilson's murder on May 15, 2014. He was in jail on May 19, 2014, when he told a corrections officer that he "need[ed] to do the right thing and get this off [his] shoulders." He made what amounted to a full confession of his guilt and admitted that Tilson had not been armed during the incident that resulted in Tilson's death.

¶ 7 On May 30, 2014, defense counsel asked the court to order a fitness evaluation of defendant based on what counsel described as the jail staff's observation of "unusual behavior" by defendant and counsel's own observations of his interactions with defendant. For instance, counsel stated that defendant "at one point [had sung] a children's tune rather than answering questions" from

counsel. The court ordered the evaluation and appointed Terrance G. Lichtenwald, a clinical psychologist, to perform the evaluation. Lichtenwald concluded that defendant was fit, but noted that defendant had "self-reported a *** time during which he heard voices and was paranoid." Lichtenwald concluded that defendant "more likely than not underwent a brief psychotic episode," which was possibly the result of Xanax withdrawal, but that defendant was no longer reporting psychotic symptoms.

¶ 8 On October 1, 2014, the court granted leave for defendant to replace defense counsel. That change also resulted in the case's assignment to a new judge. New defense counsel moved to suppress defendant's confession. On February 23, 2015, she told the court that she would "reach out" to Lichtenwald to get his opinion on defendant's competence to waive his right to remain silent. On March 2, 2015, she told the court that she had spoken to Lichtenwald and, on his advice, had since been in contact with a different potential expert witness. On March 16, 2015, counsel told the court that she had again spoken with Lichtenwald, who had told her that the potential witness he had recommended was not willing to take on that role. Counsel said that she would proceed with the suppression motion without expert testimony. The court ultimately denied the motion.

¶ 9 The evidence adduced at trial is not at issue in this appeal. Defendant was 33 years old at the time of the shooting and lived with his wife and children in a house in Rockford. Defendant, Tilson, and a mutual friend, Terrance Bell, were all drug dealers. Bell sold marijuana; defendant and Tilson sold crack. The day before the shooting, Bell and defendant had been together at Bell's house, where they had been betting with each other on video games. Tilson also came to Bell's house, but arrived later than defendant. Tilson owned a car, a Buick Park Avenue, which was at a repair shop that day. He did not have the money to pay for the repairs, and he asked Bell and

defendant for help paying the bill. The request resulted in defendant and Tilson getting into an argument that the two pursued in a series of texts. Defendant showed Bell a text from Tilson that said, "[M]an, lately I've been feeling like killin' a mother fucker or some shit like that." Tilson eventually came up with the money on his own.

¶ 10 The three friends rented a room at a Howard Johnson's motel. They used the room as a recording studio and as a base for their drug dealing. They were together in the room on May 3, 2014, and on into May 4, 2014. Kenyatta Brown, defendant's girlfriend, was also present. She had been drinking heavily. Bell and defendant had been using Xanax and cough syrup with codeine all day. Early in the morning of May 4, all four went on a drug run. They took two vehicles. Bell and Brown were in defendant's Tahoe, and Tilson and defendant were in Tilson's Buick. They drove to an abandoned house at 4211 Crandall Avenue in Rockford. Tilson parked the Buick in the driveway, and Brown parked the Tahoe on the street nearby. Bell and Brown heard several gunshots, then saw defendant exit the passenger side of the Buick and run toward them. They both denied that defendant had handed them a gun.

¶ 11 Police officers found Tilson dead in his car; the cause of death was two gunshot wounds to the right side of his head. The police recovered six .38-caliber bullets from the scene and from Tilson's body. The markings on the bullets suggested that all had been fired from the same gun. The police recovered a .38-caliber handgun from Bell; it did not produce markings that matched the bullets. Consistent with defendant's statement to the police that he had thrown the murder weapon in the river, the police never recovered a gun that produced matching markings.

¶ 12 The State introduced a copy of defendant's conviction of delivery of more than 1, but less than 15, grams of cocaine.

¶ 13 Defendant elected to testify. He told the jury that Tilson had pulled a gun on him, that he grabbed it, and that he then shot Tilson. He ran from the car and gave the gun to Bell; the gun the police took from Bell was the gun he had taken from Tilson. He did not remember making his statement to the police. He believed that he was in an altered mental state when he gave it.

¶ 14 The jury found defendant guilty on all counts before it. Defendant petitioned for postconviction relief on January 17, 2018. The trial court dismissed the petition at the first stage, finding it to be frivolous and without merit. The court entered its order on January 30, 2018. Defendant filed his notice of appeal on February 12, 2018, and filed his direct appeal on February 22, 2018.

¶ 15 On direct appeal, defendant argued, *inter alia*, that counsel was ineffective for failing to present testimony from Lichtenwald in support of his motion to suppress his confession as involuntary. We determined that the record failed to support this claim. Counsel represented to the trial court that she had spoken to Lichtenwald regarding the suppression hearing, so we could assume that her choice not to call him as a witness was strategic. Defendant argued that, although counsel consulted with Lichtenwald during the suppression proceedings, "[t]he record fails to show why Lichtenwald himself was not called to testify at the suppression hearing, at least in regard to his conclusion that [defendant] suffered a brief psychotic episode while in custody for this case." Further, "counsel's failure to support the motion to suppress with an expert psychiatric [*sic*] opinion stating, at a minimum, that [defendant] underwent a 'brief psychotic episode' around the time of his custodial confession, was objectively unreasonable."

