2019 IL App (1st) 163243-U
No. 1-16-3243
Order filed January 22, 2019

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 19195
	)	
FRANK JEMISON,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition alleging ineffective assistance of counsel for failure to call an alibi witness where defendant failed to comply with the supporting documentation requirement in section 122-2 of the Post-Conviction Hearing Act.

¶ 2 Frank Jemison appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act. He argues that the trial court erroneously dismissed his petition where he stated the gist of a claim of ineffective assistance of trial counsel, based on a failure to investigate and present an alibi witness. We affirm because Jemison failed to attach any

supporting documentation or other evidence to corroborate his claim, as the Act requires, including an affidavit essential to corroborating Jemison's claim.

¶ 3 Background

¶ 4 A jury convicted Jemison of attempted first degree murder and aggravated battery with a firearm. The trial court sentenced him to 50 years' imprisonment. We affirmed on direct appeal. *People v. Jemison*, 2015 IL App (1st) 131216-U (unpublished order under Illinois Supreme Court Rule 23). We will state the facts necessary to this disposition.

¶ 5 At trial, the victim Larry Price testified that around midnight on September 13, 2008, he, his brother, Joshua McCray, and their friend, Breshone Fancher, drove to a party on the 1400 block of Ridgeway Avenue. The party was on the second floor of a two-flat apartment building. The men walked to the second floor; Price stuck his head inside the apartment. There were "mostly guys" there so they decided to leave. As they walked back down the stairs, Price heard a "bunch" of people coming behind them. Someone shouted, "Hey, who the f*** is you?"

¶ 6 Price continued walking to his car, but could hear footsteps behind him. Someone said, "Him in the orange got your cell phone." Price had on orange and white. He did not know anything about a cell phone. As Price approached his car, someone behind him ran and prevented him from opening the door. The person said, "Don't you hear me talking to you, empty your pockets, man, empty your pockets." Fancher got into the back seat and McCray walked to the passenger side. Twelve to thirteen people started "punching" Price.

¶ 7 Price attempted to check on his brother. As he walked toward him, he encountered Jemison, whom he identified in court. Price had never seen Jemison, but noticed he was short and had "crazy little hair." Price would "never forget [defendant's] face, the tattoo," which was

"stuck in [his] mind." Jemison pointed a chrome gun at Price's face. Although Price looked at the gun, he also looked "dead right at him in his face." Price slapped the gun down and it fired. Price felt his leg fall from under him.

¶ 8 Price did not see anyone else with a weapon. He heard another shot and felt a "burning" in his stomach. He attempted to run but fell in the middle of the street. As he was running, he heard shots ricocheting and felt something "like jump up and bite [him] like it was burning." When Price fell, McCray grabbed him and dragged him down the street.

¶ 9 Eventually, the police came and had Price transported to the hospital where he had surgery. Price showed the jury scars on his abdomen and leg, and told them about a scar on his right buttock. On September 26, 2008, Price went to the police station and identified Jemison in a physical lineup. He did not see either McCray or Fancher while at the police station.

¶ 10 McCray and Fancher both testified to a substantially similar version of events as Price. They each identified Jemison in court, and had separately identified him as the shooter in physical lineups on September 26.

¶ 11 Derrick Beverly testified that he knew Jemison. On the night of the shooting, he saw Jemison playing dice "in front of the party." After hearing shots fired, Jemison was running with everyone else. Beverly denied seeing Jemison with a gun and did not see who was shooting.

¶ 12 Beverly was at the police station on September 25, on an unrelated matter. Officers approached him and asked him about the shooting and Beverly "agreed to what they said" to "get out of whatever [he] was in." The police "promised" that, if Beverly cooperated, he would not be charged with armed robbery, the offense he was in custody for at that time. He denied giving the police information about the shooting, other than that he was present during the shooting and saw

someone in a hoodie firing a gun. Beverly acknowledged he signed a statement typed out by an assistant State's Attorney in which he said he saw Jemison pull a handgun from his hoodie or waistband. But, according to Beverly, the statement was "the story" detectives gave him.

