2012 IL App (1st) 110414-U

SECOND DIVISION
OCTOBER 30, 2012

No. 1-11-0414

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 706
	)	
JAMAAL VAUGHN,	)	Honorable
	)	Raymond Myles,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

¶ 1 *Held:* Where defendant did not state the gist of a claim of ineffective assistance of counsel, the circuit court's summary dismissal of his post-conviction petition was affirmed.

¶ 2 Defendant Jamaal Vaughn 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 2010). Defendant contends that his petition stated the gist of a constitutional claim of ineffective assistance of trial counsel where his attorney failed to present Raphael Levi and Antonio Powell as witnesses. We affirm.

¶ 3 Following a jury trial, defendant was convicted of aggravated battery with a firearm in connection with the shooting of the victim, India McCain, on November 4, 2006, along the block

of Dobson Avenue between 92nd and 93rd Streets in Chicago. Defendant was sentenced to 12 years' imprisonment for the aggravated battery with a firearm.

¶ 4 At trial, India testified that she and her sister, Racquel McCain, were standing on the street with friends drinking alcohol, despite being under-age. About 20 to 30 people were on the street when defendant, who had been a friend of India's family for about 10 years, pulled up in his car. Defendant exited the car, shouted at the crowd, and waved a gun in his hand. After India crossed the street away from defendant, she heard two gun shots and felt a burning in her right shoulder. Racquel immediately took India to the hospital. India had not seen anyone else out in the neighborhood with a gun. While recovering in the hospital, defendant called her and apologized. A police detective visited India in the hospital and she told him that defendant had shot her. Several days later, India identified defendant as the shooter from a photo array and provided a statement to the detective.

¶ 5 On cross-examination, India further testified that prior to trial, defense counsel's investigator, John Byrne, interviewed her and Raquel together. India met with Byrne because defendant and his girlfriend had been calling her asking her to change her story, and she felt "sorry" for defendant. During the interview, India stated that she had not seen the shooter. Several days later, she signed an affidavit averring to that fact. However, India testified that had she read the affidavit she would never have signed it because she lied to Byrne during the interview.

¶ 6 Racquel corroborated India's testimony. She had been with India on the night in question, knew defendant from the neighborhood, and had made a statement to the police identifying defendant as the shooter. Racquel, despite being under-age, also drank alcohol on the night of the shooting, but was not intoxicated. She met with Byrne at the same time as India and also

recanted her identification of defendant. However, she refused to sign an affidavit and testified that her recantation was a lie.

¶ 7 Detective Lawrence Herhold testified that he investigated the shooting and interviewed both India and Racquel McCain. He acknowledged that India identified defendant as the shooter from a photographic array.

¶ 8 John Byrne testified for the defense that he met with Racquel and India before trial. He prepared an affidavit, based on his conversation with India, and presented it to her for her signature. He watched her read and sign the affidavit. Defendant introduced the unnotarized affidavit signed by India into evidence.

¶ 9 The jury found defendant guilty of aggravated battery with a firearm and the court sentenced him to 12 years' imprisonment. We affirmed that judgment on direct appeal. *People v. Vaughn*, No. 1-08-1978 (2010) (unpublished order under Supreme Court Rule 23).

¶ 10 On October 14, 2010, defendant filed a *pro se* post-conviction petition alleging that he was denied effective assistance of trial counsel. Defendant specifically maintained that counsel failed to call Raphael Levi and Antonio Powell, who would have testified that he did not do the shooting. According to defendant, his attorney did not call these witnesses to the stand because "they were in jail," and their "word didn't mean anything." Defendant further indicated that he "had two affidavits from the two witnesses that [defense counsel] did not present at trial," was unable to find anyone on his behalf to present those affidavits at the time he filed his petition, and was unable to contact his attorney who had the affidavits. No affidavits were attached to his petition.

¶ 11 On January 7, 2011, the circuit court issued a written order dismissing the petition as frivolous and patently without merit. In doing so, the court found that defendant failed to meet the requisite factual showing because he failed to submit an affidavit from any of the potential

witnesses, and failed to explain the significance of their testimony. The court further found that defendant's claim was forfeited.

