

No. 1-10-1112

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 03-CR-28534
)	
LAMONT DOUGLAS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's summary dismissal of defendant's *pro se* postconviction petitions is affirmed where allegations in the petition were unsupported by affidavits of alleged witnesses pursuant to section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2010)).

¶ 2 The defendant, Lamont Douglas, appeals from an order of the circuit court summarily dismissing his *pro se* post-conviction petition as frivolous and patently without merit. On appeal, the defendant contends that the court erred in dismissing his petition because it stated the gist of a meritorious constitutional claim that his trial counsel rendered ineffective assistance

when he failed to interview or present testimony from three eyewitnesses who would have testified that someone other than defendant shot the victim. On February 14, 2012, we affirmed the circuit court's dismissal on the basis that the defendant failed to provide affidavits in support of his petition as required by section 122-1(b) and section 122-2 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(b), 122-2 (West 2010)). On April 13, 2014, our supreme court ordered us to vacate our order and reconsider our judgment in light of *People v. Hommerson*, 2014 IL 115638. After reconsideration and for the reasons that follow, we affirm.

¶ 3 Following a 2006 jury trial, the defendant was convicted of first degree murder for fatally shooting Emidio Ruiz. The trial court sentenced the defendant to a term of 75 years' imprisonment. On direct appeal, this court affirmed the defendant's conviction and sentence. *People v. Douglas*, No. 1-06-2818 (2009) (unpublished order under Supreme Court Rule 23). Our supreme court denied the defendant's petition for leave to appeal. *People v. Douglas*, 233 Ill. 2d 573 (2009).

¶ 4 On February 5, 2010, the defendant filed the instant *pro se* petition for relief under the Act (725 ILCS 5/122-1 *et seq.* (West 2010)) alleging, *inter alia*, that trial counsel rendered ineffective assistance because he failed to interview or present testimony from three eyewitnesses who would have testified that someone other than the defendant shot Ruiz. The defendant alleged that Wakendra Peuges, Jackiqline Peuges and Myra Brown "were willing to testify as to their accounts of what transpired in this particular case." The defendant stated that he told trial counsel about the witnesses and their willingness to testify, and gave counsel their addresses. He claimed that counsel never mentioned anything further to him about these witnesses, and when he asked counsel about them, counsel did nothing but complain about all

the work he needed to do and had already done in the case. The defendant did not provide any further factual detail regarding the witnesses' expected testimony.

¶ 5 There are no attachments to the defendant's postconviction petition. Specifically, the defendant did not include his own affidavit attesting to the veracity of his allegations. Nor did he attach any affidavits or other documentation in support of his allegations. The defendant stated in his petition that he could not obtain affidavits from the three witnesses due to his "being incarcerated and indigent," and that he was "unable to locate any of the witnesses['] addresses without assistance from the court."

¶ 6 The circuit court found that the allegations in the defendant's petition were barred by the doctrine of *res judicata* and waived because he could have raised them on direct appeal. Alternatively, the court found that the defendant's claims were without merit. The court specifically found that the defendant failed to allege that he was prejudiced by counsel's failure to call the three eyewitnesses to testify. The circuit court also faulted the defendant for not including any affidavits from the potential witnesses setting forth their potential testimony and the significance of such testimony. The court found that the defendant's failure to do so prevented him from overcoming the presumption that counsel's performance was not deficient, but rather a matter of trial strategy. Based on these findings, the circuit court concluded that the allegations in the defendant's *pro se* postconviction petition were frivolous and patently without merit, and it summarily dismissed his petition.

¶ 7 On appeal, the defendant contends that the circuit court erred in dismissing his petition because it stated the gist of a meritorious constitutional claim that trial counsel rendered ineffective assistance when he failed to interview or present testimony from the three named eyewitnesses, who would have testified that someone other than defendant shot the victim. The

defendant notes that no one at trial identified him as the gunman, and he argues that the potential testimony from the witnesses would have rebutted the State's version of events. The defendant acknowledges that trial counsel listed Wakendra Peuges as a potential witness in his answer to discovery, but he claims that fact shows that the witness "actually existed," and therefore, that his allegation has an arguable basis in fact. The defendant asserts that there was little evidence to support his conviction outside of his videotaped statement in which he provided a detailed account of the murder and apologized to his family and the victim's family for the crime. The defendant also acknowledges that he did not provide any affidavits in support of his allegation, but he argues that he sufficiently explained their absence due to his incarceration.

¶ 8 Initially, the State argues that defendant failed to verify his *pro se* petition with his own affidavit as required by section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2010)), and that his petition is subject to dismissal on that basis alone. Alternatively, the State argues that defendant's claim has no arguable basis in law or fact because the evidence against him was so overwhelming that he cannot establish that he was prejudiced by counsel's actions. The State asserts that the fact that one of the witnesses was listed in counsel's answer to discovery shows that counsel was aware of the witnesses and made a strategic decision not to call them to testify.

