

No. 1-09-3498

**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  
FEBRUARY 8, 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. 04 CR 28306
	)	
RICHARD WORTHY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE CONNORS delivered the judgment of the court.  
Justices KARNEZIS and HARRIS concurred in the judgment.

---

**ORDER**

HELD: The circuit court's summary dismissal of defendant's post-conviction petition was proper where defendant's unnotarized declaration was not a valid affidavit, and he failed to state why he believed his appellate counsel rendered ineffective assistance, thus failing to satisfy the requirements of section 122-2 of the Post-Conviction Hearing Act.

Defendant Richard Worthy appeals from an order of the circuit court summarily dismissing his post-conviction petition as frivolous and patently without merit. On appeal, defendant

contends his trial counsel rendered ineffective assistance when he failed to present the defense chosen by defendant, and appellate counsel rendered ineffective assistance on direct appeal. We affirm.

Following a 2006 jury trial, defendant was convicted of first degree murder, aggravated battery with a firearm and aggravated discharge of a firearm for fatally shooting Terrance Brown and wounding Andreas Collier as they attempted to drive away in a car. The trial court sentenced defendant to consecutive prison terms of 45 years, 15 years and 10 years, respectively.

On direct appeal, defendant argued, *inter alia*, that his trial counsel rendered ineffective assistance because his performance was one of total incompetence. Defendant asserted that counsel misunderstood the law of accountability, improperly conceded that defendant fired his gun, eliminated the defense of misidentification, failed to object to hearsay testimony that bolstered a witness' identification of defendant, misunderstood the rules of laying a proper foundation for impeachment, misstated the evidence during closing arguments, and was ineffective in cross-examining the medical examiner. This court rejected defendant's claim that his counsel's performance should be evaluated under the standards set forth in *United States v. Cronin*, 466 U.S. 648 (1984), where prejudice is presumed, rather

than the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). We found that the *Strickland* standard applied because counsel did not concede defendant's guilt, and subjected his case to meaningful adversarial testing. *People v. Worthy*, No. 1-06-2953, order at 6 (2008) (unpublished order under Supreme Court Rule 23). We then reviewed each of defendant's claims under the *Strickland* standard and concluded that defendant failed to establish that counsel rendered ineffective assistance. *Id.* at 9. This court also rejected all of defendant's other contentions and affirmed his convictions and sentences. *Id.* at 14.

Defendant filed a petition for leave to appeal with our supreme court raising two of his claims that his trial counsel rendered ineffective assistance. The supreme court denied his petition. *People v. Worthy*, 228 Ill. 2d 552 (2008).

On September 9, 2009, defendant, through his newly retained counsel, filed the instant petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant alleged, *inter alia*, that his trial counsel rendered ineffective assistance because he did not argue the theory that defendant acted in self-defense after defendant apprised him of facts that demonstrated self-defense, or an unreasonable belief that he had to act in self-defense. Defendant claimed that counsel was ineffective for not presenting

defendant's chosen defense, and refusing to present a defense under which he would have been acquitted or had his offense reduced to second degree murder. Defendant also alleged that appellate counsel rendered ineffective assistance because he failed to raise issues that could have been raised on appeal, but were not. Defendant did not provide any further elaboration for this allegation.

Attached to the petition is defendant's own written "declaration," which is not notarized. Therein, defendant stated that he, along with his parents, sister and brother-in-law, met with trial counsel in front of the police station before he turned himself in. Defendant stated that he told counsel that he was standing outside a party when he recognized a car that belonged to someone he knew who sold marijuana, and he approached the car to buy marijuana. Defendant stated that the passenger in the car swiftly reached under the seat while looking at him, and he thought the man was reaching for a gun. Defendant then drew a gun from his waistband and fired shots at the passenger to prevent him from retrieving a gun. Defendant told counsel that he never intended to kill the passenger, but was merely trying to protect himself from being shot or killed. Defendant also told counsel that he was under the influence of drugs and alcohol at the time of the shooting. Defendant stated that he repeated these facts to counsel two months later. Defendant's four

relatives also signed the declaration, attesting that it was an accurate reflection of defendant's conversation with counsel.

The circuit court found that defendant forfeited his claim that his trial counsel rendered ineffective assistance for failing to present a theory of self-defense because such a claim should have been raised on direct appeal. The court further found that counsel's choice of defense was a matter of trial tactics and not incompetence. The court ruled that defendant failed to show that he was prejudiced by counsel's failure to present a theory of self-defense. In addition, the circuit court determined that defendant's allegation that his appellate counsel rendered ineffective assistance was devoid of any facts and entirely conclusory. Accordingly, the circuit court found that all of the allegations raised by defendant were frivolous and patently without merit, and summarily dismissed his post-conviction petition.

