2017 IL App (1st) 143538-U

No. 1-14-3538

Order filed March 31, 2017

Fifth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 08 CR 16890 |
| | ) | |
| MARK ANDERSON, | ) | Honorable |
| | ) | Nicholas R. Ford, |
| Defendant-Appellant. | ) | Judge, presiding. |

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed over his claim of ineffective assistance of trial counsel. The trial court did not abuse its discretion by denying defendant's postconviction discovery request.

¶ 2 Defendant Mark Anderson appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erroneously dismissed his petition where his several claims of ineffective assistance of counsel were not fanciful or based on an indisputably meritless legal theory.

Defendant additionally argues that the trial court erred by denying his postconviction discovery request. For the following reasons, we affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder of the victim Darryl Hart, attempted first degree murder, and aggravated discharge of a firearm. He was sentenced to 20 years in the Illinois Department of Corrections for the first degree murder conviction, with a 25-year enhancement for the discharge of a firearm. Defendant was also sentenced to a consecutive six-year term for the attempted first degree murder conviction, with a 20-year enhancement for the discharge of a firearm. In total, defendant was sentenced to 71 years. On direct appeal, defendant's attempted murder conviction was reversed and remanded, and his other convictions were affirmed. *People v. Anderson*, 2012 IL App (1st) 103288. On remand, the State nol-prossed the attempted murder charge. The trial court left unchanged the original sentence for defendant's first degree murder conviction with the enhancement and sentenced defendant to a consecutive six-year sentence for the previously-merged aggravated discharge of a firearm conviction, for a total sentence of 51 years' imprisonment. We set forth the facts of the case in our opinion in defendant's direct appeal. *Anderson*, 2012 IL App (1st) 103288. The following summarizes the evidence of defendant's guilt.

¶ 4 Ozier Hazziez testified that he went to Orbitz Submarine restaurant on July 25, 2008, shortly after 2 a.m. Another man, later identified as Hart, was talking on his cell phone in the restaurant. Three men, whom Hazziez did not know, entered the restaurant and placed a food order. Hazziez described them as a tall, skinny man; a short man; and a heavyset man. Hazziez observed one of the three men sell drugs to another individual in the restaurant.

¶ 5 Hazziez overheard Hart arguing with the three men. Hart stated, "You don't belong around here. This is my area." Hazziez stepped outside for a minute, and when he returned, the men were still arguing about selling drugs. Hazziez and Hart both walked outside of the restaurant. Hart was speaking to the heavyset man. The tall, skinny man, who Hazziez later identified as defendant, walked outside also. Hazziez heard Hart state, "You might as well shoot me," and observed defendant shoot Hart. At the time of the shooting, defendant was five feet away from Hart, and Hazziez was 10 feet away from both Hart and defendant. Hazziez testified that defendant was wearing a jacket, which he identified in the restaurant surveillance video. He did not observe a weapon on Hart.

¶ 6 When Hart fell to the ground, Hazziez "took off in [his] car" and heard three additional gunshots. He was unsure in which direction the shots were fired. After driving for approximately 20 minutes, Hazziez checked his vehicle for bullet holes. He then went to a police station and viewed two photographic arrays. In the first photo array, Hazziez identified the short man from the restaurant as Centrell Jackson. The second photo array contained defendant's picture, but Hazziez could not identify him. Three weeks later, Hazziez viewed a physical lineup and identified defendant as the shooter. At trial, Hazziez also identified defendant in still photographs from the surveillance video.

¶ 7 Detective Sylvia Vanwitzenburg testified that Hazziez identified Jackson in a photo array as one of the individuals with the shooter. A photograph of defendant was displayed in the second photo array, but Hazziez did not identify defendant. Hazziez told her that one of the individuals in the second photo array looked familiar, but he was not "one hundred percent

certain." Hazziez then told Vanwitzenburg that he would be able to identify the shooter if he saw him in person.

¶ 8 Quentin Cooper testified for the State that he had known defendant for 12 years. At approximately 2 a.m. on July 25, 2008, Cooper was with defendant and Jackson at Orbitz Submarine restaurant. While they waited for their food, Cooper spoke with someone else in the restaurant. After picking up his food, he waited in his car for Jackson, and "nothing" happened. Cooper left with Jackson and did not remember a shooting occurring.

