

No. 1-12-1916

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 2651
	)	
DIEGO SANTIAGO,	)	The Honorable
	)	Arthur F. Hill, Jr.,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err in dismissing defendant's first-stage *pro se* postconviction petition because defendant's allegations are premised on an indisputably meritless legal theory, which lacks an arguable basis in the law. Affirmed.

¶ 2 Defendant Diego Santiago appeals from the circuit court's order summarily dismissing his petition, filed *pro se*, under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant contends the circuit court erred in denying him relief at the first stage

of postconviction proceedings because he adequately alleged his trial counsel was ineffective for failing to call defendant's parents to testify as alibi witnesses. In addition, defendant contends he adequately alleged trial counsel was ineffective for failing to call occurrence witness Annette Vega to testify that she did not definitively identify defendant as the shooter in a lineup. We reverse.

¶ 3

### BACKGROUND

¶ 4 Defendant is currently serving a 55-year sentence imposed as part of his murder conviction following a jury trial. The following facts were adduced at trial. On December 28, 2006, defendant, a member of the Maniac Latin Disciple (MLD) street gang, allegedly shot and killed Epifanio Santos, Jr., a member of the rival Spanish Cobra (SC) street gang, at the intersection of Armitage and Tripp Avenues in Chicago. Defendant and codefendants Emelio Rivera, Miguel Adorno, Alexandro Flores, and Martin Logan were indicted for first-degree murder. In addition, defendant was charged with unlawful use of a weapon by a felon.

¶ 5 At trial, the State introduced into evidence transcripts from the guilty plea hearings of both Adorno and Logan. Transcripts revealed that two days after the shooting, Adorno admitted in a videotaped statement to Chicago police that he was a member of the MLDs and that he participated in the street fight with the SCs that resulted in Santos's death. On May 20, 2008, Adorno pled guilty to conspiracy to commit first-degree murder and provided substantially the same information from his videotaped interview at his guilty plea hearing. At the hearing, Adorno verified that on the day of the shooting, there had been a fight between the MLDs and the SCs. A group of MLDs then convened at defendant's house, where defendant received a telephone call from his girlfriend, Lisa, who was the mother of Santos's child. Defendant and Santos were well-acquainted and had argued periodically over several months. Adorno

overheard defendant tell Lisa, “stop putting my name in shit, bitch, 'cuz you're going to see what's going to happen to him.” Defendant then retrieved a gun at his home before everyone departed from defendant's house to look for SCs. The MLDs came across Santos and another SC, Rene Otero, and a fight ensued. Adorno struck Santos, and Logan punched him, knocking him to the ground. Defendant then approached and said, “I got this,” and shot Santos in the head with an automatic weapon. The men fled the scene, and defendant asked Adorno to get rid of the weapon.

¶ 6 Police arrested Logan the day after the shooting, and he gave a videotaped interview, providing essentially the same information as Adorno, namely that he saw defendant shoot Santos. Logan also pled guilty to conspiracy to commit murder and acknowledged the accuracy of his interview statements at his plea hearing.

¶ 7 Despite all of this evidence, once called as witnesses for the State at defendant's trial, both Adorno and Logan disavowed their earlier statements. At trial, the State initially called Adorno, and he testified that he was unable to recall a significant portion of his videotaped interview and admissions at his guilty plea hearing. He stated that he was a member of the MLDs, but defendant was not. On the day of the shooting, codefendants convened in defendant's backyard prior to the shooting, and another MLD named Casper was given a gun so he could “prove himself.” It was Casper who was present at the fight, not defendant, and Casper was the only person with a gun. Adorno did not see the actual shooting, but recalled telling the detectives that Casper shot Santos.

¶ 8 Logan's trial testimony was substantially similar to Adorno's. He was unable to recall much of his statement to police or his testimony at his guilty plea hearing. He testified that defendant was not present at the fight and was not the shooter. He stated that after he was

arrested, the arresting officers stopped the police vehicle on the way to the station to tell Logan what to say in the police interview. The arresting officers threatened to charge him with the shooting, but told him they would let him go if he named defendant as the shooter.

