FIRST DIVISION
October 30, 2017

No. 1-15-1019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	03 CR 6016
	)	
SHAUN HENDERSON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in summarily dismissing defendant's *pro se* petition for postconviciton relief.

¶ 2 Defendant, Shaun Henderson, appeals from the circuit court's summary dismissal of his *pro se* petition for postconviction relief. Defendant argues that his petition asserted an arguable basis of a claim of ineffective assistance of counsel for: (1) failing to investigate and present evidence that the window through which a witness, who identified defendant as the shooter, allegedly viewed the offense was made of frosted glass, which would have cast doubt on the reliability of her identification; and (2) failing to present an expert to testify about eyewitness identification. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant, Shaun Henderson, was charged with the attempted murder of Courtney Page who was shot in the stomach during a physical fight between him and three other men, including defendant, on January 7, 2003. After a jury trial, defendant was convicted of attempted first degree murder and aggravated battery with a firearm.

¶ 5 Defendant did not challenge his presence at the crime scene. Therefore, the issue during trial became one of identification; who, among the three men that attacked Page, held the gun against him and shot him.

¶ 6 Page testified that on January 7, 2003, three men, defendant among them, attacked him as he was about to enter a single-entrance apartment building at 8020 South Escabana Avenue in Chicago where he resided. He recognized one of the three men as “Shaun Moe.” One of Shaun Moe's friends resided on the building's first floor.

¶ 7 Page stated that he had gotten into fights with Shaun Moe's friends before, but never with Shaun Moe himself. After exchanging words, Shaun Moe punched Page in the face after he declined to hold the building's door open. A fight ensued between the three men and Page. Shortly afterwards, one of the three men drew a gun, shot Page, and ran. Afterwards, Page's ex-girlfriend, Mahogany Henry, came downstairs. Later, Page identified the shooter as the defendant in a February 2003 photo array. However, at trial, Page was unable to identify defendant in open court.

¶ 8 During cross-examination, in an attempt to discredit Page's testimony, defense counsel unsuccessfully tried to inquire about his marijuana use. While the defense had hospital records evidencing Page's marijuana use, the State objected and argued in a sidebar. After defense counsel presented an offer of proof--hospital records evidencing Page's marijuana use--the court sustained the State's objections and indicated that defense counsel lacked a proper foundation

with testimony regarding perception and recollection effects of marijuana.

¶ 9 Henry, who testified next, witnessed the altercation through a door. She was inside the building when Page rang the building's doorbell, and came downstairs when she heard loud collisions. According to her testimony, she saw Page fighting two men on the building's porch. One of them drew a gun, shot, and fled. The shooter ran with one man, and another went inside the building. On January 10, 2003, she spoke to the police while at the hospital with Page. Based on her memory, she later identified defendant as the shooter in a photo array and lineup. Later, Henry was able to identify defendant in court, stating that he "looked different" in 2003 as defendant wore braided hair.

¶ 10 The State called Officer Boldman, Detectives Troche and Brannigan, and Chicago Police Evidence Technician Watson. Officer Boldman testified that on January 7, 2003, he attempted to locate defendant at his house located at 8213 S. Manistee. There, he spoke to defendant's brother Demitrius. Demitrius notified defendant's father that the police were searching for defendant. Detective Troche was part of the fugitive apprehension unit that arrested defendant on February 4, 2003. Detective Brannigan testified that he investigated the shooting that took place on 8020 S. Escabana Avenue on January 7, 2003, and set up an investigative alert. However, he did not investigate the crime scene on the date of the crime. On or around that date, Detective Brannigan was unable to speak to Page because he was undergoing surgery. Further, shortly after the shooting, Detective Brannigan conducted a photo array during which both Page and Henry picked out defendant's picture and identified him as the shooter. On February 4, 2003, after defendant's arrest, Detective Brannigan conducted a lineup during which Henry was able to pick out defendant as the shooter. At trial, Detective Brannigan explained that the revolver used to shoot Page had a cylinder containing all bullet casings that does not eject shell casings like other

weapons. Chicago Police Evidence Technician Watson photographed and processed the crime scene. He testified about it and stated that he did not recover any ballistics evidence.

¶ 11 After the court denied defendant's motion for a directed verdict, the jury returned a verdict of guilty on both counts. On September 7, 2010, the court sentenced defendant to 30 years in prison.

¶ 12 On March 3, 2010, after the verdict, the defendant presented a posttrial motion for new trial. Defendant argued that the trial court erred in excluding evidence of Page's marijuana use on the day of the shooting. This motion was denied the same day. On March 18, 2010, defendant presented an oral *pro se* motion for new trial alleging ineffective assistance of counsel for failure to investigate. The court instructed defendant to write his *pro se* claim and name the witnesses that the defense counsel had failed to investigate.