¶ 9 The State confronted Cooper with his signed prior statement and his grand jury testimony. Cooper testified that a detective, whose name he could not remember, forced him to provide a written statement and grand jury testimony by threatening to charge him with Hart's murder if he refused. He told an assistant State's Attorney (ASA) and testified at the grand jury to what the detective coached him to say. At trial, the State asked Cooper questions based on his statement, and Cooper denied telling the ASA various portions of his statement. Cooper could not recall anything in the statement and could not recall any of his grand jury testimony.

¶ 10 On cross-examination, Cooper did not recall whether he had a gun in his vehicle on the night of the shooting, but denied disposing of a gun that night. He also did not recall whether Jackson had drugs on him that night. Cooper denied that he claimed to have been threatened because he was actually the shooter.

¶ 11 Chicago police detective Darryl Shaw testified that he interviewed Cooper on August 13, 2008. He asked Cooper about the shooting, but denied coaching Cooper and telling him what to tell the ASA. Shaw also denied threatening to charge Cooper with Hart's murder if he failed to testify in a certain manner.

¶ 12 ASA Dan Groth testified to the statement that Cooper provided him at the police station on August 13, 2008. Cooper did not claim that Detective Shaw threatened to charge him with Hart's murder if he did not testify in a certain manner. Cooper agreed to allow ASA Groth to write down his statement and to review it and make changes or corrections. ASA Groth wrote out Cooper's statement, and Cooper reviewed and signed each page, after making certain necessary corrections and initialing the changes. ASA Groth and Detective Shaw also signed each page and initialed each correction.

¶ 13 In the handwritten statement, Cooper stated that he was with defendant and Jackson around 2 a.m. on July 25, 2008 at Orbitz Submarine restaurant. Jackson was a "macbuddy," which is a person who sells drugs. Cooper believed Jackson had sold drugs to someone because he heard Hart make a statement about people selling drugs outside of the restaurant. Cooper knew Hart from grade school. Hart told Jackson and defendant, "Y'all can't be serving up here. This ain't no free enterprise. There's a war going on." Cooper observed defendant with a gun so he stepped between defendant and Hart and attempted to defuse the situation. Defendant walked away, so Cooper believed the situation was under control. Cooper and Hart walked out of the restaurant. Cooper apologized to Hart for Jackson selling drugs in the restaurant and did not observe any weapons on Hart. He saw defendant exit the restaurant with "a look in his eye [that Cooper] had never seen before" and again observed defendant holding a gun in his right hand, pointed down. Cooper stepped between defendant and Hart again, but defendant reached around him and shot Hart. Hart fell to the ground after the first shot, but defendant fired at him two more times. Defendant thereafter fired two shots at another man, who had been in the restaurant and was outside when defendant initially shot Hart. Cooper entered his vehicle after the shooting, and

when defendant attempted to enter, Cooper said, "Get the f*** away from me. Don't jump in my car. Hell no." Defendant fled, and Jackson exited the restaurant. Jackson and Cooper left the scene together.

¶ 14 ASA John Henning testified that he questioned Cooper before the grand jury and read Cooper's grand jury testimony at trial. Cooper never claimed that he was threatened. He asked Cooper whether anyone had threatened him or forced him to speak and Cooper said, "No." Cooper gave the same version of events in his statement and at the grand jury. Cooper additionally identified his statement for the grand jury and testified that no threats or promises were made to him when he gave the statement.

¶ 15 Centrell Jackson testified that he knew defendant from school. He was with defendant and Cooper in the early morning hours on July 25, 2008. He, Cooper, and defendant argued with Hart over the sale of crack cocaine on Hart's "turf." While Jackson waited inside the restaurant for his food order, defendant left the restaurant. Jackson heard three or four shots outside. He remained inside the restaurant for a few minutes after hearing the shots and then walked outside and observed Hart on the ground. Jackson did not observe Hart with any weapons. Cooper was outside, but defendant was not there. He left the scene with Cooper.

¶ 16 Chicago police officer Janick testified that on July 25, 2008, he assisted with the investigation by viewing a surveillance video from the restaurant. He identified Jackson and defendant on the video and gave their names to Detective Shaw. He arrested defendant on August 12, 2008.