¶ 13 Beverly acknowledged that he had prior convictions for possession of a controlled substance and aggravated robbery; was incarcerated for armed robbery, attempted burglary, and possession of a stolen vehicle; and had been on parole at the time of this arrest on September 25.

¶ 14 ASA Anthony Zecchin published Beverly's written statement to the jury. The statement read that Beverly saw Jemison "almost every day." At around midnight on the day of the shooting, Beverly was on the 1400 block of Ridgeway and saw Jemison standing with two other men. Jemison and the other men walked toward two men with their backs to Jemison. One of the men wore a red jacket. Beverly watched as Jemison pulled a handgun from either his hoodie or waistband and the two men turned around and put their hands up. Jemison reached for the man with the red jacket and then raised the gun and fired multiple shots toward him. The man fell to the ground and both Beverly and Jemison ran. Jemison still had the gun in his hand as he ran. Beverly was not promised anything in exchange for his statement. ASA Zecchin testified that, during the interview, neither he nor the detective present promised Beverly anything. The detective did not give Beverly any information.

¶ 15 The jury found Jemison guilty of attempted first degree murder and aggravated battery with a firearm. The trial court merged the counts and sentenced Jemison on the attempted murder count to 50 years' imprisonment, which included a mandatory 25-year firearm enhancement for personally discharging a firearm causing great bodily harm. On direct appeal, we affirmed. *Jemison*, 2015 IL App (1st) 131216-U (unpublished order under Supreme Court Rule 23).

¶ 16 In February 2016, Jemison filed a *pro se* petition for postconviction relief (725 ILCS 5/122-1 *et seq.* (West 2016)), claiming "actual innocence." Jemison asserted that trial counsel was ineffective for failing to investigate and call Quantinique Redo as an alibi witness. He claimed that before trial, he informed counsel that, at the time of the offense, he was at 1303 South Independence Boulevard and Redo "would have been [his] alibi." He claimed he gave counsel Redo's address. Jemison referred to Redo's affidavit as "Exhibit C," but did not attach the affidavit. Instead, he attached a letter, stating that he has "a[n] affidavit" supporting his claim of actual innocence, but could not attach it because "the mail *** at Menard has been backed up for some time now due to various reasons." He further stated he understood he must provide a reason if an affidavit was not attached, and that he would send the affidavit when he received it.

¶ 17 In May 2016, the trial court summarily dismissed Jemison's petition. In dismissing the petition, the court noted that Jemison "merely attache[d] his own letter to the court wherein he recognize[d] that Redo's affidavit [was] crucial to his *actual innocence* claim and explain[ed] that he has not attached it to the instant petition because " 'the mail at Menard has been backed up for some time now,' " and that he "promise[d] to send the letter as soon as he receive[d] it." (Emphasis in original.)

¶ 18 With respect to his claim of ineffective assistance for failing to call Redo as an alibi witness, the court found that, without Redo's affidavit, Jemison's "self-serving assertions are insufficient to overcome the strong presumption that the trial counsel decision was the product of reasonable trial strategy in light of the evidence, not incompetence."

¶ 19 Analysis

¶ 20 Jemison contends that the trial court erroneously dismissed his petition because he stated the gist of a claim of ineffective assistance of trial counsel for failure to investigate and present Redo as an alibi witness.

