SECOND DIVISION
November 22, 2016

No. 1-14-2321

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. 04 CR 27617
	)	
ZACKARY WRIGHT,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's post-conviction petition does not include an arguable claim that he was prejudiced by his counsel's failure to present additional witnesses to support his alibi defense because the affidavits of those witnesses are inconsistent and do not corroborate the account of the alibi witness who testified at trial. Defendant's mittimus is corrected to reflect credit for time spent in custody pursuant to our authority under Illinois Supreme Court Rule 615(b)(1).

¶ 2 Following a bench trial, defendant Zackary Wright was convicted of first degree murder and attempted murder. The trial court sentenced defendant to a term of 60 years for murder, which included a 20-year sentence enhancement for personally discharging a firearm, and a

consecutive term of 30 years for attempted murder. On appeal, defendant contends that his post-conviction petition presents the gist of a constitutional claim that his trial counsel was ineffective for failing to present testimony from several witnesses who would strengthen his alibi defense. Defendant also argues he is entitled to 778 days of credit toward his sentence for time spent in custody.

¶ 3 The evidence at trial established that defendant fatally shot Ashley Moody and fired a gun at Lance Hill while the two victims sat in a car in November 2004. The following testimony from defendant's 2006 trial is relevant to the issue raised in this appeal.

¶ 4 At trial, the State presented testimony that defendant was interviewed by an assistant Cook County State's attorney on December 1, 2004. Defendant's videotaped statement was played for the jury; in that statement, defendant confesses to participating in the shooting.

¶ 5 In the videotape, another prosecutor describes the shooting of Moody and Hill as having taken place "at approximately 1:26 a.m." on November 22, 2004, at 14214 South State Street in Riverdale. Defendant said that he and his friend James Crosson were with three other people, including Zacharia Robinson and a person who was later identified as Joe Pillar. Defendant identified photos of Crosson and Pillar. The group spent most of the day together attending a football game and hanging out at a barbershop. At one point, Crosson told defendant that they were "fitting to go kick it and get drunk." The trio went to various liquor stores and then went to Pillar's house.

¶ 6 After discussing a dispute over gang territory, Joe, Crosson and defendant decided to shoot Hill because they thought Hill had fired a gun at them at one of the liquor stores. Joe handed defendant a gun, and defendant and Crosson walked to a car that Joe had pointed out.

Defendant and Crosson walked up to the car and Crosson fired 10 times into the car. Defendant fired about 5 or 6 times. Defendant was wearing a gray hooded sweatshirt with the hood up, black pants and white sneakers, while Crosson wore a black hooded sweatshirt and black ski mask. Defendant and Crosson ran through an alley and met Joe, who took them back to defendant's house.

¶ 7 Hill testified that at about 1 a.m. on November 22, 2004, he and Moody were sitting in a car when they were shot by two men. Hill said he thought Joe Pillar was one of the gunmen.

¶ 8 Demetria Davis testified that in 2004, she lived with Pillar, who was her boyfriend. At about 12:30 a.m. on November 22, 2004, she was sleeping when Pillar entered their bedroom with Crosson and a man she did not know who wore gray clothing. The men stayed in the room for about five minutes drinking and singing and then left the room and talked outside the bedroom door. Davis heard Pillar say he was going to shoot Hill and heard defendant agree to that plan. Crosson said Pillar should stay in the residence with Davis. Before Davis testified before a grand jury, she identified Pillar and Crosson in a photo array and also identified defendant during her grand jury testimony as the third person in the bedroom. Davis also identified defendant in court.

¶ 9 The theory presented by defense counsel at trial was that no physical evidence connected defendant to the shooting, defendant's confession was false, and Davis's testimony was not credible. Among other witnesses, defense counsel presented the testimony of Vickie Neustadter, defendant's cousin.

¶ 10 Vickie Neustadter testified that at the time of these events, she lived at 10635 South Lafayette Street in Chicago[1] with her children, her aunt and defendant, along with defendant's fiancée and their two children. She stated that defendant was with her in the early morning hours of November 21, 2004, starting at about 12:45 a.m. She said that date was memorable because she and defendant had gone to her daughter's house after receiving word from Kelvin, who is defendant's brother and her cousin, that her daughter was in labor. Neustadter testified that an ambulance arrived at 1:30 or 1:45 a.m., and Neustadter accompanied her daughter to the hospital while defendant and Kelvin stayed at the house.

