

No. 1-09-0999

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).

SECOND DIVISION
APRIL 19, 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. 05 CR 20040
)	
RAYMOND SUTTON,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

O R D E R

Held: Where defendant did not state the gist of a claim of ineffective assistance of counsel, he was not entitled to remand for second-stage post-conviction proceedings; the trial court's judgment was affirmed.

Defendant Raymond Sutton 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). Defendant contends that his petition stated the gist of a

1-09-0999

constitutional claim of ineffective assistance of trial counsel where his attorney failed to present an expert witness who could testify regarding whether a door lock can be opened with a knife. We affirm.

Following a jury trial, defendant was convicted of residential burglary in connection with the knowing and unauthorized entry of Gregory Edwards' apartment located at 6806 South Clyde Avenue in Chicago with the intent to commit a theft. Defendant was sentenced to seven years' imprisonment for the residential burglary.

As relevant to this appeal, the evidence at trial revealed that Edwards left his apartment at about 7:15 p.m. on August 3, 2005, to attend a meeting. Tierra Matticx, who was 11 years old at the time of the incident, was in the common area of the apartment complex with friends. She saw defendant walk up a staircase leading to Edwards' porch, go to Edwards' door, stick a knife in the keyhole, wiggle the knife, open the door and enter the apartment. As defendant entered the apartment, he was carrying an empty bag, but when Matticx saw him exit the apartment, the bag appeared to contain something. Although Matticx did not know defendant's name, she had seen him in the area several times, including observing him help Edwards move into his apartment two weeks before the burglary. After returning home about 45 minutes later, Edwards noticed that the

1-09-0999

back door was open and that a window latch was unlocked. He also noticed that several personal items were missing from the apartment and called police. Officer Larry Ellison responded to the burglary, but saw no signs of forced entry.

The following day, Edwards saw children jumping rope near his apartment and remembered they were the same children he observed when he left for the meeting. Edwards asked Matticx if she saw who broke into his apartment, and she responded that the offender was the curly-haired man who had helped Edwards move into his apartment. On August 13, 2005, Edwards saw defendant and caught him after a short chase. Officer Fred Taylor arrived at the scene and arrested defendant after Edwards told him that defendant burglarized his apartment, and that Matticx observed him do so.

The jury found defendant guilty of residential burglary. On direct appeal, we vacated a \$4 fine, but otherwise affirmed the judgment in all other respects. *People v. Sutton*, No. 1-07-0648 (2008) (unpublished order under Supreme Court Rule 23). In particular, we found that Matticx's testimony was sufficient to convict defendant of residential burglary, her testimony was supported by Edwards, and any minor inconsistencies in Matticx's testimony did not create a reasonable doubt of defendant's guilt. *Sutton*, No. 1-07-0648, slip op. at 5-7.

1-09-0999

On March 24, 2009, defendant filed a *pro se* post-conviction petition alleging that he was denied effective assistance of trial counsel. As pertinent to this appeal, defendant alleged that counsel failed to establish that there were two locks on Edwards' door, including a deadbolt lock, and also failed to present expert testimony that would have shown that it is impossible to use a knife to unlock Edwards' apartment door. Defendant further maintained that trial counsel failed to introduce evidence from the police report which showed that police determined the burglar entered the apartment through a window and exited through the door. In support, defendant attached to his petition photographs of the type of lock allegedly "picked" with a knife, materials describing how those types of locks can be picked, and a police report where the point of entry is marked as the window, and the point of exit is marked as the rear door. The materials are entitled "How Lock Picking Works" and explained how to open various types of locks. On April 9, 2009, the circuit court dismissed the petition as frivolous and patently without merit.

In this appeal, defendant challenges the propriety of that dismissal, arguing that he raised the gist of a constitutional claim of ineffective assistance of counsel. He specifically maintains that his attorney was ineffective for failing to investigate and present evidence rebutting Matticx's narrative of

the offense. In particular, defendant argues that trial counsel failed to present an expert witness to testify that it is extremely difficult, if not impossible, to open a deadbolt lock with just a knife.

