

No. 1-09-1810

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FIRST DIVISION  
FILED: June 27, 2011

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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
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 01 CR 15906
	)	
GEORGE FRISON,	)	The Honorable
	)	Mary M. Brosnahan,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Lampkin and Rochford concurred in the judgment.

**ORDER**

*HELD:* The defendant's *pro se* postconviction petition was properly dismissed as frivolous and patently without merit.

The defendant, George Frison, appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), contending that he was deprived of his constitutional right to the effective assistance of trial and appellate counsel. For the reasons that follow, we affirm the decision of the circuit court.

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The defendant was charged, along with codefendants Anthony Mason and Edward Ware, with the first degree murder of Kennedy Brooks and the aggravated battery with a firearm of Eddie Baker in connection with a shooting incident on June 6, 2001. The defendant and codefendant Mason were tried simultaneously before separate juries.

Prior to trial, the defendant moved to suppress his videotaped statement to police on the ground that it was involuntary. At the hearing on his motion, the defendant testified that he was a long-time addict of heroin and was going through heroin withdrawal at the time he gave the statement. The defendant asserted that the inculpatory statement was untrue and had been coerced by the police. He also presented the expert opinion of Dr. Michael Stone, a psychiatrist, who testified that he believed the defendant was suffering from heroin withdrawal when the statement was given. Dr. Stone's opinion was premised on information obtained from the defendant, police records, and the defendant's videotaped statement. The trial court denied the defendant's motion to suppress the statement.

At the defendant's trial, the State presented evidence that, at approximately 11:50 p.m. on the night of June 5, 2001, the defendant and codefendants Mason and Ware drove to the intersection of 43rd Street and Michigan Avenue, where they had previously

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arranged to purchase narcotics from Eddie Baker and Kennedy Brooks. When the defendant and codefendant Mason got into the van occupied by Baker and Brooks, the defendant pulled out a gun and demanded the drugs. Mason also pulled out a gun and started shooting. Baker, who was shot in the right leg, exited the van and ran down an alley. When he reached the end of the alley, he heard three additional gunshots, but did not observe who fired the shots. Baker ran home and was later taken to the hospital. Brooks died of multiple gunshot wounds, and his body was found lying in the middle of the street near the intersection. The defendant was arrested on the morning of June 7, 2001, while he was in the basement of his apartment building. The police recovered several weapons, including the .25-caliber semi-automatic pistol that was used in the shooting of Brooks.

The defendant's videotaped statement was published to the jury. In that statement, the defendant admitted that he had arranged to purchase 100 grams of heroin from Brooks, but he never intended to complete the transaction. Instead, he and his codefendants planned to rob Brooks of the drugs. The defendant also admitted that he and Mason were both armed with loaded guns when they entered the van and that he struggled with Baker, who grabbed his arm as he started to pull out his gun. Mason started shooting, and Baker and Brooks ran from the van. After he returned

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to the car, Ware took a handgun and pursued Brooks, telling him to turn over the drugs. The defendant stated that he drove off after hearing a gunshot. In his statement, the defendant acknowledged that he did not observe Baker or Brooks with a weapon.

At trial, the defendant testified contrary to his videotaped statement, stating that Baker and Brooks robbed him at gunpoint during the narcotics transaction that he had arranged on behalf of Ware. The defendant explained that, when he went to meet Brooks and Baker, he had \$12,050 of Ware's money and was unarmed, but Mason was carrying a .25-caliber automatic pistol. The defendant testified that, as he started to hand over the money, Baker pulled out a gun. Mason grabbed the weapon, and the two men began to struggle. Following a series of gunshots, everyone exited the van, and he returned to the car and told Ware that he had been robbed. Ware armed himself with a gun and ran after Brooks to retrieve his money. The defendant stated that he heard what sounded like a gunshot as he drove away.

In addition, the defendant also repeated much of his testimony at the pretrial hearing, stating that he was undergoing withdrawal from heroin when his inculpatory statement was given. According to the defendant, he agreed to make the videotaped statement because the police told him they would get him medical attention and would not harass his family if he cooperated. The defendant also called

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Dr. Stone, who again testified that he believed the defendant was going through withdrawal when he gave the videotaped statement.

