

No. 1-09-2114

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).

FIRST DIVISION
June 20, 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 17725
)	
ELBERT CONWAY,)	Honorable
)	Thomas V. Gainer, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Summary dismissal of post-conviction petition affirmed where defendant's claim of ineffective assistance of trial counsel had no arguable basis in law or in fact.

Defendant Elbert Conway 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). He

contends that the circuit court erred in dismissing his petition at the first stage of proceedings because he set forth a cognizable claim of ineffective assistance of trial counsel.

The record shows, in relevant part, that in 2005, a jury found defendant guilty of aggravated battery with a firearm and attempted first degree murder. At sentencing, the court merged these convictions and sentenced defendant to a single term of 25 years' imprisonment for attempted first degree murder. This court affirmed that judgment on direct appeal. *People v. Conway*, No. 1-05-3435 (2007) (unpublished order under Supreme Court Rule 23).

On April 22, 2009, defendant filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel, and, as pertinent to this appeal, cited the failure of counsel to interview Mark Cherry and Andre Cox. In support of this allegation, defendant attached the affidavit of Cox who averred, in relevant part, that he and Cherry questioned the shooting victim, Willie Madlock, "as to why he was lying on" defendant and his alleged co-offender. Willie responded that he did not know who had shot him, but had "a lot of dislike" for defendant because he believed that defendant had "slept with his girl and was smiling in his face." Cox told defendant about this conversation and volunteered to testify on his behalf, but was never contacted by an attorney.

Defendant also attached his own affidavit in which he averred, in relevant part, that he informed trial counsel's representative of the statements Willie made to Cherry and Cox. He stated that counsel was aware of Cherry and Cox, but told him that he "had nothing to worry about" in light of statements Willie had made to Jeanine Cortay in a phone call to counsel's office. Defendant also stated that he asked counsel whether he was going to call Cherry and Cox as witnesses, and counsel responded that he had not spoken with them and intended to call defendant's sister, Latoya Granderson, and Cortay.

The circuit court timely reviewed defendant's petition and found, *inter alia*, that defendant did not support his claim that counsel was ineffective for failing to interview and call Cox and Cherry with appropriate evidence. The court further found that it was reasonable for counsel not to have investigated Cherry and Cox when he intended to elicit similar testimony from Cortay, and that defendant was not prejudiced where nothing in Cox's affidavit would have discredited Michelle Madlock's lineup identification of defendant as the shooter. The court then summarily dismissed defendant's petition as frivolous and patently without merit, and defendant now challenges the propriety of that dismissal on appeal.

The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial

denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings under the Act are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2008). The Act further requires that the petition be supported by "affidavits, records, or other evidence," or state why they are not attached (725 ILCS 5/122-2 (West 2008)). *Delton*, 227 Ill. 2d at 253.

At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

Defendant maintains that he set forth a claim of ineffective assistance of trial counsel warranting further proceedings under the Act. The State responds that defendant has forfeited this claim by failing to raise it on direct appeal. Defendant replies that where the facts pertaining to the post-conviction claim do not appear on the face of the trial record, the rules of procedural default will be relaxed. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010).

Defendant claimed in his petition that counsel failed to interview Cox and Cherry, who allegedly could testify that Willie did not know who the shooter was and disliked defendant. Although defendant's averments show that counsel was aware of these potential witnesses, and that he and defendant discussed whether they would be called, we decline to impose forfeiture to his claim where the specific information regarding their proposed testimony was outside the trial record and could not have been considered on direct appeal. *Taylor*, 237 Ill. 2d at 372-73.

To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

Defendant claims that counsel was ineffective for failing to investigate and call Cox and Cherry. We initially note that a claim that counsel was deficient in failing to investigate and

call a witness must be supported by an affidavit from that witness. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Here, defendant attached to his petition his own affidavit and that of Cox, but he did not attach an appropriate affidavit from Cherry. We are thus unable to determine whether Cherry could have provided testimony or information favorable to defendant (*Enis*, 194 Ill. 2d at 380), and will not consider his purported testimony in this appeal.

That said, we turn to whether trial counsel rendered ineffective assistance in failing to interview and call Cox for the purpose of testifying to the information contained in his affidavit. We observe that the decision of whether to call a particular witness is generally a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989).

Here, Cox averred that he would have testified that Willie told him he did not know the identity of his shooter, but identified defendant as such because he disliked him for sleeping with his girlfriend. Although we recognize that Cox's purported testimony would have had impeachment value with respect to Willie's identification of defendant as the shooter, the record shows that Willie's credibility had already been vigorously challenged at trial. He was subjected to extensive cross-examination which touched on, *inter alia*, his drug dealing, drug

use, and gang affiliation. His credibility was also attacked by defendant's sister, Latoya, who testified that Willie told her at a bond hearing, "If I just get [\$]2,500, this shit be over with, I won't have to be here."

Notwithstanding this impeachment, Willie's identification testimony was independently corroborated by the identification testimony of his sister Michelle. From her second-floor bedroom window, Michelle saw two individuals walk up to Willie's car, which was parked directly in front of her house. After she heard shots fired, she looked out the window and observed defendant standing on the driver's side of Willie's car for about five seconds "[c]licking" his gun, before walking away with his armed companion. Michelle then heard a door open, followed by her brother calling her name, telling her he had been shot, and asking for her help.

Michelle ran downstairs and opened the front door, but did not immediately go outside because she saw that the shooters were still walking down the block. Instead, she called 911, and the emergency operator told her to bring towels outside and use them to put pressure on Willie's gunshot wounds. She directed her uncle to do this, and remained on the phone until the ambulance arrived, as she was instructed to do. When police eventually arrived, she told them what she had seen, although she did not mention that she knew who was responsible for the shooting.

About two months after the shooting, Michelle identified defendant in a lineup as one of the shooters, and also identified the second shooter, Louis Sanders, from a photo array. At trial, she identified defendant again as one of the shooters, and testified that she had seen him once or twice before in the neighborhood, but had never spoken with him and did not know his name. Michelle also testified that Willie was not allowed in her home because she does not condone his activities and has to protect her two children.

There is nothing in Cox's affidavit that would impeach the independent identification testimony of Michelle, and little that would further impeach Willie's testimony considering that counsel had already elicited an abundance of damaging information about him at trial. Moreover, in ruling on defendant's motion for a new trial, the court noted that it found Michelle "very hostile to Willie Madlock's witness. She did not like her brother." The court also noted that "[t]he whole lifestyle of her brother was such that she didn't want anything whatsoever to do with him *** she simply did not like him, and you could see that in her, and you could see that in the testimony and the answers that she gave that that was her position." It is thus clear that the trial court found a lack of bias in the testimony of Michelle, which is compelling indicia of its independent reliability.

Under these circumstances, we find that defendant has failed to show that counsel's decision regarding this proposed witness was unreasonable or outside the presumption of sound trial strategy (*Enis*, 194 Ill. 2d at 378), or that he was arguably prejudiced by counsel's failure to interview and call Cox as a witness (*Strickland*, 466 U.S. at 687, 694). In sum, defendant failed to set forth a cognizable claim of ineffective assistance of trial counsel (*Flores*, 153 Ill. 2d at 283), to warrant further proceedings under the Act, and we affirm the summary dismissal of his post-conviction petition.

Affirmed.