¶ 17 Forensic scientist Carl Brasic testified that he investigated the crime scene on July 25, 2008. He recovered one metal fragment and five fired cartridge cases on the sidewalk. He also

recovered a green and yellow Athletics jacket, as well as a package of cigars and five loose cigarettes in the right outside pocket of the jacket.

¶ 18 Forensic scientist Cynthia Prus testified that, based on a reasonable degree of scientific certainty, she matched a latent print on one of the cigarettes to an inked palm print card in defendant's name. However, she could not recover latent impressions suitable for comparison on any of the cartridge cases.

¶ 19 The parties stipulated that forensic scientist Scott Rochowicz was a qualified expert in the field of trace evidence. If called, Rochowicz would testify that he tested the recovered Athletics jacket for gunshot residue, taking samples from the right and left cuffs. The results indicated that the sample areas "may not have contacted a PGSR [primer gunshot residue] related item or may not have been in the environment of a discharged firearm." Further, he concluded that "if the sample areas did contact a PGSR related item or were in the environment of a discharged firearm then the particles were not deposited, were removed by activity, or were not protected by the procedure."

¶ 20 The parties additionally stipulated that (1) Hart's cause of death was multiple gunshot wounds, and the manner of death was homicide; (2) paramedics recovered nine bags containing cocaine in Hart's mouth; and (3) the bullets were all fired from the same gun and that the proper chain of custody was maintained.

¶ 21 After the State rested, the trial court asked whether defendant wished to testify. The following colloquy ensued.

"[DEFENSE COUNSEL]: Judge, at this time the defendant and I have talked extensively during the trial. And Mr. Anderson has told me that he does not wish to testify in this case.

THE COURT: Is that right, Mark?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: You understand you have an absolute right to testify or not testify and in the end it is your decision alone to make?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: Have you talked about it alone with [counsel]?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: Are you satisfied your communication with him regarding whether or not to testify?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: After talking to him and your communication with him, what is your decision: Testify or not testify?

[THE DEFENDANT]: Not testify.

[THE COURT]: Has anyone threatened you or promised you anything in order to make you choose not to testify?

[THE DEFENDANT]: No, sir.

[THE COURT]: Testifying of your own free will?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: This is a decision you are making freely and voluntary, is that right?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: Is there anything you want to add?

[THE DEFENDANT]: No, sir.

* * *

[THE COURT]: At this time I find the defendant has knowingly and voluntarily and considered communicated with his very abled attorney decided to make a decision not to testify. I will find the decision is made both knowing and voluntarily, that is, made of his own free will, and was not the subject of any threats or promises, is that right, Mark?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: No one threatened you or promised you anything not to testify?

[THE DEFENDANT]: No, sir."

¶ 22 The defense called no witnesses and presented no evidence in its case in chief. During closing arguments, in regard to the gunshot residue stipulation, defense counsel argued, in relevant part:

"[A] stipulation was read to you, and just as Judge Ford told you, a stipulation is evidence just like it had a mouth on it and was talking to you from the witness stand. *** So what is important in this case is that a person by the name of Scott Rochowicz, *** and you are going to get this, who was qualified as an expert in the field of trace evidence, an expert, would say a gunshot residue test was administered to the left and right cuffs of this

> jacket, which was put in a sealed condition. And guess what? The gunshot residue tests showed that these two cuffs were not in the vicinity of a gun that was shot. So since Mark Anderson dropped the jack[et] around the corner from where the victim was shot, he must have had the jacket on when the victim was shot. And if he had the jacket on, and this is his right sleeve and he had the gun out, common sense would tell you that there would be gunshot residue on this sleeve, on this cuff. And it says in the stipulation that the only reason that it would not be in the opinion of this expert is that the item was somehow cleaned or was in the environment of rain or snow or something to cause the jacket to be altered from the time it was picked up and the time it was tested. There is not a darn thing on this jacket which was supposed to have been worn by Mark Anderson–and you can watch the video. I beg you to watch the video–there is not a darn thing on this jacket that would show he was near a gun that was shot."

