

2017 IL App (1st) 141900-U

No. 1-14-1900

Order filed March 23, 2017

Fourth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 07 CR 22863
)	
MARSHAWN WRIGHT,)	Honorable
)	Neera Walsh,
Petitioner-Appellant.)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's summary dismissal of defendant's *pro se* postconviction petition is affirmed where defendant alleged trial counsel was ineffective for failing to call witnesses but 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 2014)).

¶ 2 Defendant, Marshawn Wright, appeals from an order of the trial court summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal,

defendant contends that the court erred in dismissing his petition because it applied the wrong standard when evaluating his claim that trial counsel rendered ineffective assistance by failing to interview or present testimony from an alibi witness and an eyewitness who would have testified that someone other than defendant shot the victim. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder of the victim Sean Page and personally discharging a firearm which proximately caused death to another person. The trial court sentenced defendant to a term of 50 years' imprisonment for the first degree murder with an additional term of 25 years for personally discharging a firearm that caused death of another person, for a total sentence of 75 years. We set forth the facts of the case in our affirmance of defendant's conviction on direct appeal, (*People v. Wright*, 2013 IL App (1st) 103232) and we recount them here to the extent necessary to resolve defendant's current appeal.

¶ 4 At trial, Aukey Williams, a convicted felon, testified that he was arrested in September 2007 for distribution of a controlled substance by the federal government for his participation in a heroin distribution ring.¹ He entered into an agreement with federal prosecutors which provided that in exchange for his truthful testimony in defendant's case, he would receive a sentence reduction in the federal case.

¶ 5 Williams knew Sean Page, Earl Lewis, Mario Reeves, and defendant from their neighborhood. On May 10, 2007, at around 3 p.m., Williams went to 79th and Langley in Chicago with Reeves, Maurice Williams and Marshawn Jones to speak with a person known as "Mo" about a problem with the sale of drugs. Defendant was not with them. Williams talked to Mo outside of an apartment building on that corner. Mo was on the roof while Williams and the

¹ Defendant, Williams, and Mario Reeves, an eyewitness to the shooting in the instant case, were codefendants in the federal case. The jury was not made aware of the details of the federal case.

other men were on the sidewalk. Reeves had a “heated discussion” with Mo and asked Mo to come downstairs to continue the discussion, but Mo refused and “started shooting off the roof.” Page and Lewis were not present at this time. Reeves was shot in the leg, but did not seek medical attention. Williams did not stay and speak with the police. He, Reeves, and Jones got into a car and drove to 80th and Langley.

¶ 6 While driving, Williams saw Page and Lewis walking at 79th between Langley and Champlain. Williams, Reeves, and Jones exited the vehicle and walked toward Page and Lewis. Reeves started a fight with Lewis because he observed Lewis in a window during the prior shooting with Mo. Williams watched from across the street.

¶ 7 Williams saw defendant a few feet ahead of him. He observed a black 9-millimeter gun fall out of defendant’s back pocket. Defendant put it back in his pocket and then ran across the street toward Page and Lewis. Williams then ran across the street. As he was crossing the street, Williams heard about four or five gunshots, but he did not see defendant shoot Page. Williams stated that he saw defendant running with a gun in his right hand. He also saw that Page was bleeding from his torso. Williams saw the police arrive, but he did not talk to them because he “didn’t want [any] part of it.”

¶ 8 Williams spoke with defendant on the telephone on May 10, 2007. He asked defendant if he was all right and why he “did it.” Defendant responded that “he didn’t know.” Williams did not speak with police about Page's homicide until he was arrested in September 2007 on the federal felony case. He spoke with the police about the homicide prior to receiving any sentence deals. Williams identified several individuals on a surveillance video while speaking with the police at that time and named defendant as the shooter.

¶ 9 The prosecutor played the surveillance video recording of the homicide at trial. Williams identified Page and Lewis as they walked on 79th. He also identified himself, Reeves, and defendant in the video. Williams stated that the video accurately showed what happened at the time Page was shot. In several photographs, Williams identified defendant holding a weapon pointed at Page.

¶ 10 Earl Lewis, a convicted felon, testified that he had a pending contempt case because he failed to appear after being served with a subpoena in the instant case. Lewis was friends with Page and had known him for five years. He knew Reeves and Williams from their neighborhood. He also identified defendant in a photograph and in court as someone he knew from the neighborhood. Lewis was an “acquaintance” of a person called “Mo.”

¶ 11 On May 10, 2007, Lewis and Page were in an apartment building at 79th and Langley with a woman. He did not know if Mo was in that building that day. He heard gunshots while in the building. He looked out of the window and saw people running, but could not tell where the gunshots originated. Later, Lewis and Page walked down 79th to the store.