¶ 16 We determined that the record before us did not support an assumption that Lichtenwald's testimony would have straightforwardly replicated Lichtenwald's conclusions in the fitness report.

Instead, absent evidence that counsel lacked a proper strategic basis for her decision, we assumed that she had a proper basis and did not act arbitrarily.

¶ 17 II. ANALYSIS

¶ 18 Defendant maintains that the trial court erred in dismissing his postconviction petition at the first stage. On appeal, defendant limits his argument to one of the constitutional claims he raised in his petition: his postconviction claim of ineffective assistance of counsel based upon his attorney's alleged failure to investigate his history of mental illness was not frivolous and patently without merit and should have survived to the second stage.

¶ 19 The Post-Conviction Hearing Act (Postconviction Act) provides a means for a defendant to collaterally attack a conviction or sentence based on an alleged violation of federal or state constitutional rights. 725 ILCS 5/122-1 to 122-7 (West 2018). The trial court may dismiss a postconviction petition during the first stage of proceedings if it finds the petition to be frivolous or patently without merit. *Id*. § 122-2.1(a)(2). "A petition is considered frivolous or patently without merit when the allegations in the petition fail to present the gist of a constitutional claim." *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009). The "gist" standard is a "low threshold," and the postconviction petition "need only present a limited amount of detail[.]" (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 20 At the first stage of postconviction proceedings, the trial court must independently review the petition, taking the allegations as true and determine whether the petition is "frivolous or patently without merit." *People v. Hodges*, 234 Ill.2d 1, 10 (2009); 725 ILCS 5/122–2.1(a)(2) (West 2018). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis in either law or in fact. *People v. Tate*, 2012 IL 112214, ¶ 9. "A petition which lacks an arguable basis either in law or in fact is one which is based on an

indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill.2d at 16. We review the summary dismissal of a post-conviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 21 To succeed on a claim of ineffective assistance of counsel, a defendant must present evidence to satisfy both prongs of the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. A court decides whether the performance of a defendant's attorney was deficient using an objective standard of competence grounded in prevailing professional norms. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). To establish that counsel's performance was deficient, a defendant "must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy." *Richardson*, 189 Ill. 2d at 411. For example, "trial counsel's decision[s] regarding the extent of cross-examination, whether to present witnesses, and what defense theory to assert all constitute matters of trial strategy." *People v. Whitamore*, 241 Ill.App.3d 519, 525 (1993) (citing *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)).

¶ 22 Defendant's postconviction petition alleges, *inter alia*, that counsel was ineffective for failing to investigate his "history of mental illness." According to the petition, defendant related to counsel that he needed and was prescribed psychotropic medications, "indicating that he had a serious psychiatric background," and that after being so advised, counsel "failed to make a professional, lawyer-like effort to ascertain whether the defendant had a history of mental illness" and to obtain medical records that would have supported his motion to suppress his confession. The medical records, which, defendant asserts, he was unable to obtain, would reflect that he was "initially diagnosed to be suffering from anxiety in 2004" and was prescribed Xanax on a regular basis until his arrest in 2014.

¶ 23 In deciding defendant's direct appeal, we concluded that his counsel's decision not to support the motion to suppress with expert opinion testimony was the product of sound trial strategy. To the extent that defendant attempts to repeat this argument here, the issue is barred. See *People v. Richardson*, 189 Ill. 2d 401, 407-08 (2000) ("determinations of the reviewing court on the direct appeal are *res judicata* as to issues actually decided). However, defendant alleges the additional issue of counsel's failure to investigate his mental history and obtain medical records to support his motion to suppress. The question for us is whether his allegations are sufficient to survive first stage dismissal.

¶ 24 The supreme court has noted that the "low threshold" at the first stage "does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Hodges*, 234 Ill.2d at 10. Section 122–2 of the Postconviction Act provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122–2 (West 2018). The purpose of the " affidavits, records, or other evidence" requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). "Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *Id.* at 254-55. "A postconviction petitioner's failure to either attach the necessary affidavits, records or other evidence or explain their absence is fatal to a post-conviction petition and 'by itself justifies the petition's summary dismissal.' " (Internal quotation marks omitted.) *People v. Richardson,* 2015 IL App (1st) 113075, ¶ 29 (citing *Delton*, 227 Ill. 2d at 255).

¶ 25 The only attachment to defendant's petition is his own affidavit swearing that the factual averments are true to the best of his knowledge and belief. Defendant does not attach a copy of the referenced medical records, even though, as the subject of the records, he would have been entitled to obtain a copy of them. See *Richardson*, 2015 IL App (1st) 113075, ¶ 30 (addressing the defendant's failure to attach a mental evaluation to his postconviction petition). Moreover, although defendant states that he was unable to obtain the records, he does not explain any attempts he made to obtain them. So, in order to find that defendant's petition "states the gist of a constitutional claim, we must assume that the [records] produced evidence favorable to [defendant], without factual allegations or any evidence to that effect and no explanation for their absence." *Id.* This is a defect in the petition "that the law does not allow us to excuse, just as courts do not excuse a postconviction petitioner's failure to articulate the substance of a missing witness' testimony claimed to be favorable." *Id.* (citing *People v. Harris*, 224 Ill.2d 115, 142 (2007)).

¶ 26 In short, we presume facts are true; we do not presume conclusions are true. Defendant's failure to provide evidence that his allegations are capable of independent corroboration, or to explain the absence of such evidence, justifies dismissal of his postconviction petition at the first stage.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 29 Affirmed.