¶ 23 Following arguments, the jury found defendant guilty of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. The aggravated discharge of a firearm conviction was merged into the attempted murder conviction, and defendant was sentenced to 20 years for the first degree murder conviction, with a 25-year enhancement for the discharge of a firearm, and a consecutive six-year term for the attempted first degree murder conviction, with a 20-year enhancement for the discharge of a firearm, for a 71-year total sentence. On direct appeal, this court affirmed defendant's convictions for first degree murder and aggravated discharge of a firearm. *People v. Anderson*, 2012 IL App (1st) 103288. However, this court reversed defendant's conviction for attempted murder and remanded to the trial court because the corresponding jury instruction failed to specify Hazziez as the victim of the

attempted murder charge. *Anderson*, 2012 IL App (1st) 103288 at ¶ 64. The Illinois Supreme Court denied defendant leave for appeal on January 30, 2013. *People v. Anderson*, No. 114987 (Jan. 30, 2013). The United States Supreme Court subsequently denied defendant's petition for writ of *certiorari*. *Anderson v. Illinois*, 134 S.Ct. 85 (2013).

¶ 24 On remand, the State nol-prossed the attempted murder count. The trial court stood by the original sentence for the first degree murder conviction and imposed a six-year consecutive sentence for the previously-merged aggravated discharge of a firearm conviction. Ultimately, defendant was sentenced to 51 years' imprisonment. Defendant appealed the attempted aggravated discharge of a firearm conviction, which this court affirmed. *People v. Anderson*, 2015 IL App (1st) 140131-U.

¶ 25 On April 7, 2014, defendant filed a postconviction petition with the assistance of counsel. The petition alleged that trial counsel was ineffective for (1) failing to communicate with defendant prior to trial, (2) failing to interview "any witnesses," and (3) stipulating to the testimony of the gunshot residue expert. The petition additionally requested discovery of "all reports, notes, records, summaries or any other information related to the gunshot residue in this case," so that defendant "can further develop his argument that his trial attorney was ineffective in entering into a stipulation regarding the gunshot residue evidence." On June 27, 2014, defendant amended his petition to include his own affidavit and the affidavit of a privately retained gunshot residue expert, Jason Beckert.

¶ 26 Beckert averred that he is a forensic scientist and "considers [himself] an expert in the area of microscopic trace evidence." He further averred that he was retained to provide expert consultation regarding gunshot residue but first needed to obtain "any and all lab notes, lab

reports, data, police reports and any other documents related to the gun-shot residue testing in this case."

¶ 27 Defendant averred to the following. Counsel did not visit him in jail or go over discovery with him prior to trial. Counsel did not request his consent to stipulate to the gunshot residue evidence, and defendant would not have consented. He was wearing an Athletics jacket the night of the shooting, but did not fire a weapon. Defendant is innocent and witnessed Cooper shoot Hart on July 25, 2008. After witnessing the shooting, defendant fled the scene and left his jacket, among other things. Several days after the shooting, Cooper confessed that he shot Hart to defendant and Jackson. "Upon information and belief," counsel did not attempt to interview either Cooper or Jackson. Defendant expected to testify at trial, but counsel "told [defendant he] was not going to testify, and [counsel] told [him] how to answer the questions posed to [defendant] by the judge when admonished as to whether the decision to testify was [his] to make." Consequently, defendant's decision not to testify was not made voluntarily or intelligently.

¶ 28 On September 25, 2014, the trial court entered an order summarily dismissing defendant's postconviction petition, finding that defendant's claims were frivolous and patently without merit and denying defendant's discovery request. This appeal followed.

¶ 29 On appeal, defendant contends that the trial court erred by dismissing his petition at the first stage of postconviction proceedings because his various claims of ineffective assistance of counsel were not fanciful or based on an indisputably meritless legal theory. He additionally argues that the trial court abused its discretion by denying his request for discovery pertaining to the State's records on the gunshot residue evidence.

¶ 30 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). 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).

¶ 31 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. 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 postconviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill. 2d at 11; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). We review the summary dismissal of a petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 32 To state a claim of ineffective assistance of counsel, defendant must allege that 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 v. Washington*, 466 U.S. 668, 687-88 (1984)). During first-stage proceedings, we generally do not consider trial strategy-related arguments. *Tate*, 2012 IL 112214, ¶ 22. The failure to satisfy either prong will defeat an ineffective assistance claim. *People v. Enis*, 194 Ill.

2d 361, 377 (2000). 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).

¶ 33 Defendant first contends counsel was ineffective for failing to communicate with him prior to trial. As a result of this failure, defendant alleges that he was unable to participate in his defense and was coached and forced to make an uninformed decision not to testify. The State responds that the trial court properly dismissed defendant's petition because he failed to demonstrate prejudice under *Strickland,* and he knowingly waived his right to testify.

