No. 1-09-2411

FIRST DIVISION
FILED: May 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 14910
	)	
LEE MURPHY,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Summary dismissal affirmed where defendant's post-conviction claim of ineffective assistance of trial counsel was conclusory, unsupported, and failed to present an arguable *Strickland* claim.

Defendant Lee Murphy appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends

that the court erred in summarily dismissing his petition because he set forth a claim of ineffective assistance of trial counsel that had an arguable basis in law and in fact.

Following a 2005 jury trial, defendant was convicted of the March 17, 2003, first degree murder of Choni Dade and the attempted murders of her two children, five-year-old Dashay Barlow and two-year-old Jailan Carter. On direct appeal, this court affirmed those convictions, and the consecutive sentences of 75 and 20 years' imprisonment imposed on them. *People v. Murphy*, No. 1-05-3345 (2008)(unpublished order under Supreme Court Rule 23). In doing so, this court rejected, in relevant part, defendant's claim that he was denied effective assistance of trial counsel for failing to properly present the pretrial motion to suppress evidence relating to the lineup. *Murphy*, order at 22.

On June 8, 2009, defendant filed the instant *pro se* post-conviction petition alleging, in relevant part, that he was denied effective assistance of trial counsel based on counsel's failure to investigate, interview, and call the alleged alibi witnesses Brenda Evans, Raymond Wade, Inita Campbell, Darlene Edwards, and Teair Butler. Defendant alleged that he was at the house of his friend Wade at the time of the crime, and that Wade took a lie detector test about his whereabouts and those of defendant. He further alleged that Evans was also at the house,

and that she told the detective that defendant was there and took her to work.

On August 11, 2009, the circuit court dismissed defendant's petition in a written order. The court noted that defendant's claim that counsel was ineffective for failing to investigate, interview, and call certain witnesses was waived because defendant failed to raise this claim on direct appeal. The court also observed that defendant failed to outline any of the witnesses' proposed testimony, and did not attach affidavits from them. The court therefore concluded that defendant's petition was frivolous and patently without merit.

In his appeal from that decision, defendant contends that the circuit court erred in dismissing his petition because he set forth a claim of ineffective assistance of trial counsel that had an arguable basis in law and in fact. He maintains that counsel was ineffective for failing to investigate, interview, and call his alleged alibi witnesses. Defendant presents no issue regarding the other allegations set forth in his petition, and has thus waived them for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only

that defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

In determining whether defendant set forth a meritorious claim of ineffective assistance of counsel, we are guided by the standard set forth in *Strickland*. *People v. Morris*, 335 Ill. App. 3d 70, 78 (2002), citing *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate ineffective assistance of trial counsel, defendant must allege facts showing that counsel's performance was objectively unreasonable and resulted in prejudice to defendant. *Strickland*, 466 U.S. at 687, 694; *People v. Chatman*, 357 Ill. App. 3d 695, 700 (2005).

On appeal defendant generally claims that his counsel was ineffective for failing to investigate, interview, and call the alleged alibi witnesses, and specifically names Wade, Evans, and Edwards as the witnesses that should have been called. In his post-conviction petition, defendant named two additional alleged alibi witnesses, Campbell and Butler.

We observe that Campbell, Wade, and Evans (Wade's mother) were known to defense counsel as they were mentioned at trial. Specifically, Detective Daniel McNally testified at trial that defendant initially told him that he was at Wade's house around 10:30 a.m or 11 a.m. on March 17, 2003, that later in the afternoon, he took Wade's mother to work, and that after returning to Wade's house, he picked up Campbell from work. Defendant later confessed to the detective that he committed the crime, which occurred around 10:50 a.m. Defendant also acknowledged at trial that he told the detective that he was with Wade. Clearly, counsel was aware of Wade and his mother and their proposed testimony. Thus, it is not arguable that counsel's failure to call these witnesses was ineffective assistance of counsel as counsel could have easily decided that their testimony would not have been helpful to defendant. *People v. Lacy*, No. 1-09-2863, slip op. at 38 (Ill. App. Feb. 10, 2011).

Furthermore, defendant was Campbell's fiancé, and he was friends with Wade. Given their close relationship to defendant, the credibility of Campbell, Wade, and Wade's mother may have carried little weight. *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003). We also observe that if counsel had called the other alleged alibi witnesses, Edwards and Butler, defendant's testimony admitting that he told the detective that he was with Wade, could have been impeached by this other alibi, thereby

harming defendant's case. *People v. Marshall*, 375 Ill. App. 3d 670, 677 (2007). The decision of whether to call a witness is a tactical and strategic decision, and trial counsel is given wide latitude in making that decision. *People v. Penrod*, 316 Ill. App. 3d 713, 724 (2000). Accordingly, it is not arguable that counsel's failure to investigate, interview, and call the alleged alibi witnesses was unreasonable.

