

NOTICE
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2016 IL App (5th) 140163-U

NO. 5-14-0163

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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,)	Jefferson County.
)	
v.)	No. 06-CF-429
)	
DEMETRIUS COLE,)	Honorable
)	Eric J. Dirnbeck,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's dismissal of the defendant's *pro se* petition for postconviction relief during the first stage of the postconviction proceedings is affirmed where it was not arguable that the defendant's appellate counsel and trial counsel were ineffective.

¶ 2 The defendant, Demetrius Cole, appeals the first-stage dismissal of his petition for postconviction relief filed pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)). For the following reasons, we affirm.

¶ 3 On March 5, 2010, a jury found the defendant guilty of three counts of first-degree murder and one count of robbery, for the murder and robbery of Randy Farrar committed inside Farrar's residence. On June 10, 2010, the trial court sentenced the defendant to 45

years' imprisonment for the first-degree murder conviction and 7 years' imprisonment on the robbery conviction. The robbery conviction was to run consecutively to the first-degree murder conviction. The defendant appealed his conviction and this court affirmed. *People v. Cole*, 2012 IL App (5th) 100542-U.

¶ 4 On December 26, 2013, the defendant filed a *pro se* postconviction petition raising numerous issues of constitutional violation. The overarching claim in his petition was that he was denied effective assistance of appellate counsel based on counsel's failure to raise various claims in his direct appeal. Specifically, the defendant maintained that appellate counsel was ineffective for failing to raise the following issues, in pertinent parts: (1) that the trial court erred in allowing inadmissible hearsay to be admitted without giving the defense an opportunity for cross-examination; (2) that the court erred in allowing the prosecutor to make a statement during the investigating officer's testimony "in the guise of a question" that indicated the defendant "was involved" in the murder and robbery; (3) that the State elicited improper opinion testimony from a witness where she testified as to the definition of the phrase "hit a lick"; (4) that trial counsel provided ineffective assistance where counsel failed to call two witnesses who would have testified as to a different definition of the phrase "hit a lick"; (5) that the court abused its discretion and denied the defendant his right to present a complete defense when it refused to allow the defense to introduce photographs of the victim's home taken during the day where the intended use was to show the vantage point of a witness who had claimed to have observed the defendant beating the victim through the front window of the victim's home on the night in question; and (6) that trial counsel was ineffective for not requesting a

recess to allow an investigator to retake the photographs at night. The defendant also argues that his trial counsel was ineffective where counsel failed to call Shirleta Jean Blount, along with her mother, as an alibi witness for the defendant.

¶ 5 On March 21, 2014, the circuit court entered an order dismissing the defendant's *pro se* postconviction petition at the first stage of the postconviction proceedings. The court concluded that it was clear that the defendant had either already raised his claims on direct appeal or that he had failed to raise those claims on direct appeal, resulting in the claims being barred by the doctrines of *res judicata* or waiver. In addition, the court noted that the defendant had also included allegations that his appellate counsel was ineffective for failing to raise, on direct appeal, the issues addressed in his postconviction petition. The court stated that it declined to deem "patently erroneous" appellate counsel's assessment of the record and counsel's decision not to raise the issues asserted by the defendant. Moreover, the court concluded that the defendant failed to establish that had appellate counsel raised any or all of the issues set forth in his petition, his conviction or sentence would have been reversed. Thus, the court concluded that the defendant's *pro se* postconviction petition was frivolous and patently without merit and raised no significant issues of constitutional dimension. Accordingly, the court dismissed the defendant's petition at the first stage of the postconviction proceedings. The defendant appeals.

¶ 6 Our review of the circuit court's dismissal of a postconviction petition is *de novo*. *People v. Cathey*, 2012 IL 111746, ¶ 17. The Post-Conviction Hearing Act (the Act) provides a three-stage process for the adjudication of postconviction petitions in

noncapital cases. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, the trial court independently reviews and assesses the defendant's petition within 90 days of its filing, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Tate*, 2012 IL 112214, ¶ 9. A petition is frivolous or patently without merit where it has no arguable basis in either law or fact. *Tate*, 2012 IL 112214, ¶ 9. For a petition to have no arguable basis, it must be based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 35. To survive a summary dismissal, the postconviction petition, taken as true and liberally construed, must allege the "gist" of a constitutional claim, which is a low threshold. *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006).