¶ 11 Because the timeline as testified to by Neustadter was 24 hours prior to the shooting as described by other witnesses, defense counsel questioned Neustadter as follows on direct examination:

> "MS. FERGUSON [assistant public defender]: Just so we're clear on the dates and times, at a quarter to 1:00, was it the 21st leading into the 22nd? Do you know what I'm saying?
>
> MR. LAGERWALL [assistant State's Attorney]: Objection. Leading.
>
> THE COURT: Well –
>
> MS. FERGUSON: Tell me what was the date [], if you can, that you went over to your daughter's house to take her to the hospital?
>
> A. It was on the 21st after 12:00 midnight.
>
> Q. You went over there on the 21st?

[1] The record lists defendant's address at the time of the offense as 10635 South Lafayette in Chicago.

A. It was after 12:00.

Q. But what I'm trying to find out [] is when you got to the hospital that day, was that the 22nd? Do you know what I'm saying?

A. No, it was the 21st.

Q. So when you took her to the hospital that night, when the ambulance took her, was that the 20th?

A. No, it was the 21st.

Q. Well, there is one day on one side and one day on the other. That's what we're trying to figure out.

A. It was a quarter till 1:00.

Q. Let me ask you this question.

A. It was 12:45 a.m., that was the 21st."

¶ 12 Neustadter testified she saw defendant earlier that day and knew he was at a football game.

¶ 13 The jury found defendant guilty of the first degree murder of Moody and the attempted murder of Hill and further found that he personally discharged a firearm in both offenses. Following a sentencing hearing, the trial court imposed consecutive terms of 60 years and 30 years in prison.

¶ 14 On direct appeal, defendant challenged the admissibility of his videotaped confession and Davis's pre-trial identification, and he also asserted that remarks by the prosecution in closing argument denied him a fair trial. This court affirmed defendant's convictions and sentence. *People v. Wright*, No. 1-07-0593 (2009) (unpublished order under Supreme Court Rule 23).

¶ 15 On April 14, 2014, defendant filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). Central to this appeal is defendant's assertion in that petition that his attorney provided ineffective assistance by failing to "investigate and present a viable alibi defense."

¶ 16 Defendant asserted in his petition that when Vickie Neustadter testified, she was ill and on over-the-counter medication. Defendant stated Neustadter had inadvertently described his activities 24 hours prior to the shootings instead of providing an alibi for him during the time of the offense. Attached to defendant's petition were affidavits from Neustadter and her daughter, Charlitta, along with Robinson and two of defendant's family members.

¶ 17 Vickie Neustadter attested in her affidavit that she was sick, disoriented and "very nervous" during her testimony, which caused her to state an incorrect date as to the events in question. Neustadter stated that the "true date and time was Nov. 22, 2004 from about 12:45 a.m. to 1:45 a.m." and the "date and time could have been cleared up if [defendant's counsel] would have called other witnesses they said was on their witness list" or called her back to testify after the effects of her medication wore off. Neustadter attested that defendant was not guilty because "he was with me and other family on the date and time of the crime."

¶ 18 Charlitta Neustadter attested in her affidavit that she lived at 10604 South State Street and called her mother at about 12:45 a.m. on November 22, 2004, to report her labor pains. Her mother told her that she and defendant would provide assistance, and they arrived at her house at about 12:50 a.m. Charlitta attested that she "asked [defendant] to attempt to locate the father of the baby so he can be at the hospital or at the house" when the ambulance arrived. She stated that the ambulance arrived at 1:40 a.m. and the baby's father was there to go to the hospital with her.

Charlitta stated that after arriving at the hospital, her labor pains subsided. She was released from the hospital at 7:10 a.m., and defendant was there to assist her.

¶ 19 Charlitta further attested:

> "Although I did not see [defendant] from before about 12:50 a.m. to 1:00 a.m. on November 22, my knowledge of these facts show that when the crime happened, [defendant] was at his house or my house and did not have time to go to Riverdale and shoot anybody and get back."

Charlitta attested that defense counsel was aware of her version of events.

¶ 20 Kelvin Hawkins attested in his affidavit that he is defendant's brother and had been robbed on November 21, 2004; however, Hawkins stated that defendant "has never retaliated for any incident that took place." Hawkins lived at the same address as Charlitta and "at the time of the crime [defendant] was in our neighborhood, either in my mother's house or at my house[.]" Hawkins further stated that he "was in my house with my family on 11-29-2004 [*sic*]." He said defense counsel was aware of his version of events.

¶ 21 Willie Mae Hawkins attested in her affidavit that she is defendant's mother. She stated defendant is innocent because "the night the shooting happened he was at home with me and other family members witnessed him at home when he was not within my presence or view." She attested that defense counsel was aware of her version of events.

