

No. 1-10-0254

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. 00 CR 7271
)	
JERMAINE DAVIS,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

1. *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed where defendant's claims of ineffective assistance of trial and appellate counsel were waived or otherwise failed for lack of adequate supporting documentation.
2. Jermaine Davis, the defendant, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that the circuit court erred in dismissing his petition at the first stage of proceedings because he set forth cognizable claims of ineffective assistance of trial and appellate counsel.

3. The record shows, in pertinent part, that in 2004, a jury found defendant guilty of the aggravated battery and first degree murder of Demetrius Thomas. At sentencing, the court entered judgment solely on the first degree murder conviction, then sentenced defendant to 25 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Davis*, No. 1-05-1251 (2007) (unpublished order under Supreme Court Rule 23). The supreme court subsequently remanded the cause to the trial court for a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) (*People v. Davis*, 231 Ill. 2d 349 (2008)), and ultimately affirmed defendant's conviction and sentence (*People v. Davis*, 233 Ill. 2d 244 (2009)).

4. On October 27, 2009, defendant filed a *pro se* petition for post-conviction relief alleging, as pertinent to this appeal, that trial counsel was ineffective for failing to fulfill a promise made in opening statements that he would present evidence to explain why defendant put the victim in a garbage dumpster. Defendant claimed that this evidence was originally supposed to be introduced through his testimony, but defense counsel did not allow him to testify. In support of his petition, defendant attached his own affidavit in which he averred that he had informed counsel of his desire to testify, but that counsel told him that he would not be testifying and said, "we'll be ok." Defendant stated that his testimony "would have fulfilled [*sic*] the promise to the jury," and noted that he would have testified that "[t]he only reason Petitioner help put victim in dumpster is that Petitioner was afraid of the offenders."

5. Defendant also alleged that trial counsel was ineffective for failing to convey to him a plea offer from the State for a sentence of "time-served in exchange for Petitioner's testimony against two (2) other possible suspects." In a second supporting affidavit, he averred, in pertinent part, that counsel informed him of this offer before jury selection, but told him that he had refused the offer "because he knew I was afraid to testify against my co-defendants." When defendant asked if the offer remained open, counsel responded, "NO - I had nothing to worry about - we're going to trial."

Lastly, defendant alleged that appellate counsel was ineffective for not raising these issues on direct appeal.

6. On December 16, 2009, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. With respect to defendant's claim that counsel failed to keep his promise to the jury, the court rejected defendant's reliance on *People v. Davis*, 287 Ill. App. 3d 46 (1997), noting that trial counsel never told the jury that defendant would testify. The court also found that defendant failed to provide sufficient documentary support for his claim that trial counsel failed to disclose the State's plea offer, and that appellate counsel was not ineffective where the underlying claims were without merit. This appeal followed.

7. The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his federal or state constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant must set forth the specific manner in which his constitutional rights were violated (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

8. Defendant maintains that he set forth claims of ineffective assistance of counsel warranting further proceedings under the Act. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be

satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

9. On appeal, defendant first contends that trial counsel was ineffective for failing to convey to him the State's plea offer of time-served in exchange for his testimony against two suspects. Although he acknowledges that the circuit court did not address the merits of this claim because it found a lack of supporting documentation, defendant claims that he was not required to provide such documentation where he and trial counsel, whom he alleged was ineffective, were the only possible affiants. The State responds that defendant's failure to attach any supporting documentation warranted its dismissal.

10. Under the Act, defendant must clearly set forth the alleged constitutional violations in his petition and provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2008). The purpose for requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration (*People v. Collins*, 202 Ill. 2d 59, 67 (2002)), and the failure to attach them or explain their absence is fatal to a post-conviction petition and justifies its summary dismissal. *Delton*, 227 Ill. 2d at 255.

11. Here, defendant provided his own affidavit as the sole support for his claim that the State made a plea offer of time-served in exchange for testimony against two unnamed suspects, and that counsel rejected the offer without first conveying it to him. In *People v. Miller*, 393 Ill. App. 3d 629, 638-40 (2009), this court upheld the dismissal of defendant's post-conviction petition supported only by defendant's affidavit. In doing so, we observed the supreme court's caution set forth in *People v. Curry*, 178 Ill. 2d 509, 531 (1997), that defendant's subjective, self-serving statements are insufficient to satisfy the prejudice requirement of *Strickland*. *Miller*, 393 Ill. App. 3d at 639-40. In this case, defendant, likewise, did not provide any materials which would allow for objective or

independent corroboration of his claim (*Collins*, 202 Ill. 2d at 67), or provide an explanation for failing to attach such support, as required by the Act. 725 ILCS 5/122-2 (West 2008); *Miller*, 393 Ill. App. 3d at 639.