¶ 7 Ineffective assistance of counsel claims are governed by the familiar two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11. First, the defendant must show that counsel's performance was deficient. *Id.* Second, the defendant must show that counsel's deficient performance was prejudicial to the defendant, *i.e.*, that there is a reasonable probability that the proceeding would have had a different result absent the deficient performance of counsel. *Id.*; *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 24. The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Richardson*, 189 Ill. 2d 401, 412 (2000). Accordingly, the defendant must show both that appellate counsel's failure to raise the particular issue was objectively unreasonable and that the decision not to raise the issue was prejudicial to the defendant. *People v. Peeples*, 205 Ill.

2d 480, 513 (2002). Unless the underlying substantive claim of error has merit, there can be no prejudice from appellate counsel's failure to raise it in the appeal. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 12.

¶ 8 At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶¶ 19, 22.

¶ 9 The defendant first argues that appellate counsel was arguably ineffective for failing to raise the issue that the circuit court erred in allowing inadmissible material and testimonial evidence from the investigating officer to be admitted without giving the defense an opportunity for cross-examination. Detective Kemp, a detective captain with the Jefferson County sheriff's department, was involved in the investigation of Farrar's death and was a witness for the State at the defendant's trial. During trial, Kemp testified that his investigation led him to Christopher Watkins and Chandra Jones, who both admitted to being present at the Farrar residence on the night of Farrar's murder. Kemp further testified that Watkins and Jones implicated the defendant as being present on the night that Farrar was killed. This testimony was admitted over objection. Jones testified at the trial, but Watkins did not. Shortly after this testimony, the prosecutor prefaced a

question to Kemp by stating, without objection, "So you at this point have learned that [the defendant], Chris Watkins, and Krysta Donoho¹ were involved in the crime."

¶ 10 In his direct appeal, the defendant argued that Kemp's testimony without a limiting instruction directing the jury that it could not be considered as proof of the defendant's guilt prejudiced him because the entirety of the State's direct evidence was based on Jones's testimony, and Kemp's testimony had effectively bolstered her credibility. This court rejected the argument on direct appeal, concluding that Kemp's testimony merely related to the course of his investigation, not the substance of Watkins's statements to Kemp. *People v. Cole*, 2012 IL App (5th) 100542-U.

¶ 11 In his postconviction petition, the defendant argued that he was denied his right to confrontation where he was unable to cross-examine Watkins concerning the incriminating statements attributed to him by Kemp. The defendant argues that this was inadmissible hearsay as the testimony was not limited to describing how the investigation was conducted, but disclosed the contents of Kemp's conversation with Watkins. Moreover, the defendant argues that the prosecutor's statement following the testimony that the defendant was "involved in the crime" amplified the prejudicial impact of Kemp's hearsay testimony.

¶ 12 The State counters that this court addressed this specific claim in the defendant's direct appeal and therefore the claim is properly defeated by operation of waiver and *res*

¹Krysta Donoho was the defendant's girlfriend and was also implicated as being present at the Farrar residence on the night of the murder.

judicata. The State acknowledges that the defendant's argument on direct appeal complained about the lack of a limiting instruction while the specific issue raised in the defendant's postconviction petition complained about the testimony being admitted over objection without the defendant's being given an opportunity for cross-examination. However, the State argues that the defendant cannot obtain relief under the Act by rephrasing previously addressed issues in constitutional terms in a postconviction petition. In support of this position, the State cites *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992), which stated that claims that have been previously addressed but were rephrased in constitutional terms were properly defeated by waiver and *res judicata*.

¶ 13 We agree with the State and conclude that the issue raised in the defendant's postconviction petition concerning the incriminating statements attributed to Watkins by Kemp was raised by him in his direct appeal, albeit not phrased in constitutional terms. Because the defendant has previously raised this issue, it is barred by *res judicata*. Thus, we conclude that the trial court properly rejected this claim as *res judicata* at the first stage of the postconviction proceedings. See *People v. Blair*, 215 Ill. 2d 427, 447 (2005) (a trial court may properly dismiss a first-stage petition based on *res judicata*).