¶ 21 The Act sets forth a three-stage process as a means for criminal defendants to challenge their convictions based on constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Jemison's petition for postconviction relief was summarily dismissed at the first stage, where the trial court independently reviews the petition, taking the allegations as true, and determines 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, that is, a legal theory completely contradicted by the record, or fanciful or delusional factual allegations. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 22 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 sets a low threshold. *Hodges*, 234 Ill. 2d at 9. 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. *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). Despite this low threshold, a defendant is not excused from providing factual support for his or her claims and must show a sufficient factual basis to demonstrate that the allegations in the petition are "capable of objective or independent corroboration." *People v. Collins*, 202 Ill. 2d 59, 67 (2002). We review the summary dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 23 Section 122-2 of the Act sets forth the requirement for providing factual support for a postconviction petition. Specifically, section 122-2 requires a defendant to support the allegations in the petition by attaching "affidavits, records or other evidence" to the petition or explain its absence. 725 ILCS 5/122-2 (West 2016); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). In this way, the defendant can show that the allegations in the petition are capable of independent corroboration and identify "sources, character, and availability of evidence alleged to support the petition's allegations." *People v. Allen*, 2015 IL 113135, ¶ 34; see also *Delton*, 227 Ill. 2d at 254.

¶ 24 A defendant's failure to attach the affidavits or documentation required by section 122-2, 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)). If a postconviction petition is not properly supported with corroborating documentation 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.

¶ 25 We find the trial court's summary dismissal of Jemison's petition was proper because he failed to attach any supporting documentation to corroborate his claim, in contravention of the requirements of section 122-2. As our supreme court recently explained, where a postconviction petitioner raises a claim of ineffective assistance of counsel for failing to call a particular witness, an affidavit from the proposed witness is not necessarily required to support a claim under section 122-2, as long as the claim is supported by the record or other evidence. *People v. Dupree*, 2018 IL 122307, ¶ 34 (noting, in context of second stage postconviction petition, that affidavit is required only where "it is essential for the postconviction petitioner to make the

necessary 'substantial showing' to support a claim of ineffective assistance," but may not be required in every case raising ineffectiveness claim based on counsel's failure to call witness).

¶ 26 Despite this requirement, Jemison provides no evidence or documentation to support his claim. Particularly, without Redo's affidavit, we cannot ascertain what testimony, if any, Redo could provide in support of Jemison's claim, or that this potential testimony even exists. There is nothing in the record to support Jemison's contention that counsel failed to contact Redo. Further, we cannot take Jemison's claim that he was with Redo at an address on South Independence as true because three trial witnesses, including the victim, identified Jemison as the shooter on Ridgeway and a fourth witness, Beverly, also placed him there. So, Jemison's petition does not comply with section 122-2 of the Act, and the lack of corroboration renders review of his claim impossible.

¶ 27 Nevertheless, Jemison claims that his petition meets the supporting documentation requirement because he explained the absence of Redo's affidavit when he wrote the trial court a letter, in which he explained that the prison mail was delayed. Additionally, relying on *People v. Washington*, 38 Ill. 2d 446 (1967), he argues in his reply brief that an indigent, incarcerated postconviction petitioner is excused from attaching an affidavit where the petitioner "specifically identifies each proposed witness and sets forth the essential aspects of each witness' testimony."

¶ 28 Nonetheless, we do not find that Jemison adequately explained the absence of the necessary affidavit. Jemison's letter vaguely states that he has an affidavit and did not receive it in time to attach to his petition, but then states that he would send it when he did receive it. Based on the record, we are unable to ascertain when or whether Jemison attempted to contact Redo or whether she had even agreed to provide an affidavit and what, if anything, she would

say regarding Jemison's alleged alibi. It is also not clear whether Jemison actually possesses Redo's affidavit or merely requested it. In short, nothing in Jemison's petition or letter corroborates his claim of counsel's failure to present an alibi witness, other than his own statements.

¶ 29 Additionally, while we acknowledge that, in certain situations, incarceration may excuse a defendant's failure to provide supporting materials in a postconviction petition (*Washington,* 38 Ill.2d at 451), incarceration, on its own, is not a sufficient explanation for failing to supply section 122-2 supporting documentation because relief under the Act is available only to persons "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2016). Thus, persons who are incarcerated and indigent file the vast majority of postconviction petitions.

¶ 30 Affirmed.