

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 12551
	)	
RUBEN FLEMING,	)	Honorable
	)	Jennifer F. Coleman,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Gamrath and Justice Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* We affirm the dismissal of defendant’s petition for postconviction relief where he failed to show ineffective assistance of trial counsel.
- ¶ 2 Ruben Fleming appeals from the first-stage dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2024)). On direct appeal, we found that Fleming was entitled to a new *Krankel* hearing because the State participated in the original hearing, which made it adversarial, and we remanded. *People v. Fleming*, 2016 IL

App (1st) 141355-U. On remand, the circuit court dismissed his petition, which we affirmed.

Fleming, 2023 IL App (1st) 211171-U

¶ 3 Fleming now appeals the first-stage dismissal of a postconviction petition, claiming his trial counsel was ineffective for failing to call a witness whose testimony would have supported an arguable claim that he was not the shooter. We affirm because the proposed testimony would not have undermined the victim's identification of Fleming or created a reasonable probability of a different outcome.

¶ 4 Background

¶ 5 Fleming was charged by indictment with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1)) (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)). The jury found Fleming guilty of both counts. The trial court merged the aggravated battery conviction into the attempted murder conviction and sentenced Fleming to 50 years in prison. On direct appeal, Fleming challenged his conviction and the State's participation in his preliminary *Krankel* hearing. This court affirmed his conviction but remanded for a new *Krankel* inquiry because the State had taken an adversarial role. *People v. Fleming*, 2016 IL App (1st) 141355-U.

¶ 6 On remand, Fleming retained counsel to represent him, and retained counsel filed a *Krankel* motion, alleging that his trial counsel provided ineffective assistance by allowing him to appear before prospective jurors in jail-issued and unkempt clothing, failing to strike a former prosecutor from the jury, and failing to impeach the victim's identification testimony or adequately challenge his account of the shooting. After a hearing, the trial court denied the claims in the *Krankel* motion. This court affirmed on appeal. See *Fleming*, 2023 IL App (1st) 211171-U.

¶ 7 On September 9, 2024, Fleming filed a *pro se* petition under the Act, alleging that he received ineffective assistance because trial counsel failed to call Oak Park Police Department Sergeant Ladon Reynolds who was present at the scene, as a witness. Fleming alleged that a case supplementary report, attached to the petition, detailed that Reynolds witnessed the verbal altercation between Fleming and the victim and saw Fleming leave the scene before shots were fired. In the report, Reynolds relayed that he “heard yelling” and saw an “animated male black screaming at [someone].” Reynolds then saw the “animated man” enter a car driven by an “old man” and drive away. Reynolds heard “cracks that may have been gunshots.” Reynolds stated that he was too far away to see the “animated man[‘s]” face.

¶ 8 The circuit court dismissed the petition, finding that the claim was waived because Fleming failed to raise it on direct appeal, at the *Krankel* hearing, or on appeal from the *Krankel* hearing. Even if not waived, Fleming failed to demonstrate that trial counsel’s failure to call Reynolds as a witness was objectively unreasonable when the evidence in his report was consistent with the trial evidence. This appeal followed.

¶ 9 Analysis

¶ 10 On appeal, Fleming argues that he set forth an arguable claim that his trial counsel was ineffective for failing to call Reynolds, whose testimony would have undermined the victim’s identification of him and supported his trial theory that he was not the shooter.

¶ 11 While “a defendant must generally raise a constitutional claim alleging ineffective assistance of counsel on direct review or risk forfeiting the claim,” (*People v. Veach*, 2017 IL 120649, ¶ 47), Reynolds’s report does not appear to be included in the trial record. Accordingly, Fleming could not have raised the issue on direct appeal or during the *Krankel* proceedings. See

id. (“Procedural default does not, however, preclude a defendant from raising an issue on collateral review that depended upon facts not found in the record.”).

¶ 12 The Act allows defendants to challenge their convictions based on an alleged violation of their state or federal constitutional rights. *People v. Jean*, 2024 IL App (1st) 220807, ¶ 28. Postconviction proceedings have three stages. *Id.* Fleming’s petition was dismissed at the first stage, when a circuit court must dismiss a petition within 90 days of filing and docketing if it is “frivolous or is patently without merit.” 725 ILCS 5/122–2.1(a)(2) (West 2024). A petition meets this standard when it “has no arguable basis either in law or in fact—relying on an indisputably meritless legal theory or a fanciful factual allegation.” (Internal quotation marks omitted). *People v. Allen*, 2015 IL 113135, ¶ 25. “Meritless legal theories include ones completely contradicted by the record, while fanciful factual allegations may be ‘fantastic or delusional.’ ” *Id.*

¶ 13 The threshold for a petition to survive the first stage is “low,” with the petition only needing to “state the gist of a constitutional claim” supplying “sufficient factual basis to show the allegations in the petition are capable of objective or independent corroboration.” (Internal quotation marks omitted). *Id.* ¶ 24. The circuit court is precluded from “engag[ing] in any fact-finding or credibility determinations” at this stage, and “all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true.” *People v. Coleman*, 183 Ill.2d 366, 385 (1998). We review the summary dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill.2d 175, 184 (2010).

¶ 14 In examining ineffective assistance of trial counsel claims, we follow the two-part test described in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Johnson*, 2021 IL 126291, ¶ 52. A defendant must show that (i) counsel’s performance fell below an objective

standard of reasonableness and (ii) counsel's deficient performance resulted in prejudice. *Id.* To establish prejudice, a defendant must demonstrate a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*

¶ 15 Decisions about what evidence to present generally fall within trial strategy and ordinarily do not support ineffective assistance claims. *People v. Dupree*, 2018 IL 122307, ¶ 44; *People v. Williams*, 2017 IL App (1st) 152021, ¶ 38. A court may reject an ineffective assistance claim for lack of prejudice without deciding whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 16 Fleming has not shown that trial counsel's decision not to call Reynolds as a witness was objectively unreasonable or prejudicial. Reynolds's report states that he witnessed an altercation between two men, saw one enter a car that drove away, and heard "cracks that *may* have been gunshots." (Emphasis added). The report does not establish whether Reynolds heard the sounds before or after the car left. Reynolds did not witness the shooting and was too far away to identify the man who entered the car. At trial, the victim testified that Fleming threatened and attempted to strike him before the shooting. The victim also identified Fleming in a photo array, a lineup, and at trial as the man who pointed what he believed was a gun at him shortly before he was shot.

¶ 17 Reynolds's report, at best, describes him witnessing an altercation before the shooting. Nor does the report undermine the victim's identification of Fleming, whom he had seen at close range before the shooting. Fleming thus failed to show that counsel's decision not to call Reynolds was unreasonable or that his testimony would have created a reasonable probability of a different outcome. *Elliott*, 2022 IL App (1st) 192294, ¶ 37; *Johnson*, 2021 IL 126291, ¶ 52.

¶ 18 Affirmed.