¶ 13 On April 12, 2010, defendant filed additional allegations and stated that defense counsel had failed to investigate his alibi witnesses, Joseph and Georgia Henderson. On May 26, 2010, the State filed a written response to defendant's *pro se* allegations and argued that defendant failed to state the relevance of the witnesses' testimony and whether their testimony would have been occurrence, alibi, or character testimony.

¶ 14 On May 27, 2010, the court held a preliminary inquiry into defendant's *pro se* motion. The trial court asked defense counsel to explain defendant's claim of failure to investigate. Counsel stated that because he had not decided to present an alibi defense, he did not interview the defendant's witnesses. Counsel also stated that he had spoken to one of the witnesses, that they were defendant's parents, and that they had no "direct knowledge" involving the case. Counsel stated that the witnesses were of no sound relevance to the case. The State stated that defendant's representation was sound. After listening to defendant, defendant's counsel, State's

counsel, and reviewing each paragraph of defendant's claim, the court found that defendant was adequately represented. Accordingly, the court denied defendant's *pro se* motion for new trial.

¶ 15 On direct appeal, defendant argued that the trial court improperly limited his right to conduct a reasonable cross-examination when it prohibited cross-examination regarding a key State witness's marijuana use on the day of the crime. Second, defendant argued that the trial court erred in denying his posttrial motion for new trial alleging ineffective assistance of counsel. We affirmed. *People v. Henderson*, 2013 IL App (1st) 102736-U.

¶ 16 Defendant filed a *pro se* postconviction petition on July 6, 2014, alleging *inter alia* that trial counsel was ineffective for failing to investigate the frosted-glass window through which Henry allegedly viewed the crime and that counsel was ineffective for failing to call an expert on eyewitness identification to testify about "post event identification." Petitioner attached excerpts from the trial transcript and copies of blurry black and white photographs to his petition.

¶ 17 On November 7, 2014, defendant filed a *pro se* supplemental petition for postconviction relief in which he again argued that the photographs of the frosted-glass windows at the scene show that Henry could not have observed the shooting. Defendant attached his affidavit to his petition, wherein he averred that upon hearing Henry's testimony at trial, defendant immediately informed his trial counsel about the frosted-glass window, he spoke to trial counsel while awaiting trial about hiring an expert to testify about the "effects of post trauma identification by witnesses," and he asked trial counsel to send an investigator to photograph the crime scene. Defendant also attached an affidavit from Dwayne Jones, dated August 1, 2014, who stated that there is a "round frosted window that you cannot see threw [sic] on either side of the door that leads up to the apartment on the second floor." Jones further stated that he had been in the building several times as a child and as an adult. Defendant also alleged that trial court was

ineffective for failing to argue that there was no consent to search, failing to call an expert to testify to the effects of marijuana on identification and for failing to provide defendant with sufficient information to decide whether to testify at trial.

¶ 18 On January 9, 2015, the circuit court summarily dismissed defendant's supplemental *pro se* postconviciton petition. The court found that the photographs of the frosted-glass window that defendant attached to his petition were "completely indiscernible" and was not new evidence because defendant had this information before his trial. In addition, the court found that the photographs were not of such conclusive character that they would likely change the result on retrial because the photographs did not establish the condition of the window on the day of the shooting. The court further found that defendant's claims that counsel was ineffective for failing to call experts was not supported by any documentation. It is from this order that defendant now appeals.

¶ 19 ANALYSIS

¶ 20 Defendant first argues that his supplemental *pro se* postconvcition petition asserted an arguable basis of a claim of ineffective assistance of counsel for failing to investigate and present evidence that the window through which Henry viewed the shooting was made of frosted glass, which would have cast doubt on the reliability of her identification because she would not have been able to see defendant through the frosted glass window. Defendant also claims that trial counsel was ineffective for failing to call an expert witness on identification.

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

process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 22 At the first stage, the circuit court must determine whether the petition before it alleges the " 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of post-conviction review, as opposed to setting forth a claim in its entirety. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009); *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). Taking all well-pleaded facts as true, the court must determine whether the petition alleges a constitutional infirmity that, if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2010*); People v. Coleman*, 183 Ill. 2d 366, 385 (1998). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. Our review of the summary dismissal of a petition is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 23 A postconviction petition must be both verified by affidavit (725 ILCS 5/122-1(b) (West 2012)), and supported by "affidavits, records, or other evidence" (725 ILCS 5/122-2 (West 2012)). *People v. Collins*, 202 Ill. 2d 59, 65 (2002). If such "affidavits, records, or other evidence" are unavailable, the petition must explain why. 725 ILCS 5/122-2 (West 2012); *Id.* Affidavits, records or other evidence is required to ensure that the allegations in a petition are capable of objective or independent corroboration. *Id*. Without this additional support or explanation of its absence, the gist standard of post conviction review has not been met and this court may dismiss the petition as frivolous and patently without merit. *Id*.

