2019 IL App (5th) 150387-U

NO. 5-15-0387

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 06-CF-428
	)	
CHRISTOPHER WATKINS,	)	Honorable
	)	Barry L. Vaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant failed to attach an affidavit to his *pro se* postconviction petition, and was also unable to state the gist of a constitutional claim of ineffective assistance of counsel, the trial court's order summarily dismissing the *pro se* postconviction petition was correct.

¶ 2 Defendant appeals from the trial court's summary dismissal of his first-stage postconviction petition. In his underlying criminal case, defendant was convicted of first-degree murder and the trial court sentenced him to 45 years in prison. On direct appeal, defendant argued that he did not receive a fair trial because his trial counsel was not allowed to impeach the State's primary witness to the extent he wanted, because the chief detective's testimony included speculative and hearsay evidence, and because the

State's closing argument was unduly prejudicial. In addition, defendant raised a jury instruction issue and argued that his sentence was excessive. This court affirmed his conviction and sentence in *People v. Watkins*, 2014 IL App (5th) 110549-U. Defendant filed a postconviction petition alleging ineffective assistance of his trial counsel for failing to call a witness who may have provided testimony that he had no involvement in the murder. The trial court dismissed defendant's petition on August 7, 2015, as frivolous and patently without merit because defendant failed to attach an affidavit. For the reasons stated in this order, we affirm.

¶ 3 BACKGROUND

¶ 4 A Mount Vernon businessman, Randy Farrar, was killed on July 1, 2006. Farrar had been shot twice in his head.

¶ 5 In the immediate investigation, the Jefferson County sheriff's department found ammunition for a .380-caliber gun, two spent .380 shell casings on the floor of the basement located near Farrar's body, and a note on Farrar's nightstand with a name, "Susan," along with a telephone number. Farrar's cell phone was found in his vehicle, and there was a voicemail from "Susan" left on July 1, 2006. No fingerprints or other physical evidence connected defendant to the crime scene. However, it was later determined that the phone number on the note belonged to Gwen Jones, defendant's mother.

¶ 6 On July 11, 2006, Gwen Jones called the sheriff's department to advise that defendant told her that he and Demetrius Cole (also Gwen Jones's son) were at Farrar's house and that Cole shot Farrar. The sheriff's department then interviewed

defendant. Defendant claimed that Cole offered him $40 to drive Cole and Cole's girlfriend, Krysta Donoho, to a house to get money from a man who lived there. Defendant stated that only Donoho went into the house. Approximately 10 minutes later, Cole exited the car and went into the house to get Donoho. After his brother did not immediately return, defendant approached the house; looked into the windows; saw Donoho running and crying; heard a man yell; saw his brother and a man engage in a scuffle in the kitchen; saw Cole, Donoho, and the man go to the basement; spoke to Donoho, who came up from the basement to tell defendant that Cole was going to kill the man; heard gunshots; ran back outside of the house; and saw Cole run out of the house carrying a gun and a pair of shorts. Cole then threatened defendant if he "snitched." Defendant drove Cole and Donoho to the local Wal-Mart store. Later, Cole called defendant to advise that he was returning to the man's house.

¶ 7 The sheriff's department then interviewed Chandra Jones, who claimed she was also at Farrar's house when he was killed. While she concurred that defendant, Cole, and Donoho were present, she stated that after Farrar was killed, the four of them went first to a Circle K gas station, then to a McDonald's restaurant, and then to Wal-Mart.

¶ 8 From surveillance tapes at the gas station and restaurant, the sheriff's department confirmed defendant's presence at the gas station. In the gas station video, defendant was seen displaying a large amount of cash. Cole walked next door to the McDonald's and showed the cashier that he also possessed a large amount of cash.

¶ 9 On the basis of Chandra Jones's interview and the content seen on the surveillance tapes, the sheriff's department asked defendant to answer additional questions. During this interview, defendant stated that Cole took $1700 from Farrar's home and gave him $100 plus the originally-promised $40. Later he admitted that he had actually taken $400 to $700 from Farrar's home. He also admitted that the four individuals returned to the man's house to remove an item that could have contained fingerprints.

¶ 10 Gwen Jones testified that she and Donoho met Farrar for the first time at an area liquor store. Farrar gave Donoho his card listing his name and phone name. Donoho told Farrar her name was Susan. Later, Farrar called Gwen Jones's home and asked to speak to "Susan."

¶ 11 At trial, Chandra testified that she first met defendant, Cole, and Donoho on the date of the murder. She learned that Farrar would pay Donoho for spending time with him. She testified that the first stop of the evening was at a Casey's General Store where Donoho used a pay phone to make a call. Upon her return to the car, they drove to the man's house. She and Donoho went to the front door. Farrar answered and invited Donoho into his house, but told Chandra that she had to stay outside. From outside of the house, she saw defendant and Cole enter the house and then engage the man in a fight. Shortly after that, defendant came out of the house with a lot of money. Cole and Donoho stayed inside the house. Defendant headed back to the house. Chandra testified that she heard two gunshots after defendant went back into the house. At the time of both gunshots, Donoho was standing in the doorway. Then, the three exited the

house and got back into the vehicle with Chandra. Defendant gave Chandra $200 that she understood was intended to keep her from speaking about what happened that night.

