

No. 1-13-0902

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 08 CR 17751
)	
SHAWN JENKINS,)	Honorable
)	Nicholas Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition.
- ¶ 2 Defendant Shawn Jenkins appeals from the circuit court's summary dismissal of his *pro se* postconviction petition and argues that he provided an arguable claim to warrant the advancement of his petition to the second stage. Specifically, defendant argues that his appellate counsel was ineffective for failing to raise the issue that the trial court erred in preventing a witness from testifying to her observations. For the following reasons, we affirm the judgment

of the circuit court.

¶ 3

BACKGROUND

¶ 4 The Chicago police department executed a search warrant authorizing the search of defendant and the first floor at 5428 West Rice, for heroin, related paraphernalia and records, proof of residency, money and firearms. Officer Michael Marose testified that on August 29, 2008, he was assigned to gang investigations and was assigned to help execute a search warrant at 5428 West Rice. Officer Marose stated that upon arrival, the officers went to the door, knocked loudly and announced police. No one answered the door so another officer used a ram to force entry of the main door. When he entered the residence, Officer Marose observed defendant standing in the foyer next to a doorway. Officer Marose identified defendant in court.

¶ 5 After entry was made into the residence, a number of civilians were detained. Upon searching the kitchen, Officer Marose found a blue duffle bag which contained a blue-steel Colt .32-caliber semi-automatic handgun with eight live rounds. He recovered the bag and gave it to Officer DiFranco, who held the bag for safekeeping. A short time later, Officers Marose and DiFranco looked more thoroughly through the blue bag and recovered a smaller red bag with four shotgun shells and a clear plastic baggie containing suspect heroin.

¶ 6 On cross-examination, Officer Marose stated that the entrance to the basement was in the common hallway and separate and apart from the entrance to the first-floor apartment. Officer Marose also admitted that the inventory forms for items recovered from the blue bag indicated that the bag was found on the ledge next to the basement stairs. On redirect, Officer Marose clarified that he found the blue bag in the kitchen and the inventory forms contain a "clerical mistake." He stated that he did not prepare the inventory forms.

¶ 7 Officer Russell White, Jr. testified that on August 29, 2008, he was assigned to assist in the execution of a search warrant at 5428 West Rice. He was part of the initial entry team and once he entered the residence, Officer White searched a bedroom. He recovered three proof of residency items for defendant from the top of the dresser. Officer White stated that he recovered prescription sheets from Walgreen's, dated July 17, 2008, addressed to defendant at 5428 West Rice. He also found a letter from Comcast to defendant at 5428 West Rice, dated August 13, 2008, and a Comcast bill, dated August 6, 2008, addressed to defendant at that address. On cross-examination, Officer White admitted that no guns, drugs or cash was recovered from the bedroom.

¶ 8 Sergeant Mark Richards testified that on August 29, 2008, he was assigned to help execute a search warrant at 5428 West Rice. Sergeant Richards was not part of the entry team and entered the residence approximately two to three minutes after the initial entry and assisted the officers in securing several individuals, including defendant. He identified defendant in court.

¶ 9 Sergeant Richards then went down into the basement by gaining access from an open door through the foyer. When asked by the prosecutor if the basement door was "actually inside that first-floor apartment," the sergeant answered yes. Sergeant Richards described the basement as approximately 10 feet by 10 feet. Sergeant Richards testified that he recovered two firearms from inside the duct work on the ceiling. He stated that he could reach into the duct and the firearms were approximately a foot back inside the duct work. He did not need to stand on anything to reach the firearms, he was able to reach into the duct. He recovered a blue-steel .32-caliber semi-automatic handgun and a stainless steel .32-caliber revolver. Sergeant Richards also found boxes of Dormin and Sleepinal, cutting agents. He described a cutting agent, such as

Dormin and Sleepinal, as having the same consistencies of heroin and is used to extend the volume of heroin for resale.

¶ 10 On cross-examination, Sergeant Richards admitted that he did not interview any of the civilians at the residence. He also did not recall which of the detained individuals he searched. He stated that he did not enter the first-floor apartment through the entry door in the hallway. He walked through the main hallway to the basement. Sergeant Richards stated that he found the guns in three minutes. He noted a purse and flip-flop sandals in a photograph exhibit of the basement. On redirect, Sergeant Richards testified that he focused on the duct work because it was a typical hiding spot for contraband.

¶ 11 Officer DiFranco testified that on August 29, 2008, he was working in the gang intelligence unit and was assigned to execute a search warrant at 5428 West Rice. He was not part of the initial entry team, but instead entered the residence approximately a minute later. When he entered the residence, he observed a deceased dog in the hallway as well as other police officers and civilians. He identified defendant in court.

¶ 12 Officer DiFranco stated that he was informed by another officer that a firearm had been recovered and he then proceeded to the kitchen. The officer handed him a blue bag. Officer DiFranco said that he was the affiant of the search warrant so he was acting in a supervisory role.