¶ 9 The State also called Carlos Garcia, an MLD gang member, who testified that defendant was a member of the MLDs. Garcia admitted to participating in the fight with the SCs that resulted in Santos's death. Garcia observed defendant arrive at the fight with a gun and walk toward Santos, who was on the ground. He heard shooting, but did not see the actual shots fired. Garcia fled the scene in a car with Flores and Rivera. After they fled, Flores realized he had left his coat with his identification at the scene of the shooting. The three drove back to the scene and were arrested.

¶ 10 Rene Otero, an SC gang member, testified that he and Santos were smoking marijuana at the intersection of Armitage and Tripp when they were assaulted by a group of men. Otero and Santos fought back. During the fight, Otero saw Santos fall to the ground and then heard two gunshots. He told police that he did not actually see the shooting, but saw defendant with a gun at the scene.

¶ 11 Chicago police detective James Gilger testified that he saw Santos's body on the sidewalk when he arrived at the scene. Evidence technicians recovered two bullet fragments and a shell casing. Officer Vincent Stinar also testified that he was one of the officers who arrested Logan the day after the shooting. He took Logan directly to the police station without making a stop and denied telling Logan what to say in his videotaped interview.

¶ 12 Following this evidence, the State rested. Defendant then rested without presenting evidence.

¶ 13 After closing arguments, the jury found defendant guilty of first-degree murder by personally discharging a firearm. The circuit court subsequently sentenced defendant to 30 years' imprisonment for the murder, to be followed by an additional 25 years for discharging a firearm. The unlawful use of a weapon charge merged because of the mandatory discharging of a firearm enhancement.

¶ 14 This court affirmed the judgment on direct appeal, rejecting defendant's claims that the State violated evidentiary rules by introducing prior consistent statements, as well as by referencing the guilty pleas of codefendants on direct examination. *People v. Santiago*, 401 Ill. App. 3d 927 (2011).

¶ 15 On April 4, 2012, defendant filed a *pro se* postconviction petition pursuant to the Act, supported by affidavits. In relevant part, he alleged that trial counsel was ineffective for failing to call defendant's parents to testify as his alibi witnesses, and also for failing to call occurrence witness Annette Vega. In his affidavit, defendant's father, Diego Santiago, Sr., alleged that defendant was at home with his family on the day of the incident, and trial counsel informed him that counsel would be called to testify as an alibi witness on defendant's behalf. In addition, defendant's father attested that defense counsel informed him that his testimony was unnecessary because counsel allegedly believed that the State did not have enough evidence to convict defendant. In her affidavit, defendant's mother, Carmen Santiago, also attested that defendant was at home with his family on the day of the incident. Trial counsel informed her that she was on a potential witness list to testify, but counsel eventually informed her that her testimony was not needed.

¶ 16 The circuit court summarily dismissed defendant's *pro se* postconviction petition concluding defendant's claims for ineffective assistance of trial counsel were waived because

they were issues that could have been raised on direct appeal. The court noted, however, that waiver aside defendant failed to meet the *Strickland* standard for ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). This appeal followed.

¶ 17

#### ANALYSIS

¶ 18 On appeal, defendant contends that the circuit court erred by summarily dismissing his *pro se* postconviction petition because there was an arguable basis in law and fact for defendant's claims that trial counsel was constitutionally ineffective for failing to call both defendant's parents to testify as alibi witnesses and for failing to call occurrence witness Annette Vega. The Act provides a method by which persons under criminal sentence in the State can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution or both. 725 ILCS 5/1-22 et seq. (West 2006); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding not involving the death penalty contains three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the circuit court must, within 90 days of the petition's filing, independently review the petition, and taking the allegations as true, determine whether the petition is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. The petition may only be dismissed as frivolous or patently without merit if the petition has no arguable basis either in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16. This standard presents a low threshold requiring only that the petitioner plead significant facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). In considering the petition, the circuit court may examine the court file of the criminal proceeding, any transcripts of the proceeding, any action by the appellate court, and affidavits or records attached to the petition. 725 ILCS 5/122-2.1(c) (West 2012); *Brown*, 236 Ill. 2d at 185. The summary dismissal

of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 336, 388-89 (1998).

