2012 IL App (1st) 111252-U

SIXTH DIVISION
September 21, 2012

No. 1-11-1252

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 9487
	)	
JAMES LEWIS,	)	Honorable
	)	Timothy J. Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice LAMPKIN and Justice GARCIA concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's *pro se* post-conviction petition affirmed where defendant failed to provide support for his allegations of ineffective assistance of trial counsel, or sufficiently explain their absence.

¶ 2 Defendant James Lewis appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq*. (West 2008)). He contends that he presented an arguable claim that his counsel was ineffective for failing to investigate two potential witnesses and requests a remand for second-stage proceedings.

¶ 3 The record shows that defendant, and two co-defendants who are not parties to this appeal, were charged in relation to a series of events that occurred on April 18, 2007, on the south and southeast sides of Chicago. Following a bench trial, defendant was found guilty of home invasion, aggravated kidnaping, and two counts of armed robbery, then sentenced to concurrent terms of 60 and 35 years in prison.

¶ 4 Defendant filed a direct appeal from that judgment, which is currently pending in this court. People v. Lewis, No. 1-10-2617. In that appeal, defendant has raised the following issues: (1) the trial court erred in denying his motion to suppress identification; (2) his due process rights were violated when the fitness evaluation requested by counsel prior to trial was not performed; and (3) his sentence is excessive. Since these issues are distinct from those raised in this appeal from the dismissal of his post-conviction petition, we may proceed on the issues presently before us.

¶ 5 On October 4, 2010, defendant filed a *pro se* "Petition for Judicial Notice of Law" and a "Petition for Writ of Mandamus," in which he challenged various aspects of his preliminary hearing and grand jury proceedings. The circuit court advised defendant that, because the

allegations in his petitions implicated constitutional rights, the court would re-characterize his filings as a post-conviction petition. The circuit court also admonished defendant of the potential consequences of doing so, and advised him to wait for the decision on his pending direct appeal before filing a post-conviction petition, so that he would be fully informed of any additional issues. The trial court then gave defendant time to consider his options.

¶ 6 On December 28, 2010, defendant filed a "Petition for Post-Conviction Hearing," in which he argued, *inter alia*, that trial counsel was ineffective for failing to investigate and interview Emanuel Davis and Roosevelt Sain. In relation to these claims, defendant attached a supplemental police report, and an affidavit in which he stated that his failure to find any other documents that were not attached to the petition was because he was "having a hard time getting them."

¶ 7 The attached police report summarizes the arrest and questioning of Davis on March 19-20, 2008, and reflects that, due to DNA recovered from a glove at the scene of the kidnaping, an alert was issued for Davis, who was then arrested and questioned about the incident. Davis voluntarily submitted to a buccal swab and participated in separate line-ups for the two victims, but neither one identified Davis as one of the offenders. Davis denied having any knowledge of the incident, and stated that his cousin, Sain, had used Davis' name in the past upon being arrested, and he believed that Sain was probably involved in this incident. After conducting a computer inquiry, the officers learned that Sain's state police identifying number was the "same SID number on the DNA hit from the Illinois State Police Forensic Science Division," and that

Sain was currently incarcerated. Davis was released without being charged and the report further reflects that the "R/Ds will attempt to writ Roosevelt Sain from IDOC" to conduct a lineup.

¶ 8 On January 7, 2011, defendant informed the circuit court that he wished to withdraw his previously filed petitions and substitute his Petition for Post-Conviction Hearing. The court once again advised defendant of the benefits of waiting to file a post-conviction petition, but defendant stated that he understood the implications and wished to proceed with his petition.

¶ 9 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the trial court found, *inter alia*, that defendant's ineffective assistance of counsel claim relating to Davis and Sain did not meet either prong of the *Strickland* test. The trial court stated that, even if the presence of Sain's DNA on a glove found at the scene proved that he was one of the offenders, it did not prove that defendant was not involved in the crime. The court further stated that defendant's attorney "cannot be faulted for failing to offer evidence which proves nothing regarding the guilt or innocence" of defendant. The court thus concluded that counsel's performance was not unreasonable and that prejudice did not inure to defendant as a result.

¶ 10 Defendant now challenges the propriety of the dismissal order and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Because we review the judgment, and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). That said, we note that defendant has concentrated solely on his claim of ineffective assistance of counsel, thereby abandoning the

multiple claims raised in his petition and forfeiting them for appeal. Ill. S. Ct. R. 341(h)(7); *People v. Borello*, 389 Ill. App. 3d 985, 998 (2009).