¶ 13 Officer Marose gave the blue bag to Officer DiFranco. A short time later, Officer DiFranco was able to search the blue bag with Officer Marose while they were in the kitchen. In addition to the firearm, they recovered shotgun shells and a small, rock-like substance suspect heroin. Officer DiFranco identified the blue bag in photographs. He noted that the bag was not photographed in the kitchen, but instead was photographed on the staircase down to the

basement. Officer DiFranco testified that the blue bag was not recovered on the staircase.

¶ 14 Officer DiFranco stated that there were other items not recovered in the search because the police officers only recover items pertinent to the case. He said that contact cards were made for each of the individuals in the residence, but the police only arrested defendant. Officer DiFranco gave defendant his Miranda rights.

¶ 15 Officer DiFranco testified that the blue bag "got moved to the basement staircase because [he]made an error." Officer DiFranco stated that other than moving the blue bag from the kitchen to the basement, the evidence was properly preserved. He said that he did not fill out an inventory form in this case, but his name was put on the inventory because he was the case officer.

¶ 16 Officer DiFranco also stated that the basement has a separate entrance from the first-floor apartment. He admitted that older mail addressed to someone other than defendant was found in the apartment, but was not recovered for evidence. He further testified that his name was listed on contact cards for the detained individuals because he was the case officer, but he did not complete the cards personally. Officer DiFranco admitted that he never saw defendant in the basement or the kitchen.

¶ 17 Officer Jacinta O'Driscoll testified that she was assigned to the Chicago anti-gun enforcement team. On August 29, 2008, she was assigned to assist on a search warrant at 5428 West Rice. Officer O'Driscoll was assigned to the rear of the house for security purposes and did not enter the residence until everyone was secured, which was several minutes later. She was asked to pat down two females. She took one of the women into the sitting room of the apartment and observed a green bag on the floor near a weight machine. She stated that the bag

was open and she could see a plastic bag with a green, leafy substance, suspect cannabis. She also found several smaller Ziplock bags that are used for packing narcotics and a scale in the green bag. Officer O'Driscoll also testified that she transported other items recovered from the residence to the police station.

¶ 18 Lenetta Watson testified that she was employed as a forensic scientist in the area of drug chemistry with Illinois State Police at the forensic science center. Watson was qualified as an expert in the area of drug chemistry. Watson stated that she weighed and tested the substance suspected to be cannabis and the result was positive for the presence of cannabis. She testified that her expert opinion with reasonable scientific certainty was that the recovered item was 101.4 grams of plant material containing cannabis. Watson also tested the recovered item that was suspected heroin. She weighed the substance and then performed two tests. The tests indicated the presence of heroin. Her expert opinion was that the recovered item was 24.3 grams of a powder containing heroin.

¶ 19 Following Watson's testimony, the State presented a stipulation that defendant had two felony convictions which were qualifying felony offenses for the armed habitual criminal statute.

¶ 20 The State then rested its case. Defendant moved for a directed finding, which the trial court denied.

¶ 21 Shirlita Matthews testified for the defense. She stated that she lived in the first-floor apartment located at 5428 West Rice from late 2007 until June 2008. She said that she was "going with someone that was staying there." When she moved in, defendant lived there with Javon Churchill. While she lived there, defendant slept in the bedroom and she and Churchill slept in the dining room, which was converted to a bedroom. She testified that when she lived

there she did not see any drugs or guns. She moved out because she and Churchill ended their relationship. At the time she moved out, defendant and Churchill were living in the apartment.

¶ 22 The defense rested following Matthews' testimony.

¶ 23 Following deliberations, the jury found defendant guilty of the offense of armed habitual criminal, possession of a controlled substance and possession of cannabis. At the subsequent sentencing hearing, the trial court sentenced defendant to a term of 20 years for the armed habitual criminal conviction, and six year terms on each drug charge, to be served concurrently.

¶ 24 On direct appeal, this court affirmed defendant's conviction, but remanded for resentencing on his conviction for possession of cannabis and ordered that the mittimus be corrected to reflect the correct convictions. *People v. Jenkins*, 2012 IL App (1st) 101257-U. On remand, the trial court reduced defendant's six-year sentence to one year imprisonment for possession of cannabis.

¶ 25 On November 20, 2012, defendant filed a *pro se* postconviction petition wherein he alleged: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) numerous errors by the trial court, including the issue that the trial court erred when it did not allow Shirlita Matthews to testify to her knowledge about the occupants of the residence where the drugs and guns were recovered; (3) numerous instances of ineffective assistance of trial counsel, including counsel's failure to raise the trial court's erroneous rulings on direct appeal; (4) pervasive prosecutorial misconduct; (5) that the State committed a Brady violation; and (6) that State applied the armed habitual criminal as a new and independent criminal offense. The circuit court dismissed the petition at the first stage as frivolous and patently without merit. It is from this dismissal that defendant now appeals.