The Act provides a remedy for defendants who claim that a substantial violation of their constitutional rights occurred in the proceedings which resulted in their convictions, when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). Where defendant has previously taken a direct appeal from a judgment of conviction, the judgment of the reviewing court is *res judicata* as to all issues decided by the court, and any other claims that could have been raised on direct appeal, but were not, are waived. *Enis*, 194 Ill. 2d at 375. These procedural bars are relaxed, however, where the facts relating to the claim do not appear on the face of the original appellate record. *People v. Harris*, 206 Ill. 2d 1, 13 (2002). Because defendant's post-conviction claim relies on evidence outside the original appellate record, *i.e.*, expert testimony that was not presented at trial, waiver is not implicated. *Enis*, 194 Ill. 2d at 375-76. Therefore, we address the merits of defendant's claim (*Harris*, 206 Ill. 2d at 33-34), and review the circuit court's dismissal of defendant's petition *de novo* (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)).

The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. Nevertheless, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). The failure to attach the required documents or explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

Although defendant attached "other evidence" in support of his allegations, his petition was nevertheless deficient because he failed to support his claim with any affidavits of expert witnesses regarding door locks or lock picking. Defendant only attached pictures of locks, information downloaded from websites regarding lock picking, and a police report. Although all allegations in supporting documentation are to be accepted as

true at this stage (*People v. Ward*, 187 Ill. 2d 249, 255 (1999)), the documents defendant attached to his petition do not show that an expert would testify that it is improbable that a deadbolt lock could be picked with a knife. Therefore, defendant's unsupported conclusory allegation that an expert witness would testify that Edwards' lock was nearly impossible to pick is not sufficient to require further proceedings under the Act. *People v. Jackson*, 213 Ill. App. 3d 806, 811 (1991).

More significantly, we find defendant's petition failed to state the gist of a claim of ineffective assistance of counsel. Specifically, a defendant alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

It is well established that the decision whether to call a witness to testify at trial is a matter of trial strategy (*Enis*, 194 Ill. 2d at 378), and the decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable'" (*People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)). In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's

conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

In this case, the record shows that trial counsel's decision not to call an expert witness to testify about the intricacies of locks and lock picking was a matter of trial strategy. Although defendant maintains that an expert witness would have testified that the victim's deadbolt lock was extremely difficult, if not impossible to open with just a knife, there is no evidence that any such expert existed that would testify to that statement, particularly where defendant failed to attach an expert's affidavit to his petition.

Moreover, defendant's allegation that trial counsel failed to investigate is meritless. Defendant specifically maintains that Edwards' door contained two locks, and counsel's failure to investigate the number of locks on Edwards' door prejudiced him at trial because Matticx's testimony would have become "more implausible" if the evidence showed two locks existed. There is a strong presumption that trial counsel acted effectively in investigating a case (*People v. Kokoraleis*, 159 Ill. 2d 325, 330 (1994)), and where circumstances known to counsel at the time of his investigation do not reveal a need to inquire further, it is not ineffective for the attorney to forgo additional investigation (*People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997)). Here, there is no indication that counsel failed to investigate

1-09-0999

any matter pertinent to this case. The record is void of any evidence that a deadbolt lock was present on Edwards' door, and defendant's contention to the contrary is a fanciful factual allegation that is not supported by the evidence at trial.

Nevertheless, even assuming that counsel's action in failing to call an expert witness could be considered unreasonable, defendant has failed to show arguable prejudice. As we found in defendant's direct appeal, the State proved defendant guilty of residential burglary beyond a reasonable doubt. *Sutton*, No. 1-07-0648, slip op. at 7. Matticx observed defendant, with whom she was familiar, use a knife to open Edwards' apartment door, enter the apartment with an empty bag, and leave the apartment with a bag that appeared to contain items. The credible testimony of one eyewitness is sufficient to convict defendant. *People v. Robinson*, 153 Ill. App. 3d 272, 275 (1987). Furthermore, Matticx's testimony was supported by Edwards, who testified that he had left his apartment on the date in question, and when he returned, he noticed that his backdoor was open and that he was missing some personal items. The fact that the responding officer to the burglary saw no signs of forced entry, and the police report indicated that the offender entered the apartment through a window and exited through a door, does not change the result.

1-09-0999

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.