¶ 24 Defendant first claims that his *pro se* postconviction petition was improperly summarily

dismissed because he stated an arguable claim that counsel was ineffective for failing to investigate and present evidence that the window through which Henry viewed the offense was frosted glass. Defendant claims that had counsel investigated, he would have been able to challenge Henry's identification of defendant based on the fact that she would not have been able to see defendant through a frosted glass window.

¶ 25 Normally, to establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) counsel's actions resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the first prong, a defendant must demonstrate that his attorney's performance fell below an objective standard of reasonableness. *Evans*, 209 Ill. 2d at 220. Under the second prong, prejudice is shown where there is a reasonable probability that the result would have been different but for counsel's alleged deficiency. *Id*. Failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. However, in reviewing the summary dismissal of a *pro se* postconviction petition at the first stage, we hold a defendant to a more lenient standard. At this stage, a defendant must show that (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the petitioner was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 20-22 (citing *People v. Hodges*, 234 Ill. 2d 1, 17 (2009)).

¶ 26 With respect to this claim, defendant has not made the required factual showing. Although defendant attached black and white photocopies of photographs of the alleged frosted glass window and an affidavit from Dwayne Jones, which he claims support his contention, we find that the evidence petitioner claims supports his claim of ineffective assistance of counsel to be insufficient. The photographs of the windows from the crime scene that defendant attached to

his petition are indiscernible. Furthermore, even if they were discernible, defendant has provided no evidence to suggest how the windows looked on the day of the crime. In fact, photographs of the crime scene were taken by the Chicago police department and the record indicates that defense counsel relied on these photographs at trial in an attempt to discredit the witnesses. In addition, Dwayne Jones' affidavit is too general to support defendant's claim. Mr. Jones makes no remarks regarding the condition of the window on the date of the crime. Without the required factual showing, defendant has therefore failed to state the gist of a constitutional claim.

¶ 27 Defendant claims that his *pro se* postconviction petition raised the arguable claim that trial counsel was ineffective for failing to present an expert to testify about eyewitness identification. Specifically, defendant contends that an expert would have supported his defense that Henry's and Page's identification of him as the shooter was unreliable because Page was fighting with three men and would not have been able to pay attention.

¶ 28 We recognize that in recent years our supreme court has recognized the potential usefulness of expert testimony concerning reliability of eyewitness identifications in the appropriate case. See *People v. Lerma*, 2016 IL 118496, ¶ 24 (recognizing that eyewitness identification "research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony"); *People v. Starks*, 2014 IL App (1st) 121169, ¶ 71 (citing *State v. Guilbert*, 306 Conn. 218, 49 A. 3d 705, 721-22 (2012) (recognizing that "expert testimony on such subjects as (i) the weak correlation between a witness's confidence in his or her identification and its accuracy, (ii) how the presence of a weapon can diminish the reliability of an identification, and (iii) how stress at the time of observation can render a witness less able to retain an accurate perception and memory of the event, can assist the jury in evaluating such evidence without usurping the jury's factfinding function" in certain appropriate circumstances).

Although our supreme court has held that the circuit court may abuse its discretion in excluding proffered eyewitness expert testimony where the only evidence against the defendant consists of eyewitness identifications *(Lerma*, 2016 IL 118496, ¶ 32), the court has not extended this holding to claims that an attorney's failure to offer such expert testimony amounts to ineffective assistance of counsel. We see no reason to do so either.

¶ 29 Whether to present expert witness testimony regarding the reliability of eyewitness identifications is a matter of trial strategy. "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf" are "matters of trial strategy" which are "generally immune from claims of ineffective assistance of counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997). To overcome this presumption, counsel's trial strategies "must appear irrational and unreasonable in light of the circumstances that defense counsel faces at the time" such that "no reasonably effective criminal defense attorney, facing similar circumstances, would pursue such strategies." *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997). We have recognized that a defense counsel's "failure to call an expert witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion." *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005). Accordingly, we reject defendant's assertion that he presented the gist of a constitutional claim.

¶ 30 CONCLUSION

¶ 31 For the reasons stated, the judgment of the trial court is affirmed.

¶ 32 Affirmed.