

No. 1-10-0389

**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
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 3010
	)	
JEROME WEATHERS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBride delivered the judgment of the court.  
Justices J. Gordon and Howse concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The circuit court properly denied defendant postconviction relief when his *pro se* petition failed to comply with the affidavit requirements of the Act and its allegations were rebutted by the trial record.
- ¶ 2 Defendant Jerome Weathers 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 the circuit court erred in dismissing his petition when his claim that he received ineffective assistance of counsel because counsel withdrew a previously filed motion to suppress

statements without "truly" conferring with him was based on neither an indisputably meritless legal theory nor a fanciful factual allegation. We affirm.

¶ 3 In January 2002, defendant and codefendants Byron Nelson, Corey Hodges, Lawrence Bradley, and Iran Thomas were arrested after the victim Cornelius Buchanan was fatally shot.<sup>1</sup> Defendant was subsequently charged by indictment with, *inter alia*, first degree murder. The Office of the Public Defender was appointed to represent defendant. Appointed counsel then filed a motion to suppress statements alleging that although defendant was interrogated by police officers, he was never informed of his *Miranda* rights. The motion also alleged that the statements sought to be suppressed were obtained after defendant elected to remain silent and requested an attorney, and as a result of coercion.

¶ 4 Defendant then obtained private counsel. Although private counsel initially requested a date upon which to argue the previously filed motion to suppress statements, at a later hearing counsel stated that after reviewing the discovery in the case and conferring with defendant, the defense wished to withdraw the motion to suppress statements. The trial court granted this request, and the matter proceeded to a bench trial.

¶ 5 The evidence at trial established that a gun fell out of defendant's pocket while he was running away from police. Defendant was subsequently taken into custody and the gun recovered. Forensic evidence showed that defendant had gunshot residue on his hands at the time of his arrest, five bullets had been fired from the gun that fell out of defendant's pocket, and one bullet recovered from the victim's body had been fired from that gun. An assistant State's Attorney testified that prior to speaking to defendant at a police station, defendant was advised of his *Miranda* rights. The record also indicates that the videotape of defendant's inculpatory statement was published to the court. That videotape is not included in the record on appeal.

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<sup>1</sup> Codefendants are not parties to this appeal.

¶ 6 Ultimately, the trial court found defendant guilty of first degree murder during which he personally discharged a firearm, and sentenced him to 75 years in prison. That judgment was affirmed on appeal. See *People v. Weathers*, No. 1-06-1768 (2008) (unpublished order under Supreme Court Rule 23).

¶ 7 In October 2009, defendant filed a *pro se* postconviction petition alleging that he received ineffective assistance of counsel because counsel withdrew the motion to suppress statements without "truly" conferring with defendant. The petition further alleged that defendant's statement was involuntary because he was never advised of his *Miranda* rights. The petition is neither signed nor notarized. An affidavit in support asserts that the facts contained in the petition are true. The affidavit is neither signed nor notarized. The circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 8 On appeal, defendant contends the circuit court erred when it summarily dismissed his *pro se* petition for postconviction relief because he received ineffective assistance of counsel based upon counsel's withdrawal of a previously filed motion to suppress statements without conferring with defendant. Defendant contends that had counsel actually consulted with him, counsel would have learned that defendant was never advised of his *Miranda* rights.

¶ 9 Before addressing the merits of defendant's contention, this court must first address the State's argument that defendant waived this claim because he did not raise it on direct appeal. However, as defendant's claim rests on the alleged failure of counsel to have a conversation with him, and this court is limited, on direct appeal, to the record on appeal (see *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994)), defendant could not have properly raised this claim on direct appeal. When a defendant wishes this court to consider issues that rely on matters outside the record, those issues are properly raised in a timely petition for relief pursuant to the Act. See *People v. Page*, 193 Ill. 2d 120, 135 (2000) (claims based on evidence *de hors* the record are

properly reviewed in the context of a postconviction petition because "the reviewing court on direct appeal could not have considered" them). Accordingly, this court will consider the merits of defendant's claim.