The jury found the defendant guilty of intentional murder and of aggravated battery with a firearm (720 ILCS 5/9-1(a)(1), 12-4.2(a)(1) (West 2000)). The trial court sentenced him to an aggregate sentence of 42 years in prison. This court affirmed the defendant's convictions and sentence on direct appeal. See *People v. Frison*, No. 1-05-2561 (2007) (unpublished order under Supreme Court Rule 23).

The defendant subsequently filed a *pro se* postconviction petition, claiming that he had been denied the right to effective assistance of counsel. In particular, the defendant asserted that his appellate counsel was ineffective based on the failure to raise unspecified "meritorious" issues on direct appeal. The petition also asserted nine claims of ineffective assistance of trial counsel, including that the defendant's attorney "reeked of alcohol and appeared intoxicated" during trial. With regard to this claim, the petition alleged that several members of the defendant's family also "observed and smelled this scent" and that defense counsel's "condition during trial 'greatly' affected his performance."

The defendant further claimed that his trial attorney was ineffective in failing to interview and call several members of the defendant's family and his former drug counselors. The petition

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alleged that those witnesses would have testified that the defendant "had a substance abuse problem for a number of years, thus warranting a 'diminished capacity' defense."

Attached to the *pro se* postconviction petition was the defendant's verification, pursuant to section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2008)) certifying that, under penalty of perjury, the facts set forth in the petition are true and correct "to the best of his knowledge and belief." The defendant's petition was supported by the affidavits of three of his sisters, his mother, and codefendant Mason. The petition was also supported by the statements of codefendant Ware and Menard McAfee, a fellow prison inmate, both of which were verified under section 1-109 of the Code. In addition, the defendant attached his own statement, also verified under section 1-109 of the Code, attesting that three other persons had executed affidavits that had been lost when he was transferred to another prison facility.

The circuit court summarily dismissed the defendant's *pro se* petition, finding that it was frivolous and without merit. This appeal followed.

On appeal, the defendant contends that the circuit court erred in summarily dismissing his postconviction petition because the factual assertions in the petition and supporting documents were sufficient to present the gist of a claim that he had been deprived

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of his constitutional right to the effective assistance of trial and appellate counsel. Our review of the summary dismissal of a *pro se* postconviction petition is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204 (2009).

We initially address the State's claim that the defendant's *pro se* petition was properly dismissed because it was technically defective and did not comply with the terms of the Act. This claim is premised on the assertion that only a notarized affidavit is sufficient to satisfy the statutory requirements that a postconviction petition be "verified by affidavit" (725 ILCS 5/122-1(b) (West 2008)) and that its allegations be supported by "affidavits, records, or other evidence" (725 ILCS 5/122-2 (West 2008)). To support this argument, the State relies on *People v. Collins*, 202 Ill. 2d 59, 782 N.E.2d 195 (2002), *People v. Carr*, 407 Ill. App. 3d 513, 944 N.E.2d 859 (2011), and *People v. Niezgoda*, 337 Ill. App. 3d 593, 786 N.E.2d 256 (2003), which held that the dismissal of a postconviction petition was proper where the petition was not supported by a notarized affidavit. *Collins*, 202 Ill. 2d at 66; *Carr*, 407 Ill. App. 3d at 515-16; *Niezgoda*, 337 Ill. App. 3d at 596-97. Yet, these cases do not mention section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2008)), and it is unclear if they considered whether a certification under that provision would satisfy the statutory

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requirements that postconviction petitions be supported by affidavits.

However, *People v. Rivera*, 342 Ill. App. 3d 547, 795 N.E.2d 1016 (2003), did expressly address that question and found that a statement certified under section 1-109 of the Code is the functional equivalent of a notarized affidavit and, therefore, sufficient to meet the requirements of the Act. *Rivera*, 342 Ill. at 550-51; see also *People v. Dredge*, 148 Ill. App. 3d 911, 913, 500 N.E.2d 445 (1986) (recognizing that a statement that has been verified, but not notarized, may be considered in determining whether a petition is sufficient to satisfy the pleading requirements at the first stage of postconviction proceedings).