¶ 14 The defendant's argument relating to the prosecutor's statement that the defendant was "involved" in the crime as opposed to merely being present during the commission of the crime was not specifically raised on direct appeal. However, we conclude that it does not raise an arguable claim of ineffective assistance of appellate counsel. We initially note that although the defendant's trial counsel objected several times during Kemp's testimony, trial counsel did not object to the prosecutor's statement. A reviewing court is

"highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). In general, trial strategy encompasses decisions such as what matters to object to and when to object. *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991). Moreover, Kemp's testimony revealed that witnesses had implicated the defendant as being present on the night in question, and that his investigation had led to a warrant being issued for the defendant's arrest. There was also evidence presented from Jones as to the defendant's involvement in the murder. Thus, we conclude that the defendant was not arguably prejudiced by the prosecution's statement. Accordingly, we conclude that it is not arguable that appellate counsel's failure to raise this issue on direct appeal was objectively unreasonable.

¶ 15 The defendant next argues that his appellate counsel was arguably ineffective for failing to raise the issue that the circuit court erred in allowing improper opinion testimony from a witness. During the trial, the State presented testimony from Ratasha Turner, who observed the defendant in the Mt. Vernon McDonald's on the night of the murder. According to Turner, she observed the defendant holding "hundreds" of dollars when he flipped through money to find a smaller bill to pay for his order. Turner asked the defendant where he had obtained the money, and he responded that they had "hit a lick." When the prosecutor asked her what "hit a lick" meant, she responded that it meant that they had "robbed somebody." Defense counsel started to object to the testimony, but did not follow through with the objection.

¶ 16 The defendant argues that this was improper opinion testimony in that the State had failed to establish either Turner's personal knowledge as to what the defendant meant by the phrase or had failed to establish that Turner had some expertise qualifying her to give an opinion as to the meaning of the slang term. In support of this position, the defendant cites *People v. McCarter*, which held that evidence introduced by the State allowing two lay witnesses to testify as to what defendant meant when he used the expressions, "it's going down," "put that up," and "the hanging come before the catching" was inadmissible. *People v. McCarter*, 385 Ill. App. 3d 919, 933-34 (2008). The court concluded that the witness's testimony went beyond the realm of mere observation and crossed the line into impermissible opinion testimony as it was not based on mere sensory perception or a recitation of facts, but required an inferential step in the witness's mind as to what defendant meant. *Id.* at 934.

¶ 17 The cases cited by the defendant are distinguishable in that the prosecutor was not asking Turner for her opinion as to what the defendant meant by the phrase "hit a lick." Instead, the prosecutor was asking Turner what she understood the phrase to mean, which is based on her own perception of the meaning of the phrase. The fact that she observed the defendant with "hundreds" of dollars supported her understanding of the phrase. The defendant also argues that trial counsel was ineffective for failing to rebut this testimony with witnesses who would have testified that the phrase had an innocent construction. Attached to the defendant's postconviction petition are two affidavits from individuals stating that they use the expression "hit a lick" to refer to winning money at gambling. We conclude that defense counsel's failure to rebut this testimony was also a matter of

trial strategy. As we have previously noted, a reviewing court is highly deferential to trial counsel on matters of trial strategy, and decisions such as what matters to object to and when to object fall within matters of trial strategy. Although the defendant argues that the phrase "hit a lick" has a different meaning, he does not contradict Turner's testimony that "hit a lick" can mean to rob someone. Accordingly, we conclude that it was not arguable that appellate counsel's failure to raise the issue was objectively unreasonable.