¶ 11 At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Although this requires a limited amount of detail, he is required, under section 122-2 of the Act, to support his allegations with affidavits, records or other evidence, or state why they are not attached. *Hodges*, 234 Ill. 2d at 9-10. If a petition lacks an arguable basis in law or fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *Hodges*, 234 Ill. 2d at 11-12, 16.

¶ 12 A claim of ineffective assistance of counsel is examined under the two-prong *Strickland* test, in which a defendant must show that counsel's performance was deficient and that defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*). In this post-conviction context, we consider the propriety of the circuit court's dismissal of defendant's claim, and determine whether defendant's allegations arguably demonstrate trial counsel's deficient performance and resulting prejudice. See *People v. Jones*, 399 Ill. App. 3d 341, 368 (2010).

¶ 13 In his petition, defendant alleged that trial counsel was ineffective for failing to investigate Davis and Sain, and attached the above-mentioned supplemental police report, where Davis and Sain are referenced, in support thereof. On appeal, defendant argues that his trial defense of misidentification could have been bolstered by Davis and Sain. He maintains that,

because his DNA was found at the scene of the kidnaping, Sain must have been one of the perpetrators and that he could have testified that defendant was not involved in the incident.

¶ 14 The State responds that defendant's failure to attach any supporting affidavits to his petition, as required by the Act, is fatal to his petition, citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002). In his reply brief, defendant argues that this court has long recognized the near impossibility of obtaining an affidavit from defense counsel to support a claim of ineffective assistance of counsel, but fails to address his failure to attach any affidavits from Davis or Sain.

¶ 15 Section 122-2 of the Act requires defendant to support the allegations in his *pro se* post-conviction petition by either attaching factual documentation to the petition, or otherwise explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). The purpose of this requirement is to show that the allegations in the petition are capable of independent or objective corroboration. *Delton*, 227 Ill. 2d at 254. An allegation that trial counsel provided ineffective assistance because he failed to investigate and present testimony from witnesses must be supported by affidavits from those proposed witnesses. *Jones*, 399 Ill. App. 3d at 371, citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Without such affidavits, the reviewing court cannot determine whether those witnesses could have provided testimony favorable to defendant, and thus, further review of the claim is not necessary. *Jones*, 399 Ill. App. 3d at 371.

¶ 16 Here, the evidence at trial established that defendant was one of several perpetrators who kidnaped and attempted to procure ransom in exchange for the release of one of the victims, and

was also involved in the home invasion and robbery of the other victim. Relying on the fact that Sain's DNA matched DNA found on a glove at the scene of the crime, defendant speculates that Sain "might have" provided evidence that defendant had no role in the offense. In his reply brief, defendant acknowledges that Davis "may have had no knowledge of the offense," but that because he had knowledge of the fact that Sain had used Davis' name after arrests, defense counsel "could have used Davis to uncover valuable information about the real perpetrator of the offense."

¶ 17 Because defendant failed to attach affidavits from Davis or Sain to his post-conviction petition, we have no way of determining whether either one would have provided testimony favorable to the defense (*Jones*, 399 Ill. App. 3d at 371) and support his claim. Without support, defendant has set forth no more than a broad conclusory allegation of ineffective assistance of counsel, which is not allowed under the Act. *Delton*, 227 Ill. 2d at 258.

¶ 18 Moreover, a defendant's failure to attach affidavits or the documentation required by the Act, or otherwise explain their absence, has been found "fatal" to his post-conviction petition and alone justifies summary dismissal of same. *Delton*, 227 Ill. 2d at 255, citing *Collins*, 202 Ill. 2d at 66. Here, defendant merely asserted that his failure to attach any further documents to the petition was due to his "having a hard time getting them," which was insufficient to explain their absence as required under section 122-2 of the Act. He also failed to specify the additional documents that he stated he was having a difficult time obtaining, or explain their significance. Even assuming that defendant's difficulties stemmed from being incarcerated, his status as a

prisoner, in and of itself, does not excuse his failure to provide the supporting affidavits or documents. Were it otherwise, the requirements delineated in section 122-2 of the Act would be superfluous, given that the Act is only available to persons such as defendant, who are "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2010).

¶ 19 In sum, defendant failed to meet the pleading requirements of section 122-2 of the Act, and this failure was "fatal" to his claim of ineffective assistance of counsel. *Collins*, 202 Ill. 2d at 66. We therefore find no error in the circuit court's summary dismissal of his petition which clearly lacked any arguable basis in law or in fact. *Jones*, 399 Ill. App. 3d at 373.

¶ 20 For the foregoing reasons, we affirm the order of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition.

¶ 21 Affirmed.