Defendant moved for reconsideration of the circuit court's dismissal of his petition. Following a hearing, the circuit court denied that motion. Defendant now appeals. We review the circuit court's summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

Defendant first contends that his trial counsel rendered ineffective assistance because he failed to argue that defendant acted in self-defense, which was the theory of defense chosen by

defendant. Defendant claims that he had a right to choose his defense, and counsel's failure to abide by his desire constitutes ineffective assistance. Relying on a case from the Delaware Supreme Court (*State v. Cooke*, 977 A.2d 803 (Del. 2009)), defendant argues that he does not have to show that he was prejudiced by counsel's action because counsel's refusal to heed defendant's choice of defense was such a fundamental deprivation of his right to counsel that it obviated the need for him to demonstrate prejudice. Alternatively, defendant asserts that his petition shows that he was prejudiced because he alleged that counsel refused to pursue a defense under which he would have been acquitted, or the offense would have been reduced to second degree murder. Defendant also claims that a second degree murder instruction was justified by the evidence, and counsel's failure to request such instruction constituted ineffective assistance.

The State initially asserts that defendant forfeited review of this issue on appeal because he failed to comply with Supreme Court Rule 341 (eff. July 1, 2008) requiring him to state the standard of review, cite to the record in his brief, and provide a proper citation for the Delaware *Cooke* case. It is within this court's discretion to strike a portion of defendant's brief and deem the issue forfeited due to his failure to comply with Rule 341. *People v. Thomas*, 364 Ill. App. 3d 91, 97 (2006). Such a harsh sanction, however, is appropriate only where the procedural

violations preclude or interfere with our review. *Id.* We find that defendant's violations of Rule 341 have not precluded or substantially interfered with our review, and therefore, we decline to impose the severe penalty. *Id.*

The State further argues that the circuit court's dismissal of defendant's post-conviction petition was proper because defendant failed to attach acceptable supporting documentation to his petition in violation of the Act. The State notes that defendant's "declaration" is not notarized.

Pursuant to section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)), a post-conviction petition must have attached to it "affidavits, records, or other evidence" supporting the allegations raised therein, or explain why such documentation is not attached. Our supreme court has held that an affidavit must be sworn to before a person who has legal authority to administer oaths, and thus, a written statement that has not been sworn to before an authorized person cannot be considered an affidavit. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493-94 (2002). Following *Roth*, this court has previously held that an affidavit filed with a post-conviction petition pursuant to the Act must be notarized to be valid, and an affidavit that is not notarized has no legal effect. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). Consequently, where the defendant's post-conviction petition was not supported by the record or a properly

notarized affidavit, the circuit court's summary dismissal of the petition was proper. See *id.*

Here, the State correctly notes that defendant's "declaration" is not notarized. Defendant's "declaration," therefore, is not a valid affidavit and has no legal effect. Defendant has not attached any other documentation to his post-conviction petition to support his allegation that counsel was ineffective for not arguing defendant's chosen theory of defense, which was self-defense, nor has he explained in his petition the absence of such documentation. Accordingly, we find that defendant's petition failed to meet the requirements of section 122-2 of the Act, and the circuit court's summary dismissal of the petition was proper. See *Niezgoda*, 337 Ill. App. 3d at 597.

We recognize that the failure to meet the requirements of Section 122-2 is sometimes excused where the facts in the petition show that the only affidavit defendant could have furnished, other than his own, was that of his trial counsel. *People v. Hall*, 217 Ill. 2d 324, 333 (2005). Such a situation occurs when defendant's allegations indicate that the circumstances he is challenging arose during a private discussion between him and his counsel, and no one else was present. See *id.* That, however, is not what occurred here. Defendant stated that four other people were present during his discussion with counsel -- his parents, his sister and his brother-in-law. All

four of these family members signed the bottom of defendant's "declaration" attesting to their presence during the discussion, and the veracity of defendant's recounting of that conversation. Defendant could have procured sworn affidavits from these family members in support of his allegations, but did not. Thus, his failure to comply with the requirements of section 122-2 cannot be excused.

Moreover, we reject defendant's contention that his post-conviction petition presented a meritorious claim that trial counsel rendered ineffective assistance when he failed to pursue defendant's choice of defense and argue a theory of self-defense. It is well established that choices of trial strategy, including counsel's choice of one defense theory over another, are "virtually unchallengeable" because such choices involve counsel's professional judgment, which is not subject to a review of his competency. *People v. Cunningham*, 376 Ill. App. 3d 298, 301-02 (2007).

Defendant next contends that his appellate counsel rendered ineffective assistance on direct appeal because he failed to raise issues that could have been raised. Defendant did not provide any further elaboration for this allegation in his post-conviction petition.

To obtain post-conviction relief, the Act dictates that

defendant's petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 722 ILCS 5/122-2 (West 2008). Defendant must allege, in at least a limited amount of detail, why he believes his counsel was ineffective. *People v. Jones*, 341 Ill. App. 3d 103, 107 (2003), *aff'd*, 213 Ill. 2d 498 (2004). A mere allegation that defendant was denied his right to effective assistance of counsel, with no further detail, is insufficient to meet the pleading requirements of the Act. *Id.*

Here, defendant merely alleged that he "was denied appellate counsel in not raising issues that could have been raised on appeal but were not." Defendant has not identified any issues that appellate counsel should have raised. Defendant, therefore, has failed to sufficiently state a constitutional claim that his appellate counsel was ineffective. Accordingly, we find that the circuit court's summary dismissal of defendant's post-conviction petition as frivolous and patently without merit was proper.

For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

Affirmed.