¶ 9 We review the circuit court's summary dismissal of defendant's *pro se* postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *Coleman*, 183 Ill. 2d at 378-79. A *pro se* postconviction petition need only state the gist of a constitutional claim to survive summary dismissal. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit

if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009).

A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 10 At the outset, we reject the State's first argument that the defendant's failure to attach his verification affidavit pursuant to section 122-1(b) of the Act may alone support summary dismissal of the petition. In *People v. Hommerson*, 2014 IL 115636, ¶ 11, our supreme court held that the circuit court "may not dismiss a petition at the first stage of proceedings solely on the basis that it lacked a verification affidavit" as required by section 122-1(b) of the Act.

¶ 11 In this case, however, the circuit court did not dismiss the defendant's petition solely on the basis that it lacked his verification affidavit pursuant to section 122-1(b) of the Act. Rather, the court determined that the petition was frivolous and without merit because the defendant failed to raise his claims when he could have done so in his direct appeal, failed to allege that he was prejudiced by counsel's performance, and failed to support his allegations of counsel's deficient performance with affidavits from the three witnesses as required by section 122-2 of the Act. The supreme court in *Hommerson* specifically noted that its narrow holding, that the lack of a section 122-1(b) affidavit could not be the sole basis for first-stage dismissal, did not involve the affidavits required by section 122-2 of the Act. *Hommerson*, 2014 IL 115636, ¶ 14, n.1 ("The petition did contain several affidavits pursuant to section 122-2 [] of the Act, which are not at issue here"). Thus, *Hommerson* does not compel a different outcome in this case as its holding does not eliminate the failure to attach supporting affidavits pursuant to section 122-2 of the Act as a valid basis for first-stage dismissal.

¶ 12 Section 122-2 of the Act requires a defendant to support the allegations in his *pro se* postconviction petition by either attaching factual documentation to the petition, or otherwise explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2010); *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. *Id.* at 254. It is well settled that 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. *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010), citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000). The defendant's failure to attach the affidavits or documentation required by section 122-2 of the Act, or otherwise explain their absence, is "fatal" to his postconviction petition and alone justifies summary dismissal of that petition. *Delton*, 227 Ill. 2d at 255, citing *Collins*, 202 Ill. 2d at 66. Without affidavits from the proposed witnesses, the reviewing court cannot determine whether those witnesses could have provided testimony favorable to the defendant, and thus, further review of the claim is not necessary. *Jones*, 399 Ill. App. 3d at 371, citing *Enis*, 194 Ill. 2d at 380. If a postconviction petition is not properly supported with attachments as required by section 122-2, the court need not reach the question of whether it states the gist of a constitutional claim to survive summary dismissal. *Delton*, 227 Ill. 2d at 255.

¶ 13 Here, we find that the circuit court's summary dismissal of the defendant's *pro se* postconviction petition was proper because the defendant did not attach any affidavits or other documentation to support the allegations in his petition, as required by the pleading requirements of section 122-2 of the Act. It is undisputed that the defendant did not attach any affidavits from his three proposed witnesses in support of his allegation that they were willing to testify that he was not the man who shot Ruiz. Pursuant to section 122-2 of the Act, the defendant was

required to explain the absence of those affidavits. In his *pro se* petition, the defendant stated that he could not obtain affidavits from these witnesses because he was "incarcerated and indigent," and that he "was unable to locate any of the witnesses['] addresses without assistance from the court." We find this explanation insufficient to excuse the absence of the affidavits. As noted by the State, relief under the Act is available only to persons "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2010). Consequently, the vast majority of postconviction petitions are filed by defendants who are "incarcerated and indigent." The defendant's status as a prisoner does not excuse his failure to provide the required affidavits.

¶ 14 In addition, the defendant's claim that he could not locate the witnesses' addresses is unpersuasive. He stated in his petition that he provided trial counsel with the addresses for these witnesses. Therefore, the defendant had access to these addresses. Our review of the trial record shows that one of these witnesses, Wakendra Peuges, lived on the same block as the defendant. Further, in defense counsel's answer to discovery, Peuges was listed as a potential defense witness with an address of 5644 South Justine in Chicago. Throughout the record, the defendant's address is listed as 5633 South Justine. The record further shows that the defendant lived at this address with his mother, grandmother and three of his siblings. The defendant has not stated that he made any attempt to contact the witnesses or that any attempts to do so have been unsuccessful. Instead, he relies on his incarceration as the obstacle that prevented him from obtaining the affidavits. We find the defendant's explanation insufficient to excuse his failure to provide the affidavits. Accordingly, this court need not reach the question of whether the defendant's petition stated the gist of a constitutional claim to survive summary dismissal. *Delton*, 227 Ill. 2d at 255.

¶ 15 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* postconviction petition.

¶ 16 Affirmed.