¶ 12 In this appeal, defendant challenges the propriety of that dismissal, arguing that he raised the gist of a constitutional claim of ineffective assistance of counsel. He specifically maintains that his counsel was ineffective for failing to present the testimony of Levi and Powell who would rebut the trial testimony of India and Racquel.

¶ 13 The Act provides a remedy for defendants who claim that a substantial violation of their constitutional rights occurred in the proceedings which resulted in their convictions, when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). Where defendant has previously taken a direct appeal from a judgment of conviction, the judgment of the reviewing court is *res judicata* as to all issues decided by the court, and any other claims that could have been raised on direct appeal, but were not, are waived. *Enis*, 194 Ill. 2d at 375. These procedural bars are relaxed, however, where the facts relating to the claim do not appear on the face of the original appellate record. *People v. Harris*, 206 Ill. 2d 1, 13 (2002). Because defendant's post-conviction claim relies on evidence outside the original appellate record, *i.e.*, testimony that was not presented at trial, waiver is not implicated. *Enis*, 194 Ill. 2d at 375-76. Therefore, we address the merits of defendant's claim, and review the circuit court's dismissal of defendant's petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 14 The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a

defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. Nevertheless, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). The failure to attach the required documents or explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 15 Here, defendant failed to provide affidavits from Levi or Powell. Instead, he simply asserted that Levi and Powell would testify that he was not the shooter. Defendant attempts to circumvent the requirement that post-conviction petitions be accompanied by affidavits by arguing that he explained why the petitions were not attached. He specifically stated in his petition that his attorney was in possession of the affidavits, but he was unable to contact him. However, defendant failed to detail his efforts to contact defense counsel, or explain why he was unable to contact him. Furthermore, there is no indication in the record that defendant attempted to contact Levi or Powell personally in order to obtain the affidavits. Therefore, defendant's unsupported conclusory allegation that Levi and Powell would testify that he was not the shooter is not sufficient to require further proceedings under the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 16 More significantly, we find defendant's petition failed to state the gist of a claim of ineffective assistance of counsel.

¶ 17 Specifically, a defendant alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 18 It is well established that the decision whether to call a witness to testify at trial is a matter of trial strategy (*Enis*, 194 Ill. 2d at 378), and the decisions that counsel makes regarding

matters of trial strategy are "'virtually unchallengeable'" (*People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

¶ 19 In this case, the record shows that counsel's decision not to call Levi or Powell was a matter of trial strategy. Counsel conducted an investigation into defendant's case, and was aware of Levi and Powell. It is also significant to note that, in his petition, defendant admits that counsel was aware of Levi and Powell as potential witnesses. He even conceded that counsel made the strategic decision not to call them as witnesses due to their questionable credibility. He specifically stated in his petition, "my lawyer didn't bring the witnesses to the stand because he [said] they were in jail and [their] word didn't mean anything." Therefore, defendant's own post-conviction petition supports the reasonableness of counsel's strategic decision not to call Levi or Powell.

¶ 20 Nevertheless, even assuming that counsel erred in failing to call Levi and Powell as witnesses, defendant has failed to show a reasonable likelihood that the result of the trial would have been different. As we found in defendant’s direct appeal, the State proved defendant guilty of aggravated battery with a firearm beyond a reasonable doubt. *Vaughn*, No. 1-08-1978 at 6. India McCain identified defendant at trial as the individual who fired the bullet that ultimately struck her, and also identified him as the shooter from a photo array. The credible testimony of one eyewitness is sufficient to convict defendant. *People v. Robinson*, 153 Ill. App. 3d 272, 275 (1987). Furthermore, India's testimony was corroborated by Racquel McCain, who was also at the scene of the crime. In addition, as this court found on direct appeal, India and Racquel McCain's testimony was supported by the testimony from the investigating police officer.

Vaughn, No. 1-08-1978 at 6. The fact that India and Racquel recanted their identification of defendant, and India signed an affidavit to that effect, does not change this result. This is particularly true where the women testified at trial that their statements to defendant's investigator were lies, India felt "sorry" for defendant and had been pressured by him and his girlfriend to change her story, Racquel refused to sign the affidavit, and India stated that she would not have signed the affidavit had she actually read it.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.