We find the reasoning of *Rivera* to be sound and conclude that the defendant's *pro se* postconviction petition is not subject to dismissal merely because it was verified by a statement that was certified under section 1-109 of the Code rather than by a notarized affidavit. Affirming the dismissal of the petition on this ground alone would elevate form over substance, which we decline to do. For the same reason, we decline to hold that the verified statements executed by Edward Ware and Menard McAfee may not be considered as evidentiary support for the petition. Moreover, these verified statements qualified as "other evidence," which is explicitly permitted under section 122-2 (725 ILCS 5/122-2

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(West 2008)). Consequently, we reject the State's argument that the defendant's *pro se* petition was properly dismissed because it failed to comply with the affidavit requirements set forth in sections 122-1(b) and 122-2 of the Act (725 ILCS 5/122-1(b), 122-2 (West 2008)).

We next consider the defendant's argument that the circuit court's decision was tantamount to a partial summary dismissal, requiring that the cause be remanded and his petition advanced to second-stage proceedings on all of the claims raised therein. This argument fails because it is refuted by the record.

The defendant's petition raised 10 claims, all of which asserted that he had been deprived of the effective assistance of counsel either at trial or on appeal. In dismissing the petition as frivolous and patently without merit, the circuit court issued a 10-page order that addressed seven of the defendant's claims in detail. The remaining three claims were premised on the fact that trial counsel (1) did not call codefendant Mason to testify that the defendant was not armed and did not fire a weapon on the night of the shooting, and (2) did not interview or call certain of the defendant's family members and his former drug counselors to testify that, at the time of his arrest, the defendant had a long-time addiction to heroin addiction, and (3) did not call Joseph Collins and other witnesses to testify that Collins had not

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consented to search the defendant's residence. These claims, though not addressed in a detailed manner, were disposed of in that portion of the court's decision recognizing that a trial attorney's decision regarding which witnesses to call is a matter of trial strategy. Thus, although these three claims were dealt with in a summary fashion, the record affirmatively demonstrates that the circuit court found all of the defendant's claims to be frivolous and without merit and disposed of the petition in its entirety.

In addition, the defendant's argument that the circuit court "failed to perform a meaningful substantive review of other claims" necessarily fails in light of the fact that this court reviews the dismissal of a postconviction petition *de novo*. See *Hodges*, 234 Ill. 2d at 9. We review the trial court's judgment, not the cited reasons, and we may affirm a correct judgment on any basis supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138, 929 N.E.2d 1206 (2010). Accordingly, reversal and remand is not warranted on the basis that the circuit court entered a partial summary dismissal in violation of section 122-2.1 of the Act (725 ILCS 5/122-2.1 (West 2008)).

Turning to the substance of the defendant's postconviction claims, we note that a postconviction petition is considered frivolous or patently without merit if the petition's allegations, taken as true, fail to present the "gist" of a constitutional

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claim. *Hodges*, 234 Ill. 2d at 9. This pleading threshold is low, and a petition “need only present a limited amount of detail.” *Hodges*, 234 Ill. 2d at 9; *People v. Delton*, 227 Ill. 2d 247, 254, 882 N.E.2d 516 (2008). Yet, this does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional deprivation. *Hodges*, 234 Ill. 2d at 10. A *pro se* petition must set forth some facts which can be corroborated and are objective in nature or contain an explanation as to why those facts are absent. *Hodges*, 234 Ill. 2d at 10. A *pro se* postconviction petition may be summarily dismissed as frivolous or patently without merit if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. A petition will be found to have no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16-17.

Here, though his *pro se* postconviction petition raised 10 claims of ineffective assistance of counsel, the defendant challenges the dismissal of only two of those claims. Postconviction claims of ineffective assistance of counsel are governed by the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Hodges*, 234 Ill. 2d at 17. Under this standard, a defendant must demonstrate that his counsel’s representation fell below an

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objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 688, 694; *People v. Mahaffey*, 194 Ill. 2d 154, 174-75, 742 N.E.2d 251 (2000). Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344, 736 N.E.2d 975 (2000). Judicial review of defense counsel's performance is highly deferential, and courts indulge the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and might be considered sound trial strategy. *Strickland*, 466 U.S. at 689-90.