¶ 10 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2008). A postconviction proceeding is commenced by filing with the clerk of the court in which the conviction took place a petition verified by an affidavit (725 ILCS 5/122-1(b) (West 2008)); affidavits filed pursuant to the Act must be notarized to be valid (*People v. Carr*, 407 Ill. App. 3d 513, 515 (2011)). See also *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (affidavits filed in support of postconviction petition had "no legal effect" when they were neither notarized nor sworn before anyone with the authority under law to administer oaths). A petition's failure to comply with the requirements of the Act is grounds for its dismissal. See *Carr*, 407 Ill. App. 3d at 515, citing *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 11 At the first stage of proceeding under the Act, the circuit court determines whether a defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). "Unless positively rebutted by the record, all well-pled facts [in the petition] are taken as true" at this stage. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84 (2001); see also *People v. Jefferson*, 345 Ill. App. 3d 60, 76 (2003) (summary dismissal is proper when the trial record contradicts a defendant's postconviction allegations and the supporting documentation attached to the petition).

¶ 12 A petition is summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on

"an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 13 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Coleman*, 183 Ill. 2d at 397, citing *Strickland v. Washington*, 466 U.S. 668 (1984). Our supreme court has held that a postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "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." *Hodges*, 234 Ill. 2d at 17.

¶ 14 Before reaching the merits of defendant's contentions on appeal, this court notes that defendant's affidavit in support of his petition was not notarized, and, therefore, is not valid. See *Carr*, 407 Ill. App. 3d at 515-16 (absent certain specific exceptions, an affidavit must be notarized to be valid). Because defendant sought relief pursuant to the Act, the affidavit filed in support of the petition averring to the truthfulness of the allegations therein "needed" to be notarized in order to be valid; as it was not, the circuit court properly denied defendant postconviction relief based on the petition's failure to comply with the requirements of the Act. *Carr*, 407 Ill. App. 3d at 516.

¶ 15 However, even were this court to overlook defendant's failure to comply with section 122-1(b) of the Act, summary dismissal of defendant's *pro se* postconviction petition was proper because the petition was based upon an indisputably meritless legal theory.

¶ 16 Although defendant acknowledges that he was present when his counsel informed the court that after reviewing the discovery and consulting with defendant, counsel wished to withdraw the previously filed motion to suppress statements, defendant contends that he was denied effective assistance of counsel because counsel did not, in actuality, confer with him. The State, on the other hand, argues that the petition was properly dismissed when the record, which reveals that defendant said nothing when counsel informed the court that counsel had previously conferred with defendant, affirmatively rebuts defendant's allegation. We agree with the State.

¶ 17 Here, the record reveals that defendant did not contradict counsel's statement that counsel had decided to withdraw the motion to suppress statements filed by defendant's previous counsel after conferring with defendant. See *People v. Sailor*, 43 Ill. 2d 256, 260 (1969) (a defendant generally "speaks" through his attorney, and a defendant, by permitting his attorney to stand in his presence and act upon his behalf is deemed to have "acquiesced in, and to be bound by," counsel's actions). When, as here, the trial record contradicts a defendant's postconviction allegations (see *Jefferson*, 345 Ill. App. 3d at 76), summary dismissal is proper.

¶ 18 The record also reveals that in addition to defendant's inculpatory statement, the evidence at trial established that defendant was arrested immediately after the shooting in the same vicinity, a police officer saw a gun fall out of his pocket, defendant had gunshot residue on his hands at the time of his arrest, and one of the bullets recovered from the victim's body came from the gun dropped by defendant. Considering the forensic evidence linking defendant to the victim's death, it is unclear how counsel's alleged failure to speak with defendant prior to withdrawing the motion to suppress statements arguably could have prejudiced defendant. See *Hodges*, 234 Ill. 2d at 17. Accordingly, defendant's claim of ineffective assistance of counsel

1-10-0389

must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (the failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance).

¶ 19 Because defendant's *pro se* petition for postconviction relief was based on an indisputably meritless legal theory, the circuit court did not err when it summarily dismissed the petition as frivolous and patently without merit. See *Hodges*, 234 Ill. 2d at 16-17.

¶ 20 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.