¶ 22 Zacharia Robinson attested in his affidavit that on November 21, 2004, he spent the day with defendant, Crosson, Pillar and another person. He stated that he and defendant were at defendant's house that night when Crosson arrived and told them he and Pillar had shot someone.

¶ 23 The circuit court dismissed defendant's post-conviction petition as frivolous and patently without merit. Defendant now appeals that ruling.

¶ 24 The Act provides a criminal defendant with a means to redress a substantial violation of his constitutional rights in his original trial or sentencing by filing a petition in the circuit court in which the original proceeding took place. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); *People v. Rivera*, 198 Ill. 2d 364, 368 (2001). When a petition is filed under the Act, the circuit court can dismiss the petition within 90 days of its filing if the allegations in the petition are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed under that standard, the petition proceeds to the second stage, where counsel may be appointed for defendant, the State is allowed to move to dismiss the petition, and the petition and accompanying documentation must make a substantial showing of a constitutional violation. *People v. Tate*, 2012 IL 112214, ¶ 10; *People v. Edwards*, 197 Ill. 2d 239, 246 (2011). This court reviews *de novo* the circuit court's summary dismissal of a post-conviction petition. *People v. Smith*, 2015 IL 116572, ¶ 9.

¶ 25 At this initial stage of review, the court is to consider "the petition's substantive virtue rather than its procedural compliance." *People v. Hommerson*, 2014 IL 115638, ¶ 11. The threshold for a petition filed under the Act to survive first-stage review is low "[b]ecause most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Delton*, 227 Ill. 2d 247, 254 (2008).

¶ 26 Accordingly, a *pro se* defendant presenting a post-conviction petition under the Act is only required to allege enough facts to support the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009), citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988). The "gist" of a

claim has been defined as "something less than a completely pled or fully stated claim." *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). The supreme court held in *Hodges* that a *pro se* petition may be summarily dismissed if it "has no arguable basis either in law or in fact." *Id*. at 11-12. A petition lacks an arguable basis either in law or in fact if is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id*. at 16.

¶ 27 On appeal, defendant contends he has presented the gist of a claim of the ineffective assistance of his trial counsel for failing to present witnesses to support his alibi defense. Defendant argues his counsel knew that Charlitta Neustadter, Kelvin Hawkins and Willie Mae Hawkins could have corroborated Vickie Neustadter's testimony that, during the time of the shooting, he was at the family home and left with Vickie to check on Charlitta as her labor began.

¶ 28 In response, the State argues that defendant's claim of counsel's ineffectiveness has no arguable basis in law or in fact. The State contends that the alibi witnesses whose affidavits are appended to defendant's petition were known to defense counsel and that counsel likely did not present testimony other than that of Vickie Neustadter because the additional accounts would have contradicted, not corroborated, her alibi. Furthermore, the State asserts that counsel's decision not to present those additional witnesses did not prejudice defendant's case given the evidence presented at trial, including defendant's videotaped confession and the corroboration of that version of events by Davis's testimony.

¶ 29 A claim of ineffective assistance of counsel is reviewed pursuant to the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), under which the defendant must establish that his counsel provided deficient representation and that his case was prejudiced as a result.

Hodges, 234 Ill. 2d at 17. At this first stage of post-conviction review, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id*.

¶ 30 Our supreme court has held that arguments relating to trial strategy as an explanation for counsel's performance are not appropriate at the first stage of post-conviction proceedings. *Tate*, 2012 IL 112214, ¶ 22. Accordingly, this court proceeds to the prejudice prong, which requires defendant to show it is arguable that a reasonable probability exists that the outcome of his trial would have been different had counsel presented additional alibi witnesses. See *Hodges*, 234 Ill. 2d at 17.

¶ 31 In considering the prejudice prong, we note the strength of the State's case against defendant. Defendant confessed to the crime in a videotaped statement. Davis, Pillar's girlfriend, identified defendant as one of the men whom she overheard agreeing to the plan to shoot Hill.

¶ 32 Our review of the affidavits attached to defendant's petition establishes that they do not raise an arguable claim of defense counsel's ineffectiveness for failing to present Charlitta Neustadter, Kelvin and Willie Mae Hawkins, and Zacharia Robinson as witnesses at trial. The affidavits indicate that counsel was aware of the testimony that each of those potential witnesses could provide. However, the testimony as set out in those affidavits would not have supported his alibi defense provided at trial by Vickie Neustadter.