12. The supreme court has made it clear that defendant is not excused from the evidentiary and pleading requirements of section 122-2 (*Collins*, 202 Ill. 2d at 68), even though, as defendant points out, it has recognized that the failure to attach independent corroborating documentation or explain its absence may be excused where the petition allows an inference that the only affidavit defendant could have furnished, other than his own, was that of his attorney. *People v. Hall*, 217 Ill. 2d 324, 333 (2005). Here, however, defendant's claim that the State made a plea offer for time-served, and that the offer was rejected, could have been corroborated by an affidavit from the State's Attorney, not just from defendant or his attorney. It is also unlikely that obtaining an affidavit from counsel which merely verified the existence of the State's alleged plea offer would have been difficult or impossible under the circumstances. *Miller*, 393 Ill. App. 3d at 640. Moreover, the record shows that on February 5, 2003, defendant agreed to a plea conference, and that after the conference, the court announced that the plea offer of 20 years had been revoked. Given this disparity, the averments made by defendant do not find support in the record. Thus, we find that defendant failed to provide *any* supporting documentation to independently corroborate his claim, or to explain the absence of such, and, consequently, his petition was subject to summary dismissal. *Delton*, 227 Ill. 2d at 255.

13. In reaching this conclusion, we find *Hall* and *People v. Teran*, 376 Ill. App. 3d 1 (2007), cited by defendant, distinguishable from the case at bar. In *Hall*, 217 Ill. 2d at 332-33, the supreme court initially found the documentation requirement of *Collins* inapplicable because, unlike this case, the case had proceeded beyond the first stage of post-conviction proceedings; and, further, that the allegations in defendant's petition and detailed affidavit gave rise to the inference that the only other

supporting affidavit defendant could have obtained was that of his attorney. Similarly, in *Teran*, 376 Ill. App. 3d at 4, the court noted that it had previously denied counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) because defendant was arguably excused from providing independent corroboration for a claim based on a private conversation between him and his attorneys. Unlike those cases, defendant's claim is not wholly based on a private conversation with counsel because it involves an alleged plea offer made by the State, a third-party which could corroborate that such an offer was made and rejected. In this respect, defendant's reliance on *Hall* and *Teran* is misplaced, and provides no support for his claim.

14. Defendant next contends that counsel was ineffective for failing to fulfill his promise in opening statements that he would present evidence to explain why defendant threw the victim in a dumpster. The portion of counsel's opening statement at issue reads as follows:

"You'll learn that after the beating, one thing you will learn, one thing you will learn is that after the beating, after there was a break in the beating, you'll learn that Jermaine Davis went up and grabbed Demetrius and put him in the dumpster.

You'll learn why he did that. You will learn the facts surrounding that and the context surrounding that, and you would also, based on those facts, determine at the end that that does not amount to murder."

Defendant contends that counsel's failure to fulfill this promise was objectively unreasonable, and that he suffered prejudice because counsel's credibility with the jurors was jeopardized and the evidence against him was weak.

15. The State initially responds that this claim is forfeited because it does not rely on any evidence outside the trial record and was not raised on direct appeal. Defendant preemptively

replies to this argument in the conclusion section of his opening brief, stating that even though he did not raise this claim on direct appeal, it relies on discussions outside of the record between him and counsel. He further maintains that the doctrine of waiver should not be applied because he alleged ineffective assistance of appellate counsel.

16. A claim of ineffective assistance of trial counsel is generally waived if it is not raised by defendant's appellate counsel on direct appeal. *People v. Pearson*, 188 Ill. App. 3d 518, 523 (1989) (citing *People v. Owens*, 129 Ill. 2d 303, 308 (1989)). However, the rule of waiver will be relaxed in certain circumstances, such as where the facts pertaining to defendant's post-conviction claim do not appear on the face of the trial record (*People v. Taylor*, 237 Ill. 2d 356, 372 (2010)), or where the alleged waiver stems from ineffective assistance of appellate counsel. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). Here, where defendant was represented on direct appeal by counsel different from trial counsel, and neither exception to the rule of waiver applies, his claim of ineffective assistance of trial counsel not raised on direct appeal is waived. *Pearson*, 188 Ill. App. 3d at 523.

17. In reaching that conclusion, we initially observe that defendant's claim does not, as he asserts, rely on facts outside the trial record. Although defendant, in his argument, refers to an alleged discussion with counsel regarding proposed trial testimony that he would give as to why he threw the victim into a dumpster, and to counsel's refusal to allow him to testify and statement that they would be "ok," counsel never promised the jury that defendant would testify. Counsel merely stated, "You'll learn why he did that," and considering that a statement from defendant was published at trial which detailed his role as lookout during the beating, there was clearly an opportunity for the jury to "learn" that the reason defendant threw the victim into the dumpster was to avoid attracting the attention of police or others. In any event, in the absence of a specific promise that defendant would testify, we do not find that the alleged off-the-record discussions he

cites are necessary to the determination of his claim, and, to the contrary, find that the issue could have been raised and determined on direct appeal by reference to the record alone. *Taylor*, 237 Ill. 2d at 372.

18. We also find that defendant's allegation of ineffective assistance of appellate counsel is insufficient to relax the bar of waiver under the circumstances. In his brief, defendant merely cites the rule that the doctrine of waiver does not bar review of an issue if the waiver stems from ineffective assistance of appellate counsel (the standard for reviewing such a claim), then argues, "Since the above claims of trial counsel's ineffectiveness have arguable merit, appellate counsel was arguably ineffective for not raising them." However, this is nothing more than a conclusory assertion made without analysis or reasoning, and such a scant assertion of ineffective assistance of appellate counsel will not insulate his claims of ineffective assistance of trial counsel from summary dismissal. *Jones*, 362 Ill. App. 3d at 35.

19. For the reasons stated, we affirm the summary dismissal of defendant's post-conviction petition by the circuit court of Cook County.

20. Affirmed.