¶ 26

ANALYSIS

¶ 27 Defendant argues that the circuit court erred in summarily dismissing his *pro se* postconviction petition where he raised an arguable claim sufficient to warrant second stage proceedings. Specifically, defendant argues that he raised an arguable claim that he was denied effective assistance of appellate counsel due to counsel's failure to argue that the trial court erred in precluding defendant from questioning defense witness Shirlita Matthews. Defendant contends that Matthews had pertinent knowledge about the residents and could offer her observations of the apartment where the search occurred. Matthew's testimony would have lent support to defendant's defense, which was that other possible residents or occupants of the apartment may have possessed the recovered contraband.

¶ 28 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Where defendant is not sentenced to death, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 29 At the first stage, the circuit court must determine whether the petition before it alleges the " 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418 . Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of post-conviction review, as opposed to setting forth a claim in its entirety. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009); *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). Taking all well-pleaded facts as true, the court

must determine whether the petition alleges a constitutional infirmity that, if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11–12. Our review of the summary dismissal of a petition is *de novo*. *People v. Ross*, 2014 IL App (1st) 120089, ¶ 24.

¶ 30 If the trial court determines that a petitioner has stated the "gist of a constitutional claim," the petition is advanced to the second stage and counsel is appointed, if necessary, in accordance with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2010). At the second stage, the State is required to either answer the post-conviction petition or move to dismiss. 725 ILCS 5/122-5 (West 2004).

¶ 31 To survive the first stage, a *pro se* litigant's petition need only present the gist of a constitutional claim. 725 ILCS 5/122–2.1 (West 2008). The allegations in the petition must be taken as true and liberally construed. *Edwards*, 197 Ill. 2d at 244. However, a postconviction petition must be both verified by affidavit (725 ILCS 5/122-1(b) (West 2006)), and supported by “affidavits, records, or other evidence” (725 ILCS 5/122-2 (West 2006)). *People v. Collins*, 202 Ill. 2d 59, 65 (2002). If such “affidavits, records, or other evidence” are unavailable, the petition must explain why. 725 ILCS 5/122-2 (West 2006); *Collins*, 202 Ill. 2d at 65.

¶ 32 Combining the standard for a first-stage summary dismissal with the standard for ineffective assistance of appellate counsel, our supreme court has held that a postconviction petition alleging ineffective assistance of appellate counsel may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness;

and (2) it is arguable that defendant was prejudiced. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Appellate counsel is not obligated to raise every issue on appeal. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Moreover, appellate counsel is not incompetent for failing to raise issues, which, in his or her judgment, are without merit. *Id.* In other words, if the underlying issue is without merit, defendant can suffer no prejudice from appellate counsel's failure to raise the issue. *Id.*

¶ 33 In this case, Matthews testified that she moved out of the apartment in June 2008, two months before the warrant was executed, because she and her boyfriend were no longer dating. She testified that when she lived there she never saw any drugs or guns in the apartment but that she and her boyfriend slept in the dining room and defendant slept in the bedroom. When defense counsel attempted to question Matthews regarding her observations when she went back to the apartment to visit after moving out, the State objected on foundation grounds and the court sustained the objections.

¶ 34 Here, the foundation of defendant's argument is that Matthews should have been allowed to testify to her observations because they were relevant to his defense. However, defendant has not provided an affidavit from Matthews regarding what her testimony would have been as required by the Act.

¶ 35 The Act requires that the allegations in a post-conviction petition must be supported by affidavits, records, or other evidence or a petitioner must state why the same are not attached. 725 ILCS 5/122-2 (West 2010). Affidavits, records or other evidence is required to ensure that the allegations in a petition are capable of objective or independent corroboration. *Collins*, 202 Ill. 2d at 67. Where the entire claim rests on the alleged testimony of a third party and a

defendant could have made efforts to obtain that person's affidavit, an affidavit from that possible witness must be attached or its absence explained. *People v. Barcik*, 302 Ill. App. 3d 183, 190 (2006). Without this additional support or explanation of its absence, the gist standard of post conviction review has not been met and this court may dismiss the petition as frivolous and patently without merit. *Id.*

¶ 36 Without her affidavit, whether Matthew's testimony would have aided defendant's defense is pure conjecture. Defendant has not offered a reason for failing to include Matthew's affidavit and absent the affidavit, we are left to conclude that defendant's underlying claim of ineffective assistance of appellate counsel is non-meritorious. As previously stated, if the underlying issue is without merit, petitioner can suffer no prejudice from appellate counsel's failure to raise the issue. *Easely*, 192 Ill. 2d at 329. Consequently, we cannot find that the trial court erred in dismissing petitioner's *pro se* petition at the first stage.

¶ 37 **CONCLUSION**

¶ 38 Based on the foregoing, the judgment of the circuit court is affirmed.

¶ 39 Affirmed.