¶ 12 While they were walking, they saw Reeves coming toward them. Lewis testified that Reeves said something and then “swung at [Lewis.] We got to fighting. And after we were fighting, [Lewis] heard the gunshots.” Lewis said the gunshots were right next to him, and he grabbed Reeves and pulled Reeves over him. He could not see who was shooting. Lewis then “kicked” Reeves off of him and stood up. He looked at Page and saw that Page's white shirt was “turning red.” Lewis started running. He saw Page walking and went in the other direction.

¶ 13 The prosecutor played the surveillance video and asked Lewis to identify the individuals. Lewis acknowledged that he had previously identified the people in the video. He identified himself walking with Page. He identified Reeves, who approached them and punched Lewis.

Lewis also identified defendant as the person pointing a gun at Page. Then he identified Williams. Lewis stated that it was a true and accurate recording of what happened. At the time it occurred, he did not see defendant shoot Page, but he recognized defendant on the video.

¶ 14 The State also presented evidence that fired bullet cartridge cases were recovered from the scene and sent to the Illinois State Police lab for analysis. Brian Mayland, a forensic scientist at the crime lab, analyzed the cartridge cases as well as bullets removed during the autopsy. He testified that the cartridge cases were all fired from the same firearm, a 9-millimeter. Further, bullets recovered were fired from the same gun, either a 9-millimeter or .38-caliber gun. However, Mayland could not determine whether the bullets recovered during the autopsy and the cartridges recovered from the scene were fired from the same weapon because there was no firearm to analyze.

¶ 15 Sergeant Johnny Tate testified that he investigated Page's homicide. He went to the scene on East 79th Street and viewed the surveillance video footage from two businesses on the street and requested an evidence technician to come to the scene and download the footage.

¶ 16 Tate spoke with Tiffany Andrews on the phone on May 13, 2007. Andrews lived at 7908 South Langley. Andrews' building was the same building where an earlier shooting had occurred from the roof. Andrews told him that "there was an incident that had taken place earlier in the day and also that Earl Lewis was with [Page] when he was shot." She gave Tate Lewis' contact information, and Tate contacted Lewis.

¶ 17 Later, in June 2007, Tate spoke with Pierre Young. After his conversation with Young, Tate looked for defendant as a suspect in this case and also wanted to speak with Williams and Reeves.

¶ 18 Detective John Otto testified that on September 20, 2007, he and his partner, Detective Richard Sullivan, interviewed defendant and Williams at the Homan Square police station. He brought the DVD of the surveillance video with him. He spoke with defendant in an interview room with electronic recording. Detective Sullivan advised defendant of his *Miranda* rights and defendant agreed to speak with the detectives.

¶ 19 The detectives showed defendant the surveillance video of Page's homicide. The prosecutor played a portion of defendant's interrogation for the jury. The transcription of the interrogation is not included in the record. In the recording, defendant watched the video of the shooting and initially denied any involvement in Page's homicide. As Detective Otto opened the door to leave, defendant motioned for the detective to stay and the interrogation continued.

¶ 20 Defendant told him that he got "into it" with Mo. He said he went with Williams, Reeves and another man to talk to Mo, but Mo fired shots at them. Defendant said Page was in the building where Mo fired shots and defendant saw Page leave the building with Lewis. Defendant said that he thought Mo sent Page and Lewis out of the building. He followed them from the opposite side of the street. Then Williams and Reeves told him not to shoot. Page looked at defendant and balled up his fists. Defendant said, "It just happened." Defendant told the detective that he stole the gun from Page before the shooting because he knew where Page kept the weapon. Defendant said he fired the gun five times. After the shooting, he gave the gun to another person, who sold it.

¶ 21 After the State rested, the trial court asked defense counsel if defendant intended to testify. Defense counsel responded that defendant would testify, and the following colloquy ensued.

“THE COURT: And after your client testifies, are you planning on calling any other witnesses?

[DEFENSE COUNSEL]: No, we’ll rest, Judge.

* * *

THE COURT: Mr. Wright, I want to ask you one more question. Your attorney is indicating that you want to testify. And that’s fine. He also indicates to me that he is not going to be calling any other witnesses in your behalf? Do you understand that?

DEFENDANT: Yes.

THE COURT: And are you in agreement with him about that?

DEFENDANT: Yes.”

¶ 22 Defendant testified that he believed he was at his girlfriend’s house for most of the day on May 10, 2007, and she lived at 5631 South Woods. The prosecutor objected to this testimony. During a sidebar, the prosecutor argued that defendant had not given the State notice of an alibi as an affirmative defense. Defense counsel asserted that he was not presenting an alibi because defendant was not going to have another witness verify that defendant was elsewhere. The trial court disagreed and found that the testimony constituted an alibi, which had not been disclosed as an affirmative defense. The court sustained the objection and ordered that defendant’s testimony about being at his girlfriend’s house be stricken.