¶ 12 Two other women testified that they provided defendant, Cole, and Donoho with a ride to a house on July 2, 2006, for which they were paid $40. Defendant, Cole, and Donoho entered the house from the rear of the house and returned to the vehicle with Donoho carrying something.

¶ 13 Defendant did not testify at trial.

¶ 14 The jury deliberated and returned verdicts finding defendant guilty of both robbery and first-degree murder. At sentencing, defendant asked the Farrar family for forgiveness, noting that he was under the influence at the time of the crime. The trial court vacated the robbery conviction and sentenced defendant to 45 years in prison.

¶ 15 Defendant's posttrial motions were denied.

¶ 16 On appeal to this court, we affirmed defendant's conviction and sentence. *People v. Watkins*, 2014 IL App (5th) 110549-U.

¶ 17 On May 14, 2015, defendant filed his *pro se* postconviction petition. Defendant's first claim alleges that his trial attorney did not investigate and call Tishann Dorsey, a witness who could have exonerated him, to testify at trial. Dorsey had written a letter to defendant's attorney, James Henson, telling him that Krysta Donoho told her that defendant took no part in the robbery or the murder. A new attorney, Sean Featherstun, was appointed to represent defendant. Defendant told attorney Featherstun about the Dorsey letter, but Featherstun did not call Dorsey as a witness or attempt to have the letter admitted into evidence at trial. Defendant did not attach any affidavits to the

postconviction petition, and did not otherwise provide information about why there were no affidavits attached.

¶ 18 On August 7, 2015, the trial court dismissed the postconviction petition as frivolous and patently without merit because no affidavits were attached. The court also determined that Featherstun's decision not to call Dorsey as a trial witness was a matter of trial strategy. In addition, the court noted that Donoho's purported statement that defendant had nothing to do with the robbery or the murder was inconsistent with defendant's own statements that he was present at the crime scene.

¶ 19 From the order dismissing his postconviction petition, defendant timely appeals. We have jurisdiction over this appeal pursuant to Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014).

¶ 20 ANALYSIS

¶ 21 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a three-stage process by which a criminally convicted individual can challenge his conviction by arguing that his constitutional rights were substantially denied. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008); *People v. Johnson*, 2018 IL App (5th) 140486, ¶ 21, 99 N.E.3d 1. Only the first stage of the postconviction process is involved in this appeal.

¶ 22 At the first stage of postconviction proceedings, the trial court "reviews the petition to determine whether it is frivolous and patently without merit." *Johnson*, 2018 IL App (5th) 140486, ¶ 21. A petition that is frivolous or is patently without merit has been defined as one arguing an "indisputably meritless legal theory or a fanciful

factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). The trial court independently reviews the petition without any input from the State. *People v. Tate*, 2012 IL 112214, ¶¶ 9-10, 980 N.E.2d 1100; *Johnson*, 2018 IL App (5th) 140486, ¶ 21; *People v. York*, 2016 IL App (5th) 130579, ¶ 15, 65 N.E.3d 1029. The trial court must interpret all well-pleaded facts in the defendant's petition as true and must not engage in any fact-finding. *People v. Coleman*, 173 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071-72 (1998). To advance to the second stage of the postconviction process, the petition must state the gist of a constitutional claim. *Johnson*, 2018 IL App (5th) 140486, ¶ 21; *York*, 2016 IL App (5th) 130579, ¶ 15. The court will summarily dismiss the petition if it concludes that the petition does not meet this standard. 725 ILCS 5/122-2.1(a) (West 2014); *Johnson*, 2018 IL App (5th) 140486, ¶ 21. The court should only dismiss the postconviction petition if the petition contains no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16.

¶ 23 In order to succeed on an ineffective-assistance-of-counsel claim, a defendant must be able to show both that his attorney's representation was objectively unreasonable and that this unreasonable representation caused prejudice—that there is a reasonable probability that, without counsel's errors, the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 24 The Illinois Supreme Court has concluded that the above-stated *Strickland* test should apply at the second stage of the postconviction process, when the defendant must make " 'a substantial showing of a constitutional violation.' " *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 11 n.3). At the first stage of the postconviction petition

process, the court must view ineffective assistance allegations with a lower standard of pleading. *Id.* ¶¶ 19-20; *People v. Burns*, 2015 IL App (1st) 121928, ¶ 30, 47 N.E.3d 266. " 'At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 25 We review a trial court's summary dismissal of a first-stage postconviction petition on a *de novo* basis. *Id.* ¶ 10.