We also find that it is not arguable that counsel's actions prejudiced defendant. The witnesses defendant relies on in his petition must not only identify the source and character of their alleged testimony, but also their availability. *Johnson*, 183 Ill. 2d at 190*; People v. Brown*, 371 Ill. App. 3d 972, 982 (2007). Here, defendant did not attach any affidavits from his alibi witnesses to his petition meeting this requirement. *Brown*, 371 Ill. App. 3d at 982. Defendant was required to provide affidavits from the alibi witnesses who would have testified (*People v. Johnson*, 183 Ill. 2d 176, 192 (1998)), and his failure to do so or explain their absence was fatal to his petition (*People v. Payne*, 336 Ill. App. 3d 154, 166 (2002)).

Defendant also did not provide any information regarding the alleged alibi testimony of Campbell, Edwards, and Butler, and provided very limited information regarding Wade and his mother. Defendant indicated only that he was at Wade's house at the time of the crime, that Wade took a lie detector test regarding his

and defendant's whereabouts, that Evans was also there, and that he took her to work. Defendant, however, did not allege in his petition that Wade and his mother were at the house with him at the time of the crime. Defendant's alibi claim is utterly bereft of any factual detail, and falls short of the liberal pleading standard, *i.e.,* a limited amount of detail. *People v. Shevock*, 353 Ill. App. 3d 361, 362, 364-66 (2004). Such conclusory allegations are not allowed under the Act. *People v. Miller*, 393 Ill. App. 3d 629, 639-40 (2009). Further, because the alibi information was within defendant's personal knowledge, it is not unreasonable to expect his petition to contain it. *People v. Delton*, 227 Ill. 2d 247, 258 (2008). We find that defendant cannot arguably satisfy the prejudice prong of *Strickland* based on his conclusory, unsupported assertions that these witnesses provided an alibi.

In reaching this determination, we have considered *People v. Morris*, 335 Ill. App. 3d 70 (2002) and *People v. Montgomery*, 327 Ill. App. 3d 180 (2001), cited by defendant, and find his reliance on them misplaced. In *Morris*, 335 Ill. App. 3d at 86, this court reversed the second-stage dismissal of defendant's petition finding that he presented a substantial constitutional violation of ineffective assistance of counsel based on counsel's failure to subpoena, disclose, and call known alibi witnesses and another witness who would have corroborated defendant's claim

that his confession was coerced. In doing so, this court found that the record, pleadings, and the affidavits of defendant and the alibi witnesses raised unanswered questions of fact not positively rebutted by the record, and noted that the *voir dire* testimony of the alibi witnesses showed their availability to testify, and that the witness who was knowledgeable of the interrogation was present in court. *Morris,* 355 Ill. App. 3d at 83-85. *Morris* is clearly distinguishable from this case where defendant did not attach any affidavits (*Johnson*, 183 Ill. 2d at 192), or establish the availability of the witnesses' alibi testimony as required (*Brown*, 371 Ill. App. 3d at 982).

Defendant cites to *Montgomery* in support of his contention that his petition should be advanced to the second stage for post-conviction counsel to supply the necessary affidavits because the evidence omitted would have been valuable in this close case. In *Montgomery,* 327 Ill. App. 3d at 185-86, the circuit court dismissed defendant's petition, which alleged an ineffective assistance of counsel claim based on the failure to present expert evidence that the victim died from a seizure and not strangulation. In reversing the dismissal, this court found that the petition was not frivolous and patently without merit where it was not rebutted by the record, the evidence was valuable, and the case was close. *Montgomery*, 327 Ill. App. 3d at 186. This court also noted that an affidavit from the expert

attached to the appellate brief could not be considered on appeal, but could be presented on remand. *Montgomery*, 327 Ill. App. 3d at 186. *Montgomery* is obviously inapplicable to this case, where defendant alleged his counsel was ineffective for failing to call certain alibi witnesses, not an expert. As explained above, defendant is required to provide affidavits from the alibi witnesses who would have testified (*Johnson*, 183 Ill. 2d at 192), and his failure to do so or explain their absence was fatal to his petition (*Payne*, 336 Ill. App. 3d at 166).

In addition, this was not a close case. The evidence at trial showed that defendant was identified by Dashay as the offender after the effects of the heavy medication she was on for her injuries had worn off, and that several officers along with an assistant State's Attorney testified that he confessed to the crime. In light of this overwhelming evidence of defendant's guilt, defendant has not shown that he was arguably prejudiced by counsel's decision not to call the alleged alibi witnesses. *Johnson*, 183 Ill. 2d at 192. Accordingly, we conclude that the circuit court did not err in summarily dismissing defendant's post-conviction petition.

In light of the foregoing, we affirm the summary dismissal of defendant's petition entered by the circuit court of Cook County.

Affirmed.