¶ 23 Defendant denied that he was the shooter in the surveillance video. He admitted that he told the detectives that he committed the crime, but testified that his statement was not true and he was not the shooter.

¶ 24 On cross-examination, defendant acknowledged that he knew Page, Lewis, Williams, Reeves, and Mo and was familiar with the neighborhood around 79th Street. The prosecutor played the surveillance video. Defendant identified Page and Lewis in the video, but could not identify anyone else. He again denied that he was the shooter. While defendant acknowledged that he told the detectives that he committed the homicide, he stated that his statements were not true and he “told them what they wanted to hear.”

¶ 25 The jury subsequently found defendant guilty of first degree murder and personally discharging a firearm that caused another person’s death. The trial court sentenced defendant to 50 years’ imprisonment for the murder and 25 years’ imprisonment for the firearm enhancement, both to run concurrent to his federal sentence.

¶ 26 On direct appeal, defendant argued, *inter alia*, that trial counsel was ineffective for failing to give notice of an alibi defense. *Wright*, 2013 IL App (1st) 103232, ¶ 69. This court affirmed defendant’s convictions, finding that he could not establish prejudice in light of the overwhelming evidence against him. *Id.* at ¶¶ 69-71. The supreme court denied leave to appeal on May 29, 2013. *People v. Wright*, 39 N.E.3d 567 (2013).

¶ 27 On February 10, 2014, defendant filed the instant *pro se* petition for relief under the Act (725 ILCS 5/122-1 *et seq.* (West 2014)) alleging, *inter alia*, that trial counsel was ineffective for failing to investigate Gaines and Reeves, who would have established an alibi defense and corroborated defendant’s contention that he was not the shooter, respectively. In his petition, defendant states that Reeves was an eyewitness to the shooting and would testify “to being on 79th Street for both of the incidents that took place and led up to the actually shooting on May 10, 2007. As well as to who actually shot an[d] killed Sean Page.” He also contends that Gaines was willing to testify that defendant was “with her [the] evening of the murder and that [she and

defendant] learned about what happen[ed] from Aukey Williams later that day.” In support of his petition, defendant attached his own affidavit, and an affidavit from his mother, Velma Cotten. Defendant averred that he was with his girlfriend, Arielle Gaines, for most of the day of the shooting at 5631 South Woods. After 6 p.m., Williams called defendant and told him to go outside. Defendant got into a car with Williams, and Williams informed him that Young killed Page. Williams further told defendant that Mo fired a gun at him and Reeves, so Williams instructed Young to kill Page in retaliation. Defendant averred that he confessed to the police despite being innocent of the crime. He told his attorney that Reeves and Gaines were willing to testify on his behalf, but his attorney failed to contact either potential witness.

¶ 28 Cotten’s affidavit stated that, “Mario Reeves and Arielle Gaines informed [defendant] that they were both willing to testify on his behalf.” Both Cotten and defendant informed counsel that Reeves and Gaines were willing to testify but counsel did not call them as witnesses. Defendant told Cotten that he did not commit the crime and was with Gaines for most of the day of the shooting. Further, defendant told Cotten that he learned of the shooting from Williams, but he confessed because he was overwhelmed by the police. Defendant told her that he repeatedly denied being the shooter in the video, but eventually he told the police what they wanted to hear.

¶ 29 Defendant did not provide affidavits from Gaines and Reeves in support of his allegations. He stated in his petition that he attempted to obtain affidavits from Gaines and Reeves, but was unable to obtain them without assistance from the court due to his “being incarcerated and indigent.”

¶ 30 The trial court summarily dismissed defendant’s petition, citing his failure to attach Gaines’ and Reeves’ affidavits and finding that defendant did not make an arguable claim of

prejudice. The court later denied defendant's motion to reconsider the summary dismissal of his petition. This appeal followed.

¶ 31 On appeal, defendant contends that the trial court erred in dismissing his petition because it applied the wrong standard when reviewing his claim that trial counsel rendered ineffective assistance by failing to investigate Gaines, who would have established defendant's alibi, and Reeves, who would have testified that someone other than defendant shot the victim. Defendant acknowledges that he did not provide affidavits of Gaines and Reeves, but argues that he sufficiently explained their absence due to his incarceration.

¶ 32 The Act allows criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Harris*, 206 Ill. 2d 1, 12 (2002).