¶ 33 Even accepting the discrepancy existed between the actual date of the crime and the date described by Vickie Neustadter at trial, which is explained in her affidavit, the version of events presented by Vickie Neustadter placed defendant at Charlitta's house at 10604 State Street from

about 12:45 to 1:45 a.m., which was the time during which the shooting took place. However, in Charlitta's affidavit, she indicates that defendant was not at her house during that entire period. Charlitta stated that after defendant arrived with her mother, she asked defendant to locate the baby's father. Charlitta attested that defendant would not have had time to participate in the shooting and "get back." Therefore, Charlitta acknowledged that defendant left the house after her request to find the baby's father.

¶ 34 The affidavits of Kelvin and Willie Mae Hawkins and Zacharia Robinson also do not account for defendant's actions starting at approximately 1 p.m. on November 22, 2004, and for several hours afterward. Each of those three affiants stated that defendant was with them, but they do not provide defendant with a specific alibi for the time of the shooting. Those three affiants place defendant in different locations, either where Charlitta and Kelvin lived (10604 South State Street) or where defendant and Vickie lived (10635 South Lafayette Street). Kelvin stated that defendant was in one of those two places at the time of the offense; however, it is not clear how Kelvin knew of defendant's whereabouts when defendant was not in Kelvin's presence. Moreover, Kelvin's affidavit lists a date of November 29, 2004, which is not the date on which the crimes took place.

¶ 35 Defendant argues this case is comparable to *People v. Tate*, 305 Ill. App. 3d 607, 612-13 (1999), in which this court reversed the second-stage dismissal of the defendant's post-conviction petition, finding the affidavits of potential alibi witnesses were sufficient to warrant an evidentiary hearing under the Act on trial counsel's failure to present their testimony. We do not find *Tate* analogous to the facts here. The affidavits in *Tate* were consistent with one another and

corroborative, and each potential alibi witness attested that the defendant was either in her presence or was talking to her on the phone during the time in question. *Id*. at 610.

¶ 36 Here, in contrast, the affidavits of Charlitta Neustadter, Kelvin and Willie Mae Hawkins and Zacharia Robinson do not provide defendant with an alibi for the time of the shooting and thus do not corroborate the trial testimony of Vickie Neustadter. Because defendant was not arguably prejudiced by his counsel's failure to present testimony from these witnesses, defendant's petition lacks an arguable basis in fact and in law. Accordingly, the summary dismissal of defendant's post-conviction petition is affirmed.

¶ 37 Defendant's final contention is that the mittimus should be corrected to reflect 778 days of credit for time spent in custody while awaiting trial under section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2004) (now codified at 730 ILCS 5/5-4.5-100(b) (West 2014)). The State does not challenge the number of credit days but argues that defendant waived the issue by failing to raise it sooner, either on direct appeal or in his post-conviction petition. For support, the State relies on *People v. Reed*, 335 Ill. App. 3d 1038, 1039 (2003). That case held matters of statutory right, as opposed to matters of substantial deprivation of constitutional rights, are forfeited if not raised in trial court or on direct appeal. But, as the State acknowledges, this court has consistently held that under Rule 615(b)(1), we have authority to modify the trial court's sentencing order to give a defendant correct credit for his or her presentence custody, even where it was not raised earlier. See *People v. Brown*, 371 Ill. App. 3d 972, 985-86 (2007) (granting presentence credit even though issue raised for the first time in supplemental brief on appeal from dismissal of post-conviction petition); *People v. Andrews*, 365 Ill. App. 3d 696, 699-700 (2006) (modifying credit against defendant's sentence on appeal from

denial of defendant's motion for post-conviction relief, even though defendant's motion for post-conviction relief did not raise issue).

¶ 38 The State contends, however, that the sentencing order cannot be challenged, relying on *People v. Castleberry*, 2015 IL 116916, in which our supreme court abolished the void sentence rule established in *People v. Arna*, 168 Ill. 2d 107, 113 (1995). A sentence is void if it is entered without personal jurisdiction or subject matter jurisdiction. *Castleberry*, 2015 IL 116916, ¶12. The State contends that the trial court had both subject and personal jurisdiction and thus, defendant's sentence is merely voidable and not void, and that objections to a voidable sentence can be, and in this case, have been waived, because they were not raised sooner. This argument is a red-herring—defendant is not raising any issues as to the validity of the sentence the trial court imposed; whether the sentence is void or voidable does not matter. Indeed, defendant merely argues that he has been aggrieved by the trial court's failure to give him credit for time he has already served toward his sentence. Rule 615(b)(1) gives us authority to correct that error without addressing whether the sentence is void or voidable. Thus, we order the mittimus corrected to reflect that defendant is entitled to 778 days of pre-sentence credit.

¶ 39 Affirmed; mittimus corrected.