¶ 34 "A valid claim of ineffective assistance of counsel may exist where counsel failed to communicate with defendant." *People v. Valladares,* 2013 IL App (1st) 112010, ¶ 59. The sixth amendment requires defense counsel to keep defendant informed of developments in the case and consult with him or her on all major decisions. *People v. Smith,* 268 Ill. App. 3d 574, 579 (1994).

¶ 35 Here, defendant's only contention is that, based on counsel's failure to communicate with him, he made an uninformed decision not to testify and was therefore unable to tell the jury that Cooper was the shooter. However, the record rebuts this contention. Defendant was extensively admonished by the trial court regarding his right to testify, and repeatedly told the court that he was freely deciding not to testify. Nothing in the record indicates that counsel was forcing defendant to refrain from testifying, as he now claims. The mere fact that counsel advised against it does not render counsel's performance ineffective. See, *e.g.*, *People v. Knox,* 58 Ill. App. 3d 761, 767 (1978) ("counsel is free to urge his professional opinion on his client, and if the client acquiesces in his counsel's conduct in this regard he should be bound by such action").

¶ 36 Furthermore, defendant cannot establish that he was prejudiced because, as he argues, "he was denied the ability to participate in his own defense or make an informed decision as to whether or not to testify on his own behalf." Defendant has not explained how additional pretrial communication with counsel or defendant's own testimony would have arguably altered the outcome of his case in light of the evidence against him. See *People v. Penrod*, 316 Ill. App. 3d 713, 723 (2000) (despite trial counsel's admission that he never called or visited the defendant in jail, representation was deemed effective where the defendant did not show how further communication with counsel would have arguably altered the outcome of trial); see also *People v. Youngblood,* 389 Ill. App. 3d 209, 218 (2009) ("Indeed, it has been expressly held that a defendant must show prejudice from the denial of his right to testify in order to make out a claim of ineffective assistance of counsel.").

¶ 37 As we described in defendant's direct appeal, the evidence in this case was not close. *Anderson*, 2012 IL App (1st) 103288, ¶ 51. Hazziez, Cooper, and Jackson testified that defendant was at the scene of the crime around 2 a.m. on July 25, 2008. Cooper and Jackson knew defendant prior to the shooting, and Hazziez observed him in the restaurant and was 10 feet away from defendant during the shooting. Hazziez and Cooper testified that defendant argued with Hart, drew a gun, and shot Hart. There was no evidence that Hart was in possession of a weapon, and the forensic evidence established that only one gun was fired that night. Additionally, physical evidence, including the Athletics jacket and a cigarette with defendant's prints, linked defendant to the crime scene. Although Hazziez was unable to identify defendant with certainty in the photo array, he testified that he would be able to identify the shooter in person and subsequently identified defendant in a physical lineup. In light of the substantial evidence against

defendant, we find that defendant's allegations are insufficient to arguably establish that absent counsel's failure to communicate with him prior to trial, the outcome of defendant's proceedings would have been different. See *Strickland*, 466 U.S. at 687.

¶ 38 Defendant next asserts that counsel was ineffective for failing to interview witnesses prior to trial. Defendant claims that Cooper admitted to him and Jackson that he shot Hart and had counsel interviewed them, he would have known to ask Jackson about Cooper's confession at trial, and this testimony "could well have tipped the jury's decision in favor of acquittal." The State counters that defendant failed to attach affidavits from Cooper and Jackson, as required by section 122-2 of the Act, and cannot demonstrate prejudice. In his reply brief, defendant contends that his own affidavit is sufficient to proceed under the Act.

¶ 39 Section 122-2 of the Act requires a defendant to support the allegations in his 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; *People v. Allen*, 2015 IL 113135, ¶ 34. 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.