¶ 33 At the first stage of postconviction proceedings, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). 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." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009); *People v. Tate*, 2012 IL 112214, ¶ 9. A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as those that are fantastic or delusional. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 34 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. The allegations in the petition must be taken as true and

liberally construed. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). We review the summary dismissal of a petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 35 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 2014); *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. 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 *People v. Collins*, 202 Ill. 2d 59, 66 (2002)). 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.

¶ 36 Here, we first note that whether the trial court applied the wrong standard of review to defendant’s petition is inapposite because our review is *de novo*. Turning to the merits of the petition, we find that the circuit court’s summary dismissal was proper because defendant failed

to attach the purported witnesses' affidavits to support the allegations in his petition or sufficiently explain their absence, as required by the pleading requirements of section 122-2 of the Act. 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 obtain the witnesses' affidavits without assistance from the court. While in some situations, incarceration may excuse a defendant's failure to provide supporting materials in a postconviction petition (*People v. Washington*, 38 Ill.2d 446, 451 (1967)), incarceration, in and of itself, is insufficient grounds for the absence of affidavits. As the State points out, relief under the Act is available only to persons "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2014). Consequently, the vast majority of postconviction petitions are filed by defendants who are "incarcerated and indigent." Thus, defendant's status as a prisoner does not excuse his failure to provide the required supporting affidavits from the two potential witnesses and warrants summary dismissal. *Delton*, 227 Ill. 2d at 255.

¶ 37 Further, the lack of affidavits and limited detail in defendant's affidavit are insufficient to satisfy the evidentiary requirements of the Act: to show that the allegations are capable of independent corroboration and to identify "sources, character, and availability of evidence alleged to support the petition's allegations." *People v. Allen*, 2015 IL 113135, ¶ 34. With respect to Gaines, defendant's affidavit states only that he was with her the majority of the day of the shooting. Defendant does not state the times that he was with Gaines or provide any other detail that could later corroborate his contention that he was not the shooter. Additionally, defendant lists Gaines' address so his contention that he is unable to locate her is unavailing. Defendant's affidavit likewise falls short with respect to Reeves' potential testimony. The petition claims that Reeves would testify "to being on 79th Street for both of the incidents that took place and led up

to the actually shooting on May 10, 2007. As well as to who actually shot an[d] killed Sean Page.” Defendant does not specify exactly what Reeves’ testimony would be, but argues that Reeves would testify that Young shot Page. However, defendant does not claim to have talked to Reeves, nor does he claim that Reeves told him Young shot Page. In fact, defendant’s affidavit claims only that Williams told him that Young shot Page. Defendant merely relies on the fact that Reeves was an eyewitness to support his contention that someone else shot Page. Without more, we cannot conclude that defendant presented enough detail to satisfy the purposes of the evidentiary attachments as required by the Act. *Allen*, 2015 IL 113135, ¶ 34; *Delton*, 227 Ill. 2d at 254.

¶ 38 Moreover, even assuming *arguendo* that defendant had attached affidavits from Gaines and Reeves, we do not find that he stated the gist of a constitutional claim of ineffective assistance of counsel. An ineffective assistance of counsel claim may not be dismissed at the first stage of postconviction proceedings if it is arguable that: (1) counsel’s performance “fell below an objective standard of reasonableness;” and (2) petitioner was prejudiced by counsel’s deficient performance. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland*, 466 U.S. at 687-88. The first prong requires us to consider whether there is an arguable basis to find that counsel’s performance was “objectively unreasonable under prevailing professional norms.” *People v. Cathey*, 2012 IL 111746, ¶ 23. The second prong requires an inquiry into whether there is an arguable basis to conclude that, but for counsel’s errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* The failure to satisfy either prong will defeat an ineffective assistance claim. *People v. Enis*, 194 Ill. 2d 361, 377 (2002). If we can dispose of defendant’s ineffective assistance claim because he suffered no prejudice, we need not address

whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 39 In the case at bar, we initially note that the existence of both Gaines and Reeves were within defendant's knowledge at the time of trial, but when the trial court expressly asked defendant whether he agreed with counsel's decision not to call any further witnesses, defendant responded "yes," that he agreed. Furthermore, we find defendant failed to make an arguable claim that he suffered prejudice due to counsel's alleged failure to investigate Gaines and Reeves. Both Lewis and Williams identified defendant as the shooter from the surveillance video of the incident, and the jury watched the video corroborating their testimony. Importantly, defendant confessed to the shooting and detailed the events leading up to the shooting and how he obtained and disposed of the gun used. The video of his interrogation and confession was also played for the jury. In light of the overwhelming evidence against him, defendant cannot arguably show that, but for counsel's conduct, the outcome of the trial would have been different. *Cathey*, 2012 IL 111746, ¶ 23.

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.