¶ 19 At the outset, we note that although defendant did not file a verification affidavit, as required, the supreme court recently held that a circuit court may not dismiss a postconviction petition at the first-stage of proceedings solely on the basis that it lacks a verification affidavit. See *People v. Hommerson*, 2014 IL 115638, ¶ 11. The supreme court reasoned that at first stage proceedings, a petition is considered for its virtue rather than its procedural requirements, and to dismiss it for the lack of a verification affidavit would be at odds with a determination on whether the petition's allegations set forth a constitutional claim for relief. *Id.*

¶ 20 We also note the State's assertion that defendant waived his claim of ineffective assistance of counsel because he failed to raise it on direct appeal. In this manner, the State urges us to adopt the principle holding of the postconviction court. However, defendant's ineffective assistance of counsel claim is premised on allegations that his trial counsel failed to call certain defense witnesses, namely defendant's parents and an occurrence witness. As such, defendant's claim rests upon evidence outside the direct appeal record, and therefore, it could not have been properly raised on direct appeal. See *People v. Ligon*, 239 Ill. 2d 94, 112 (2010). Concluding that the State's waiver argument has no merit, we thus proceed in our review of defendant's underlying claim that his trial counsel was constitutionally ineffective.

¶ 21 To prevail on an ineffective assistance of counsel claim, the petitioner must show counsel's performance was deficient and that prejudice resulted from the deficient performance. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 36. Thus, a postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the

petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17. A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 22 Here, we cannot say that defendant was arguably prejudiced as a result of trial counsel's decision not to call defendant's parents as alibi witnesses. To establish prejudice, defendant must be able to demonstrate a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Here, defendant's parents' testimony would not have changed the outcome of the proceedings given the quantum of evidence against defendant. Both Adorno and Logan testified, under oath at their plea hearings, that they saw defendant shoot Santos in the head. They also both gave identical pretrial statements to police identifying defendant as the shooter. In addition, both Garcia, an MLD gang member, and Otero, an SC gang member, testified at trial that they saw defendant at the scene with a gun, and they thus corroborated the statements of Adorno and Logan. Although, Adorno and Logan testified at trial that they did not recall implicating defendant in the shooting, and testified that he was not present at the scene, the jury did not believe them. See *People v. Harris*, 389 Ill. App. 3d 107, 132 (2009) (to establish prejudice, a defendant must demonstrate a reasonable probability that sufficiently undermines confidence in the outcome of the proceeding). Based on the foregoing, there is no reasonable probability that calling defendant's parents to testify to the exact same thing as Adorno and Logan would have arguably changed the result at trial, especially given their familial relationship to defendant. See *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (defendant was not prejudiced where the alibi witnesses were defendant's cousins and, as such, their credibility may have carried little weight); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (finding that the decision not to call alibi witnesses was not prejudicial because all three may



have been relatives of defendant and their testimony would thus be afforded less weight). That is, there is no reasonable probability that a jury would have believed defendant's assertion that he was not even at the crime scene given the substantial evidence showing, to the contrary, that he was not only at the scene, but was guilty of shooting the victim in the head. Defendant's allegations in his postconviction petition therefore are premised on an indisputably meritless legal theory, which lacks an arguable basis in the law. See *Hodges*, 234 Ill. 2d at 11-12.

¶ 23 Defendant next contends that trial counsel was ineffective for failing to call occurrence witness Vega to testify. Although it gives us pause that defense counsel referenced Vega's anticipated testimony in his opening statement, defendant's claim is patently without merit. Defendant failed to include a sworn affidavit by Vega showing her potential testimony, availability, and defendant did not explain his failure to attach such an affidavit. See 725 ILCS 5/122-2 (West 2012); *People v. Barcik*, 365 Ill. App. 3d 183, 190-91 (2006) (where the defendant attacks the competency of his counsel for failure to call or contact witnesses, he must attach to his postconviction petition affidavits showing the potential testimony of such witnesses and explain the significance of their testimony); *People v. Enis*, 194 Ill. 2d 361, 380 (2000) ("in the absence of such an affidavit, a 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"). The police report stating that Vega viewed the line-up and was unable to make a positive identification of the shooter is not in and of itself enough to meet the requirements under the Act. Thus, this argument is without merit and we need not consider it further.

¶ 24

#### CONCLUSION

¶ 25 Therefore, based on the foregoing, we conclude postconviction counsel was not constitutionally ineffective. We affirm the judgment of the circuit court summarily dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 26 Affirmed.