¶ 26 The Affidavit Requirement

¶ 27 The Post-Conviction Hearing Act states: "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014). Courts have routinely summarily dismissed defendants' petitions for failure to comply with the affidavit requirement. *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007) (stating that the failure to comply with the rule is "fatal" and by itself justifies the petition's summary dismissal); see also *People v. Delton*, 227 Ill. 2d 247, 257-58, 882 N.E.2d 516, 521-22 (2008); *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002).

¶ 28 Here, defendant's postconviction petition did not contain any affidavit—not his own, or one from the witness Tishann Dorsey, or one from attorneys Henson and/or Featherstun. He also did not attach a copy of this letter written by Dorsey. Defendant did not provide any explanation for why he had not attached any affidavits to his

postconviction petition. He argues that the letter is in the possession of his trial counsel, and that he could not have expected either of his attorneys to have signed an affidavit attesting to his ineffectiveness.

¶ 29 An important purpose of section 122-2 of the Act is to show "that the verified allegations are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 67. In light of this purpose, we are not persuaded by defendant's argument that his own attorney would not prepare and sign an affidavit attesting to his ineffectiveness. Nothing in his postconviction petition or in his brief on appeal asserts that he asked one or both of his trial attorneys to do so. His mere allegation that they could not have been expected to draft that type of affidavit is theoretical, and thus insufficient. *People v. Wideman*, 2013 IL App (1st) 102273, ¶ 18, 994 N.E.2d 546 (stating that it is not sufficient to merely assert in a theoretical sense about difficulty in obtaining supporting affidavits when the defendant "never asserted that he personally experienced those difficulties"). The Illinois Supreme Court has routinely affirmed the dismissal of postconviction petitions in similar circumstances. See *Harris*, 224 Ill. 2d at 142 (summary dismissal was proper where defendant made an unsupported claim that counsel failed to investigate potential witnesses); *Delton*, 227 Ill. 2d at 257-58 (summary dismissal was proper where defendant made an unsupported claim that counsel failed to investigate possible eyewitnesses and police harassment); *Collins*, 202 Ill. 2d at 66 (summary dismissal was proper where defendant made an unsupported claim that counsel promised defendant he would file an appeal).

¶ 30 In support, defendant cites *People v. Hall*, 217 Ill. 2d 324, 841 N.E.2d 913 (2005), as authority for his claim that he was not expected to have obtained an affidavit from his attorney citing his own ineffectiveness. We find that the facts of *Hall* are quite distinguishable. While the defendant in that case did not have an affidavit from his own attorney attesting to his ineffectiveness, that is the only analogous fact to this case. In *Hall*, the defendant's postconviction petition was amply supported by documents supporting his claim, including his own affidavit in which he attested to counsel's alleged lies in great detail. *Id.* at 333-34.

¶ 31 Furthermore, failing to attach an affidavit of the proposed witness is especially problematic. "A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1, 13 (2000) (citing *People v. Johnson*, 183 Ill. 2d 176, 192, 700 N.E.2d 996, 1004 (1998); *People v. Thompkins*, 161 Ill. 2d 148, 163, 641 N.E.2d 371, 378 (1994)). Without the affidavit or even a copy of Dorsey's letter, the "reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.*

¶ 32 We find that the trial court's summary dismissal of defendant's postconviction petition was correct and must be affirmed.

¶ 33 Gist of a Constitutional Claim

¶ 34 We also conclude that summary dismissal was appropriate in this case because defendant has not established that he was arguably prejudiced by the alleged

ineffectiveness of trial counsel. The strength of the State's case is without question. Defendant was charged with first-degree murder while committing a forcible felony—robbery. The jury in this case was instructed on the issue of accountability as follows:

> "A person is legally responsible for the conduct of another person when either before or during the commission of an offense, with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agreed to aid, or attempts to aid the other person in the planning or commission of the offense." Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000).

The eyewitness, Chandra Jones, provided testimony that she saw defendant beating Farrar. She also testified about the events of the evening—the planning of the crime, along with its aftermath, including defendant's $200 payment that she believed was to "buy her silence." While defendant did not testify at trial, his recorded interviews with the sheriff's department informed the jury that he was present in the house when Farrar was murdered and that he took money from Farrar's house.

¶ 35 The evidence at issue here involves an alleged statement made by a codefendant, Donoho, in which she told Dorsey that defendant was not involved with this crime. Setting aside the evidentiary hearsay issues of this letter, defendant's own statements, coupled with Chandra Jones's testimony, effectively and completely discredit the alleged hearsay statement by Donoho to Dorsey.

¶ 36 Accordingly, we find that even if defendant's trial counsel was ineffective, defendant was not arguably prejudiced. Defendant is not able to establish a gist of a

constitutional claim. The trial court did not err in summarily dismissing defendant's postconviction petition.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the judgment of the Jefferson County circuit court.

¶ 39 Affirmed.