THIRD DIVISION
January 19, 2011

No. 1-08-3585

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. 04 CR 17326
	)	
TYRONE GILL,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to establish the gist of a meritorious claim that the State knowingly presented perjured testimony; the record showed no procedural impropriety in the court's written order; and the assessment of frivolous petition filing fees was not unconstitutional.

Defendant Tyrone Gill appeals the summary dismissal of his *pro se* petition seeking 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 had set forth the gist of a meritorious claim that the State knowingly used perjured testimony at trial. Alternatively, defendant contends that the court's summary dismissal order was procedurally improper because the court did not address this claim in its written order. In a supplemental brief, defendant also challenges the frivolous filing fee assessed by the court under the Code of Civil Procedure (Code). 735 ILCS 5/22-105 (West 2008).

Following a jury trial, defendant was found guilty of first degree murder and was sentenced to 60 years' imprisonment. The evidence included testimony from two eyewitnesses that around 1 a.m. on June 19, 2004, defendant beat, stabbed, and killed his girlfriend, Nissan Nash, on a Chicago street. This court affirmed that judgment on direct appeal, granting appellate counsel's motion to withdraw where there were no issues of merit to warrant argument on appeal. *People v. Gill*, No. 1-06-0777 (December 12, 2007) (unpublished order under Supreme Court Rule 23).

Defendant subsequently filed a *pro se* post-conviction petition alleging, *inter alia*, that the State knowingly presented the perjured testimony of an eyewitness, Deon Powell. Defendant attached to his petition a signed, unnotarized "affidavit" from Powell, in which Powell stated that he wanted to testify as a

witness for defendant, but that Chicago police detective Timothy O'Brien forcibly took him to the police station and threatened to "put the case on" him if he did not make a statement against defendant. The next day, detectives again took him to the police station and coached him on his statement.

In a written order, the circuit court summarily dismissed defendant’s petition as frivolous and patently without merit. The court also assessed defendant $105 based on its finding that defendant's allegations have no basis in law or in fact and have no evidentiary support.

Defendant now appeals from that order, first contending that the summary dismissal of his petition was improper because he set forth the gist of a meritorious claim that the State knowingly presented perjured testimony from Powell, thereby violating his right to due process.

Section 122-2 of the Act requires that a post-conviction petitioner set forth the respects in which his constitutional rights have been violated. 725 ILCS 5/122-2 (West 2008). A *pro se* petition 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*. *Hodges*, 234 Ill. 2d at 9.

The record shows that defendant alleged multiple violations of his constitutional rights in his post-conviction petition, but on appeal, contests the court's dismissal based on only one of these, his allegation that the State knowingly used perjured testimony, supported by the "affidavit" of Deon Powell. By failing to argue the other allegations on appeal, they are forfeited. *People v. Scott*, 194 Ill. 2d 268, 274 (2004).

We note, initially, that defendant raised a perjured testimony claim in response to appellate counsel's request to withdraw on direct appeal. We found that claim to be without merit (*Gill,* No. 1-06-0777, order at 5), and, thus, it is barred by *res judicata*. *Scott*, 194 Ill. 2d at 274.

To the extent that defendant's allegation may be considered because it rests on new evidence, we find that the evidence proffered by defendant in his petition does not comply with the requirements of the Act. In order to survive summary dismissal, defendant must present a petition verified by an affidavit (725 ILCS 5/122-1(b) (West 2008)) and attach an affidavit or other evidence that supports his allegation or otherwise explains their absence (725 ILCS 5/122-2 (West 2008)).

Here, defendant notarized his own verification and Powell verified his submission under section 1-109 of the Code. 735 ILCS 5/1-109 (West 2008). An affidavit filed pursuant to the Act must be notarized to be valid (*People v. Niezgoda*, 337 Ill. App.

3d 593, 597 (2003), citing *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 496 (2002)), and, accordingly, Powell's verification under section 1-109 of the Code, and defendant's insufficient verification, are not substitutes for the established requirements.

Notwithstanding, there is nothing in the "affidavit" or in the record that indicates that Powell's testimony was false or that the State had any knowledge that it was presenting false testimony. *People v. Nowicki*, 385 Ill. App. 3d 53, 97 (2008). Powell claims that he wanted to testify on behalf of defendant, but was prevented from doing so because Chicago police detectives forced and coached his statement. The record, however, shows that Powell testified clearly at trial and was not coached in his identification of defendant in the lineup or in-court. His statement and identification to the police were corroborated by two police detectives. His eyewitness testimony regarding the events on the evening of the murder were partially corroborated by a second eyewitness and by physical evidence, including blood found in defendant's automobile. Finally, we note that Powell does not recant his testimony in his affidavit. Accordingly, we find that defendant failed to set forth a meritorious claim of the State's knowing use of perjured testimony, and we affirm the summary dismissal of his post-conviction petition by the circuit court of Cook County.

Defendant, alternatively, contends that the court made a procedural error when it failed to review defendant's allegation related to Powell's purported affidavit in the written order.

Defendant's argument is based on the trial court's failure to explicitly address his perjured testimony allegation in its written order. The State responds that under *People v. Porter*, 122 Ill. 2d 64 (1988), the Act does not mandate that the trial court detail each of its findings in a written order when summarily dismissing a petition. Defendant replies that *Porter* is inapposite because it is based on the complete lack of a written trial court order, whereas here the trial court failed to address the allegation in the petition.

Initially, we observe that it is the summary dismissal of the petition that is under review on appeal and not the court's reasoning. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). That said, we agree with the State that it is clear that a written order dismissing the petition is mandatory; however, the written explanation is permissive. *Porter*, 122 Ill. 2d at 84-85; *People v. Leason*, 352 Ill. App. 3d 450, 452 (2004); *People v. Ross*, 339 Ill. App. 3d 580, 584 (2003).

Although it is advisable for a trial court to state its reasons for dismissing a postconviction petition, it is not mandatory and defendant here is not prejudiced because the dismissal will be reviewed, *de novo*, on appeal. *Leason*, 352 Ill.

App. 3d at 452, citing *Porter*, 122 Ill.2d at 82. We, therefore, find no error by the court in summarily dismissing defendant's *pro se* post-conviction petition without specifying the facts and the law it relied upon. *Leason*, 352 Ill. App. 3d at 452.

Finally, defendant contends that the trial court improperly assessed fees pursuant to section 22-105(b) of the Code (735 ILCS 5/22-105 (West 2008)) for filing a frivolous petition. He claims that the Code violates due process and equal protection because it denies indigent defendants meaningful access to the courts and it applies to prisoners exclusively.

This court has considered and rejected similar challenges to section 22-105 in *People v. Smith*, 383 Ill. App. 3d 1078, 1095, 1096 (2008); *People v. Gale*, 376 Ill. App. 3d 344, 361 (2007); *People v. Carter*, 377 Ill. App. 3d 91, 102 (2007); and *People v. Hunter*, 376 Ill. App. 3d 639 (2007). Although defendant maintains that these decisions were wrongly decided, we find no reason to deviate from these opinions, applicable to his case, and finding section 22-105 constitutional.

For the reasons stated, we affirm the order of the circuit court of Cook County summarily dismissing defendant's *pro se* petition.

Affirmed.