The defendant first claims that his trial attorney was ineffective because he "reeked of alcohol and appeared intoxicated" during trial. Even if these assertions are accepted as true, they are insufficient to support the defendant's claim because the fact that defense counsel was under the influence of drugs or alcohol does not establish *per se* ineffective assistance. See *People v. Burris*, 315 Ill. App. 3d 615, 617, 734 N.E.2d 161 (2000); *People v. White*, 180 Ill. App. 3d 781, 791, 536 N.E.2d 481 (1989). The *pro se* petition does not allege any objective facts indicating how defense counsel's performance was deficient. The defendant's assertion that his attorney's condition " 'greatly' affected his

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performance" constitutes nothing more than a broad conclusion, and, as such, it fails to provide even a limited amount of detail as to the manner in which the representation of the defendant was defective.

In addition, the postconviction petition entirely fails to allege any facts indicating that the result of the trial would have been different if his attorney's performance had not been deficient. Under *Strickland*, actual prejudice must be shown, and mere speculation as to prejudice is insufficient. *People v. Bew*, 228 Ill. 2d 122, 135-36, 886 N.E.2d 1002 (2008). The defendant's argument that prejudice may be presumed is unpersuasive where neither the petition nor the record indicates that defense counsel's ability to render competent representation was impaired. Consequently, the petition contains no facts, capable of independent corroboration, showing that defense counsel's conduct fell below an objective standard of reasonableness or that the defendant suffered prejudice as a result of his attorney's allegedly intoxicated condition. Because the basis of this claim of ineffective assistance of counsel amounts to nothing more than pure conjecture, it fails to allege the gist of a constitutional claim and was properly dismissed as frivolous and patently without merit.

The defendant also claims that he was denied the effective

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assistance of counsel because his trial attorney did not present additional testimony from family members to corroborate evidence that he "had a substance abuse problem for a number of years, thus warranting a 'diminished capacity' defense."

Decisions concerning which witnesses to call and what evidence to present on the defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel. *People v. Enis*, 194 Ill. 2d 361, 378, 743 N.E.2d 1 (2000). Because such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence, they are generally immune from claims of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 378.

In this case, the *pro se* postconviction petition alleged that defense counsel was ineffective because he failed to interview or call the defendant's mother and two of his sisters, who would have testified that he had been addicted to heroin for many years and was using heroin during June 2001. We note, however, that none of these affiants attested that they were present when the defendant gave his videotaped statement, nor did they describe the defendant's physical condition at that time. Therefore, even assuming the truth of the factual assertions in these affidavits, they do not provide any support for the claim that the substance of the defendant's statement was false or had been coerced. In light of this circumstance, the postconviction petition does not allege

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any objective facts that would overcome the presumption of reasonableness applicable to defense counsel's strategic decision not to supplement the testimony of the defendant and that of Dr. Stone with the testimony of the defendant's mother and two sisters. Accordingly, the defendant's postconviction petition failed to present the gist of a claim of ineffective assistance of counsel based on the failure to call the defendant's family members as additional witnesses.

As a final matter we address the defendant's argument that he is entitled to three additional days of credit against his sentence for time spent in custody prior to sentencing. The State concedes that the defendant's initial presentence credit was calculated incorrectly. Defendants "shall be given credit \* \* \* for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2008); *People v. Williams*, 239 Ill. 2d 503, 506-07, 942 N.E.2d 1257 (2011).<sup>1</sup>

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<sup>1</sup> Section 5-4.5-100 was enacted in 2009 as part of several amendments to the Unified Code of Corrections. Prior to the amendment, the same provisions were found in section 5-8-7, now repealed. No relevant changes were made to the language or substance of the provisions, and we will therefore refer to the current statutory scheme.

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In this case, the record reflects that the defendant was in custody for 1509 days before the trial court imposed sentence, but he was granted credit for only 1506 days. Therefore, pursuant to Supreme Court Rule 615(b)(1) (134 Ill. 2d R. 615(b)(1)), we grant the credit requested by the defendant and order that the mittimus be corrected to reflect an additional three days' credit against the defendant's sentence.

For the foregoing reasons, we affirm the summary dismissal of the defendant's postconviction petition and correct the mittimus.

Affirmed and mittimus corrected.