

No. 1-09-0888

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).

SIXTH DIVISION
January 28, 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 20952
)	
DONTRIUS WILSON,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.

Justices Cahill and R. E. Gordon concurred in the judgment.

O R D E R

HELD: Where defendant agreed his brother would not testify at trial and was not prejudiced by the absence of his brother's testimony, defendant did not present a viable post-conviction claim of ineffective trial counsel; the summary dismissal of the post-conviction petition was affirmed.

Defendant Dontrius Wilson appeals the circuit court's order summarily dismissing his *pro se* petition seeking relief under the

Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant alleged in his petition that his trial counsel was ineffective in failing to call his brother, Robert, as an alibi witness. We affirm.

Following a jury trial, defendant was convicted of the first degree murder of Gregory Lowe. The State presented testimony that at about 12:30 a.m. on August 1, 2004, defendant, Robert and Lowe were among two groups of people arguing in a second-floor apartment. Defendant lived on the first floor of that building. Robert, Lowe and several other people left the upper apartment, and defendant went downstairs and retrieved a gun. Defendant followed them outside and fired five shots into the group, fatally striking Lowe.

The defense presented defendant's mother, who testified defendant came to her house at around 10 p.m. and received a call at 12:30 or 12:40 a.m., after which he left and did not return until 1:30 a.m. Two people who lived near the shooting testified shots were fired between midnight and 12:30 a.m. One neighbor saw a group of men that did not include defendant. The other neighbor said defendant arrived at 12:30 or 1 a.m., which she said was about 30 minutes after the shooting.

The court asked defense counsel if defendant wanted Robert to testify, and defendant indicated his brother would not do so. Defendant's 75-year sentence included a 25-year enhancement for

personally discharging the firearm that killed Lowe. On direct appeal, this court affirmed. People v. Wilson, No. 1-06-0631 (2008) (unpublished order under Supreme Court Rule 23).

On January 13, 2009, defendant filed his *pro se* post-conviction petition asserting, among other claims, that his trial counsel was ineffective in not calling Robert as an alibi witness when Robert was available to testify. Attached to the petition was Robert's affidavit stating he was "coerced to give a statement against" defendant. Robert attested defendant "never, ever shot at a group of individuals on the date Mr. Lowe was killed" and "has never shot at any group of individuals that I was possibly standing in." Robert attested defendant's counsel told him he would testify at trial.

Defendant's petition also was accompanied by his own, unnotarized affidavit stating he wanted Robert to testify at his trial but his attorney "coerced [him] to inform the trial court" he did not want his brother to testify. The circuit court dismissed defendant's petition as frivolous and patently without merit.

On appeal, defendant contends his petition stated the gist of a meritorious claim of the ineffectiveness of his trial counsel. He asserts his attorney was ineffective in failing to call Robert as a witness and that Robert would have testified defendant did not shoot at the group.

Section 122-2 of the Act requires that a post-conviction petition set forth the respects in which the petitioner's constitutional rights were violated. 725 ILCS 5/122-2 (West 2008). A *pro se* petition under the Act 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). A petition lacks an arguable basis either in law or in fact if the petition is based on an indisputably meritless legal theory, which is a theory completely contradicted by the record, or if the petition is based upon a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. Our review of the summary dismissal of a post-conviction petition is *de novo*. See *Hodges*, 234 Ill. 2d at 9.

In defendant's affidavit, which we observe was not notarized, defendant attested he told his attorney he wanted Robert to testify in his defense. 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).

As to the merits of defendant's claim, a post-conviction petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced as a result. *Hodges*, 234

Ill. 2d at 17. As to the first prong, defendant claims he was "coerced" into informing the trial judge he did not want his brother to testify.

The record establishes that after the defense presented several witnesses, the following colloquy occurred:

"THE COURT [to defendant]: Your lawyer has indicated at this point it's his intention to rest on your behalf in the defense of your case. Is that your understanding as to what's going to happen?

DEFENDANT: Yes.

THE COURT: All right. Now your brother Robert Wilson also known as Mae Mae is here in the building. He's back there. * * * You know he's here and he's available to testify, right?

DEFENDANT: Yeah.

THE COURT: You have discussed that with your lawyer, right?

DEFENDANT: Yes.

THE COURT: Okay. And your lawyer is indicating that it is your joint decision not to call your brother as a witness, is that correct?

DEFENDANT: Yes.

THE COURT: Okay. You agree with your lawyer and you are indicating for the record that you do not

wish to call your brother as a witness, at this time, is that correct?

DEFENDANT: We was debating it.

THE COURT: Now's the time. Either you're calling him or you're not. And I'm not going to pass the case again. If you want him called, fine. We will bring him out there and put him up there. Which is it?

DEFENDANT: No.

THE COURT: Okay. You're sure.

DEFENDANT: I'm sure."

The above exchange indicates that defendant agreed with the decision not to present Robert as a witness. Moreover, even if counsel had elected not to offer Robert as a witness and defendant had disagreed with counsel's choice, decisions about what witnesses to present and what theory of defense to offer are matters of trial strategy left to counsel and generally are immune from claims of ineffectiveness. *People v. Perry*, 224 Ill. 2d 312, 354 (2007). It is not arguable that counsel's performance fell below an objective standard of reasonableness.

Even if that prong was met, it also is not arguable defendant was prejudiced by the absence of Robert's testimony. Indeed, Robert's appearance on the witness stand would have harmed the defense. Defendant alleged in his petition, and Robert stated in his own notarized affidavit, that when Robert

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was interviewed by police, he was coerced into incriminating defendant in the shooting. Had Robert taken the stand, he would have had to either offer testimony consistent with his earlier statements incriminating defendant or attempt to exonerate defendant and then bear the risk of being impeached with those earlier statements. In sum, defendant's contention that his trial counsel was ineffective in choosing not to present Robert as a witness lacks an arguable basis in law or fact.

Accordingly, the circuit court's summary dismissal of defendant's post-conviction petition is affirmed.

Affirmed.