¶ 18 The next issue presented by the defendant is that appellate counsel was arguably ineffective for not raising the issue that the circuit court erred in its refusal to allow the defendant to introduce photographs showing the vantage point from where Jones was sitting, *i.e.*, inside an SUV facing the front of the house, when she observed the defendant and Watkins beating Farrar through the window of his home. During a pretrial hearing held on February 25, 2010, defense counsel sought to introduce a series of photographs taken two years after the murder from the interior of an SUV looking toward the Farrar residence in order to question whether Jones could have observed certain actions inside the home from her vantage point. Defense counsel argued that the photographs would have aided the jury in determining Jones's credibility. The State objected to the photographs, noting that the front structure of the residence had been remodeled and that the large picture window in which Jones had viewed what happened inside the house had been moved to another location, that the photographs, which were taken in the daylight, did not accurately depict what Jones could have seen on the night in question as the photographs contained an obstruction in the view caused by a glare on the windshield,

and that the photographs were taken two years after the murder. The circuit court granted the State's motion to bar admission of the photographs, stating that the photographs would be misleading and confusing because they were "taken two years later with the glare and in the daytime."

¶ 19 In his postconviction petition, the defendant argued that the circuit court abused its discretion and denied him the right to present a complete defense when it refused to allow him to introduce the photographs and that trial counsel was ineffective for failing to request a recess to allow his investigator to retake the photographs at night. The main requirements for introducing photographs into evidence are their relevancy and their accuracy. *People v. Bryant*, 202 Ill. App. 3d 1057, 1064 (1990). Photographs may be admissible where there has been a change in the situation or condition if the condition is substantially unchanged, if the things sought to be shown by the photograph remain truthfully represented, or if the photograph is satisfactorily shown to be such an accurate representation that it is immaterial when the photograph was taken. *City of Chicago v. Scandia Books, Inc.*, 102 Ill. App. 3d 292, 299 (1981). A decision not to admit a photograph into evidence is within the trial court's discretion and will not be reversed absent an abuse of discretion. *People v. West*, 294 Ill. App. 3d 939, 942 (1998).

¶ 20 Initially, we note that the photographs are not part of the record on appeal and we are therefore unable to review them. However, both parties are in agreement that the photographs were taken two years after the murder, that there is a glare present in the photographs, that the residence had been remodeled following the murder, which resulted in the picture window being moved, and that the photographs were taken in the daylight.

Based on the record on appeal that was presented to us, we conclude that it is not arguable that appellate counsel was objectively unreasonable in failing to present this issue on appeal. In addition, we note that during the trial, defense counsel was allowed to show Jones other photographs in order to establish the distance from the SUV and the house and also a picture of the front of Farrar's residence. Jones acknowledged that the photographs depicted the approximate distance between the SUV and the house.

¶ 21 Furthermore, we find that trial counsel was not ineffective for failing to request to take a recess for the purpose of taking photographs at night where the photographs would not have shown Jones's view inside the house in that the house had been substantially remodeled and the picture window in which Jones viewed certain actions was no longer in the same place. Thus, we conclude that it is not arguable that appellate counsel's failure to raise these issues on appeal was objectively unreasonable.

¶ 22 Last, the defendant argues that trial counsel was ineffective for failing to call one alibi witness, Shirleta Jean Blount, and failure to interview a second potential alibi witness, Shirleta's mother. The defendant argues that this claim should be evaluated as a free-standing claim rather than as part of his ineffective assistance of appellate counsel claim as it relies on matters outside of the record. See *Peeples*, 205 Ill. 2d at 510 (the doctrines of *res judicata* and waiver will be relaxed on postconviction review where fundamental fairness requires, where the alleged waiver is attributable to the incompetence of appellate counsel, or where the facts relating to the postconviction claim do not appear on the face of the original record). Because the claim depends on facts

outside the record, the defendant argues that it requires an evidentiary hearing or at least a fair opportunity to obtain supporting affidavits, in order to fully evaluate its merits.

¶ 23 During the investigation, Shirleta gave a statement to police, which stated that the defendant was with her "around the 1st or 2nd of July 2006." Her statement indicated that the defendant had called her at work on one of those days and asked if he could go to her house. He picked up her house keys from her work and went to her house. He later went with her mother to pick up some food from McDonald's, and she thought that this had occurred around 10:15 p.m. When she returned home that night at approximately 11:45 p.m., the defendant was at her house along with other members of her family. The defendant slept on her bedroom floor and left the following morning to visit his children in St. Louis. Shirleta stated that she never saw the defendant after that, but she "know[s] in her heart" that the defendant had left around July 1 or 2 for St. Louis.

