

No. 1-09-3008

**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).

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. 07 CR 14090
	)	
MICHAEL WORKMAN,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.  
Presiding Justice Epstein and Justice Howse concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant's verification of his post-conviction petition and his affidavit in support of his claims were not notarized, petition did not comply with requirements of section 122-1(b) and section 122-2 of Post-Conviction Hearing Act; the dismissal of defendant's post-conviction petition was affirmed.

¶ 2 Defendant Michael Workman appeals the dismissal of his *pro se* post-conviction petition at the first stage of proceedings. On appeal, defendant argues his petition stated the gist of a claim of ineffective assistance of counsel in asserting that his attorney failed to move to

withdraw his guilty plea, which prevented him from taking a direct appeal from his conviction.

We affirm.

¶ 3 Following a 2001 conviction for aggravated criminal sexual abuse, defendant was required to register as a sex offender in accordance with the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2000)). In 2006, defendant was arrested and charged with failing to register as a sexual predator as defined by section 2(E)(1) of that statute (730 ILCS 150/2(E)(1) (West 2006)). Defendant posted bond and was released.

¶ 4 In March 2007, defendant registered an address in Lynwood, Illinois, as his residence, as required by the Act. In June 2007, defendant was arrested in Chicago and charged with failing to register a new address because in the preceding months, he had stayed in various locations in Chicago and was not at the Lynwood address each night.

¶ 5 On March 12, 2008, the State indicated to the court that it was ready for trial, and the court addressed defendant regarding a jury trial. Defendant waived his right to a jury trial.

¶ 6 Defense counsel asked to confer with defendant regarding an offer from the State. Upon returning to open court, defense counsel stated that defendant wanted to enter a guilty plea. The court admonished defendant as to the minimum and maximum sentences for his offense and that he was giving up his right to a trial. Defendant indicated he had not been promised anything in exchange for his guilty plea.

¶ 7 Defendant then addressed the court:

"I do have a lot I would like to say on my behalf, Judge. I made the decision to accept the plea, and it's a decision that I'm going to have to adhere to[,] something I have [to] accept."

¶ 8 The court asked if defendant had anything further to say, and he replied "no." The court found defendant guilty of failing to report his change of address and sentenced defendant to three

years in prison. The court advised defendant he had 30 days from that date to file a written motion to withdraw his guilty plea. No motion was filed to withdraw defendant's plea, and no direct appeal was taken.

¶ 9 On August 3, 2009, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), in which he asserted he was not guilty of the offense. Defendant asserted his counsel told him before his plea was entered that counsel would move to withdraw the plea within 30 days, during which time counsel could contact defense witnesses and prepare for trial. Defendant asserted that his attorney coerced him into pleading guilty because he was not prepared to go to trial that day. Defendant stated he would not have agreed to a guilty plea had counsel been ready for trial on the date of his plea, and he asserted counsel's failure to move to withdraw the plea prevented him from seeking review in a direct appeal. Defendant's attestation to the veracity of the petition was not notarized.

¶ 10 Attached to defendant's petition was his own affidavit, in which he stated his counsel assured him that if he agreed to plead guilty, counsel would file a motion to withdraw his plea within 30 days and counsel "would also get both the charge(s) & indictment(s) dismissed." Defendant stated he was innocent and that counsel's failures led to his wrongful conviction. Defendant's affidavit was not notarized.

¶ 11 Also attached to the petition was the affidavit of Michael McGuire, who attested that defendant was arrested at McGuire's apartment in Chicago on June 25, 2007, but that defendant did not live there. Unlike defendant's verification and affidavit, McGuire's affidavit was notarized.

¶ 12 In a written order entered on September 25, 2009, the circuit court dismissed defendant's post-conviction claims as frivolous and patently without merit. Defendant now appeals that ruling.

¶ 13 On appeal, defendant contends his petition stated the gist of a claim of ineffectiveness of trial counsel for failing to move for withdrawal of his guilty plea. He contends his counsel misinformed him a motion to withdraw the plea would be filed and that he would not have agreed to a guilty plea if his counsel had been ready for trial. Defendant also argues the absence of a motion to withdraw the plea resulted in the forfeiture of his right to a direct appeal.

¶ 14 A *pro se* petition under the Act may be dismissed as frivolous and 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). Our review of the summary dismissal of a post-conviction petition is *de novo*. See *Hodges*, 234 Ill. 2d at 9.

¶ 15 Pursuant to the Act, a post-conviction proceeding begins when a petition is filed that is "verified by affidavit." 725 ILCS 5/122-1(b) (West 2008). As a separate requirement, the petition must set forth the respects in which the defendant's constitutional rights were violated and must be accompanied by affidavits, records or other evidence supporting its allegations. 725 ILCS 5/122-2 (West 2008).

¶ 16 The State argues defendant did not comply with those two provisions of the Act because his verification of his petition and affidavit in support of his petition were not notarized, thus rendering his post-conviction filing invalid. The State cites *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2nd Dist. 2003), in which the trial court dismissed a defendant's *pro se* post-conviction petition because the affidavits of the witnesses discussed in the defendant's petition were not notarized. *Niezgoda* relied on *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 497 (2002), in which our supreme court held that an unnotarized affidavit had no legal effect.

¶ 17 In response, defendant acknowledges *Niezgoda* but asserts that case and its sole progeny, *People v. Carr*, 407 Ill. App. 3d 513, 516 (2nd Dist. 2011), were decided by the second district and are not binding authority. In *Carr*, the defendant's affidavit attesting to the truth of his post-conviction petition under section 122-1(b) was not notarized, and the defendant did not file any affidavits pursuant to section 122-2 in support of his petition. *Carr*, 407 Ill. App. 3d at 514-15. Relying on *Niezgoda's* statement that all affidavits filed pursuant to the Act must be notarized to be valid (*Niezgoda*, 337 Ill. App. 3d at 597), the appellate court held the defendant's unnotarized verification precluded any relief under the Act. *Carr*, 407 Ill. App. 3d at 516. The court further held the defendant could not obtain post-conviction review due to the absence of affidavits or other evidence supporting the claims in the defendant's petition required by section 122-2 of the Act. *Carr*, 407 Ill. App. 3d at 516. Our research also has revealed a recent opinion of this district that follows *Niezgoda* in holding that the unnotarized affidavit of a codefendant, offered in support of defendant's post-conviction claims, did not satisfy section 122-2. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 77 (decided by 1st Dist., 6th Div. on September 23, 2011).

¶ 18 In the case at bar, defendant's unnotarized affidavit attesting to his post-conviction petition's veracity required by section 122-1(b) rendered his petition invalid, thus precluding any relief under the Act. See *Carr*, 407 Ill. App. 3d at 515-16; *Niezgoda*, 337 Ill. App. 3d at 597. As to defendant's compliance with section 122-2, defendant's affidavit describing his conversation with trial counsel also was unverified. We note that defendant did append to his petition one notarized affidavit, that of McGuire, which differentiates the facts of his case from those in *Carr*, where no notarized affidavits were offered in support of the petition. See *Carr*, 407 Ill. App. 3d at 515. However, McGuire's affidavit did not address, and indeed could not have addressed, defendant's conversation with counsel, which was the crux of his post-conviction claim.

1-09-3008

Therefore, the absence of notarization of defendant's affidavit provides an additional basis for the denial of post-conviction relief.

¶ 19 Accordingly, the dismissal of defendant's post-conviction petition is affirmed.

¶ 20 Affirmed.