¶ 40 Here, we need not reach the question of whether defendant states the gist of an ineffective assistance claim because he failed to satisfy section 122-2. See *Delton*, 227 Ill. 2d at 255. Defendant's allegation that Cooper was the shooter was required to be supported by affidavits from Jackson and Cooper, or otherwise explain their absence. *Jones*, 399 Ill. App. 3d at 371; *Delton*, 227 Ill. 2d at 255. However, defendant failed to provide an affidavit from either of them. Contrary to defendant's assertion, his own affidavit is insufficient where he contends that counsel was ineffective for failure to investigate what a particular witness would testify to. *Jones*, 399 Ill. App. 3d at 371. We note that Cooper did testify and that his testimony did not support defendant's affidavit. Accordingly, defendant's failure to attach the requisite affidavits or explain their absence is "fatal" to his petition and justifies summary dismissal of that claim. See *Delton*, 227 Ill. 2d at 255.

¶ 41 Next, defendant argues that counsel was ineffective for stipulating to the evidence regarding the gunshot residue. Defendant argues that the gunshot residue evidence was exculpatory, and counsel "squandered" the evidence by stipulating to it rather than cross-examining the State's expert witness to show that Cooper was never tested for gunshot residue. He contends that the stipulation deprived him of a fair trial. The State responds that counsel's

decision to stipulate to the gunshot residue evidence was trial strategy and, therefore, virtually unchallengeable. Further, the State argues that defendant cannot demonstrate prejudice because the jury heard the evidence through the stipulation and counsel argued its exculpatory value during closing arguments, which was beneficial to the defense.

¶ 42 "The mere use of stipulations does not establish ineffective assistance of counsel." *People v. Smith*, 326 Ill. App. 3d 831, 851 (2001). However, an incorrect or erroneous stipulation may establish the deficiency prong of *Strickland*, although the defendant still must establish prejudice to state a claim of ineffective assistance of counsel. *Smith*, 326 Ill. App. 3d at 851.

¶ 43 We generally do not consider trial strategy-related arguments at first-stage postconviction proceedings (*Tate*, 2012 IL 112214, ¶ 22), so we decline to address the State's argument that entering into the stipulation was a matter of sound trial strategy. However, regardless of whether counsel was deficient for stipulating to the gunshot residue evidence, we find that defendant again cannot establish an arguable claim of prejudice. See *Lacy*, 407 Ill. App. 3d at 457. We are unpersuaded by defendant's contention that he was denied a fair trial due to the stipulation. As the State points out, counsel was still able to argue to the jury the value of the evidence to the defense, *i.e.*, that the lack of gunshot residue on the Athletics jacket showed that defendant was not in the vicinity of a gun when it was fired. Thus, as the jury was not deprived of this evidence and heard its relevance, combined with the substantial evidence presented against defendant discussed above, we conclude that he failed to make an arguable claim that he was prejudiced by the stipulation. *Enis*, 194 Ill. 2d at 377.

¶ 44 Defendant adds to his last contention that the trial court erred by denying his request for discovery relating to the gunshot residue evidence. He claims that he needs the State's records

regarding the gunshot residue evidence in order to establish the factual basis of his ineffective assistance claim. The State asserts that the trial court properly denied defendant's request because it amounts merely to a "fishing expedition" to challenge the State's expert's conclusions regarding the gunshot residue evidence.

¶ 45 It is within the trial court's discretion to order discovery in postconviction proceedings. *People v. Fair,* 193 Ill. 2d 256, 264 (2000). The trial court should allow discovery if the moving party establishes good cause for the request. *People v. Jakes*, 2013 IL App (1st) 113057, ¶ 25; *Fair,* 193 Ill. 2d at 264-65. The court should consider "the totality of the relevant circumstances, including the issues presented in the petition, 'the scope of the discovery sought, the length of time between the conviction and the postconviction proceeding, the burden [of granting discovery,] and the availability of the desired evidence through other sources.' " *People v. Smith,* 352 Ill. App. 3d 1095, 1113 (2004) (quoting *People ex rel. Daley v. Fitzgerald,* 123 Ill. 2d 175, 183-84 (1988)). We will uphold the trial court's decision on a request for discovery absent an abuse of discretion. *Fair,* 193 Ill. 2d at 265.

¶ 46 Here, defendant fails to articulate what he hopes to achieve by having another expert retest the jacket. As discussed above, defense counsel presented evidence to the jury that gunshot residue was absent from the cuffs of the jacket and argued that relevance to the jury. While defendant appears to argue that his expert could provide more favorable testimony regarding the gunshot residue evidence than the stipulation, we find this insufficient to establish good cause for the request. Therefore, we conclude that the trial court did not abuse its discretion by denying defendant's request.

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

¶ 48 Affirmed.