¶ 24 The record indicates that the defendant's trial counsel disclosed Shirleta as a potential witness prior to the trial, that counsel's private investigator had interviewed her, and that counsel had also spoken with her. On the first day of *voir dire*, counsel again informed the court that Shirleta was a potential witness and that he expected her to testify consistent with her police statement. The record reveals that defense counsel had given the matter careful consideration and made a strategic decision not to call Shirleta as a witness. Trial strategy decisions regarding which witnesses to call ultimately rest within trial counsel's discretion. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 25 With regard to the allegations concerning Shirleta's mother, the State argues that the trial court properly dismissed the defendant's postconviction petition because the

defendant failed to provide an affidavit from Shirleta's mother or give a reasonable explanation as to why an affidavit was not attached. See 725 ILCS 5/122-2 (West 2012) (a postconviction petition must include attachments in the form of affidavits, records, or other evidence supporting the defendant's allegations or an explanation as to why such documents are lacking). Thus, the State argues that the defendant's claim lacks any support. The State notes that the failure to attach the necessary affidavits, records, or documents showing that the petition's allegations are capable of corroboration and identifying the sources, character, and availability of evidence, or the failure to explain their absence, is fatal to a postconviction petition and justifies the petition's summary dismissal.

¶ 26 In response, the defendant argues that in his postconviction petition he provided an explanation with respect to his failure to obtain an affidavit from Shirleta, *i.e.*, that he could not locate her or obtain the necessary funds to hire an investigator to locate her. Thus, he argues that if he lacked Shirleta's contact information and the financial ability to locate her, then, implicitly, he would have also lacked the financial ability to track down her mother. Further, the defendant argues that his complaint with respect to Shirleta's mother was that his trial counsel failed to obtain a statement from her.

¶ 27 A defendant who claims that trial counsel was ineffective for counsel's failure to investigate and call a witness must support his allegation with an affidavit from the proposed witness unless the defendant's allegation is uncontradicted and supported by the record. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 30. Without such an affidavit, the reviewing court cannot determine whether the proposed witness could have provided

testimony or information favorable to the defendant. *Id.* The defendant's claims regarding Shirleta's mother and her potential testimony are not supported by the record. The record indicates that Shirleta's mother went to McDonald's with the defendant and drove him back to Shirleta's house. This information was contained in Shirleta's police statement and was investigated by defense counsel. After the investigation, defense counsel decided not to call Shirleta as a witness. There is nothing contained in the record giving any indication as to what further information would have been provided by Shirleta's mother that was favorable to the defendant had defense counsel or counsel's investigator interviewed her. Thus, the defendant's allegation must be supported with an affidavit from Shirleta's mother or at least an explanation as to why the affidavit is absent.

¶ 28 The defendant has not provided such an affidavit or an explanation as to why it is absent. This alone justifies the petition's summary dismissal. See *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008) (the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a postconviction petition and justifies the petition's summary dismissal). Because the defendant has failed to support his allegation with an affidavit and the allegations are not supported by the record, we conclude that it is not arguable that trial counsel's failure to investigate the proposed witness was objectively unreasonable.

¶ 29 Alternatively, the defendant argues that the cumulative effect of the alleged errors deprived the defendant of a fair trial even if the errors, viewed individually, would not warrant reversal. However, as explained above, we have found that appellate counsel

was not arguably ineffective. Thus, the defendant was not deprived of a fair trial viewing all of the defendant's allegations cumulatively.

¶ 30 Accordingly, we conclude that the trial court did not err in summarily dismissing the defendant's *pro se* postconviction petition in that it is not arguable that counsel's performance fell below an objective standard of reasonableness. Thus, the defendant's claims were frivolous and patently without merit.

¶ 31 For the reasons stated, the circuit court's dismissal of the defendant's *pro se* first-stage postconviction petition is affirmed.

¶ 32 Affirmed.