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SECOND DIVISION
MARCH 8, 2011

1-09-2379

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 5501
	)	
DOUGLAS TATE,	)	Honorable
	)	Marcus R. Salone,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: Defendant failed to set forth a cognizable claim of ineffective assistance of trial counsel or actual innocence to warrant further proceedings under the Post-Conviction Hearing Act; summary dismissal of the defendant's post-conviction petition affirmed.

Defendant Douglas Tate appeals from an order of the circuit court of Cook County summarily dismissing his 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 without a hearing or explanation, and because he set forth valid constitutional claims of ineffective assistance of trial counsel and actual innocence in his petition.

The record shows that the defendant was convicted of first-degree murder after a bench trial, based on evidence that on August 29, 2001, at 3:30 p.m., four witnesses saw him fatally shoot the victim, Maurice Wesley. The defendant was subsequently sentenced to 50 years' imprisonment, and

this court affirmed that judgment on direct appeal. *People v. Tate*, No. 1-07-1094 (2008) (unpublished order under Supreme Court Rule 23).

In the direct appeal, the defendant alleged, *inter alia*, that his trial counsel was ineffective for failing to call Lateoia Wilson (Lateoia) or Ronnell Winfrey (Winfrey) as witnesses to corroborate his account to police that his car was in the repair shop at the relevant time, and that the evidence was insufficient to prove him guilty beyond a reasonable doubt. This court found that the testimony of the four eyewitnesses, which included the victim's son, was sufficient to convict the defendant of first-degree murder, that any discrepancies in their testimony were minor in comparison to the consistencies, that Lateoia and Winfrey were known to be potential witnesses based on the police reports, and, without evidence to the contrary, this court presumed that counsel's decision not to call them was a matter of trial strategy. *Tate*, order at 8-10.

On August 3, 2009, defendant filed a post-conviction petition through privately retained counsel, alleging that his trial counsel was ineffective for failing to investigate and call known alibi witnesses, Tina Louise Tate (Tina), who was then his girlfriend and now wife, and her roommate Marilyn Pass (Pass), as well as known eyewitnesses such as Steven Hebron (Hebron) and Shevell Wilson (Wilson). The defendant alleged that he informed trial counsel that he was at Tina's apartment at the time of the shooting, but his counsel never questioned Tina about the alibi, and that had counsel conducted a cursory investigation, he would have learned that Tina's roommate, Pass, also saw him at their apartment on the date in question.

The defendant further alleged that the police reports show that Hebron was identified as being on the scene of the murder, but that counsel never investigated him although Hebron was sure that the defendant was not the shooter or even present at the time of the shooting. The defendant also alleged that Detective Cronin attempted to coerce Hebron to say that the defendant was the shooter, and that Wilson was identified in the police reports and also questioned by the detective, however, counsel did not investigate him.

The defendant further alleged that these four witnesses provide newly discovered evidence of his actual innocence. In support of this claim, and that of ineffective assistance of trial counsel, the defendant attached to his petition his own affidavit and the affidavits of Tina, Pass, Hebron and Wilson. The defendant averred that he told his trial counsel that on August 28, 2001, he spent the evening at Tina's apartment and did not leave until 11 p.m. the following evening.

Tina averred that the defendant came to her home on August 28, 2001, spent the night with her, and did not leave until 11 p.m. the next night. She also averred that she had met with the defendant's trial counsel prior to trial, but that he did not ask her whether the defendant was with her on August 29, 2001.

Pass averred that she lived with Tina, who is her cousin. Pass recalled that the defendant spent the night of August 28, 2001 at their apartment, and that she did not see him leave until 11 p.m. the next day.

In his affidavit, Hebron averred that on August 29, 2001, at 3:30 p.m., he was talking with some men and was five feet from the victim when he saw a black man wearing a baseball cap and jeans quickly walk up to the victim and shoot him. Hebron further averred that he has known the defendant for some years as an acquaintance, did not see him near the shooting, and is sure that he was not the shooter. Hebron averred that he told this to Detective Cronin, who tried to get him to say that the defendant was the shooter.

Wilson averred that at the time in question he heard four gunshots and turned in the direction from which the shots were fired. He further averred that he did not see the defendant anywhere near the corner where the incident occurred or shoot anyone, and averred that he had told this to the detective.

On August 11, 2009, the circuit court dismissed the defendant's petition without comment. In this appeal from that ruling, the defendant first contends that the circuit court erred when it summarily dismissed his petition without specifying its findings of fact and conclusions of law in

a written order as required by statute (725 ILCS 5/122-1(a)(2) (West 2008)). The supreme court has held that this statutory provision is directory as to the entry of a written order and its content, rather than mandatory; and, as a consequence, the circuit court's failure to specify its findings in a written order does not require reversal. *People v. Porter*, 122 Ill. 2d 64, 82-83 (1988). We thus reject the defendant's contention of error based on the court's omission.

Substantively, the defendant contends that the court erred in summarily dismissing his petition where he set forth two cognizable claims. He first maintains that he presented a valid constitutional claim of ineffective assistance of trial counsel for failing to investigate and call potential alibi witnesses, Tina and Pass, and eyewitnesses, Hebron and Wilson.

At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that the defendant only plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). This standard applies where the initial petition was filed *pro se* or through privately retained counsel (*People v. Smith*, 326 Ill. App. 3d 831, 836, 840 (2001)), and our review of a first-stage summary dismissal is *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)).

In determining whether the defendant set forth a meritorious claim of ineffective assistance of counsel, we are guided by the standard set forth in *Strickland*. *People v. Morris*, 335 Ill. App. 3d 70, 78 (2002), citing *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate ineffective assistance of trial counsel, the defendant must allege facts showing that counsel's performance was objectively unreasonable and resulted in prejudice to defendant. *Strickland*, 466 U.S. at 687, 694; *People v. Chatman,* 357 Ill. App. 3d 695, 700 (2005).

Here, the defendant relies on the affidavits of Tina, Pass, Hebron and Wilson to establish his

claim of ineffective assistance of trial counsel. The State responds that this claim is *res judicata* because the issue of whether counsel was ineffective was decided on direct appeal, and, further, that he has forfeited the additional claims which could have been raised on direct appeal. Defendant replies that this issue is neither *res judicata*, or forfeited, because it is based on facts, namely the affidavits, which were not part of the record on direct appeal.

As noted, the defendant raised a claim of ineffective assistance of trial counsel on direct appeal based on counsel's failure to call two named witnesses to corroborate his account to police. This court found no merit in his claim where the individuals were known to be potential witnesses based on the police reports and invoked the presumption that the decision not to call them was a matter of trial strategy. *Tate*, order at 10.

In his post-conviction petition, the defendant raised the same issue based on different witnesses. Under similar circumstances, this court found an ineffective assistance claim barred by *res judicata* because it had already been addressed on direct appeal. *Chatman*, 357 Ill. App. 3d at 702. We have also applied forfeiture to claims that the defendant failed to address on direct appeal where they were based on facts ascertainable from the record. *People v. Jefferson*, 345 Ill. App. 3d 60, 70-71 (2003).

The record here shows that Hebron, Wilson and Tina were listed in the police reports, which were part of the record on direct appeal. As a consequence, the defendant could have also alleged that counsel was ineffective for failing to call them on direct appeal, as he did with Lateoia and Winfrey.

The defendant seeks to avoid the application of these procedural bars by claiming that the argument in his petition was based on the affidavits which were not part of the appellate record, and thus not subject to *res judicata* or waiver. Even if we were to accept that premise, we find no basis for reversal.

The affidavits relied upon by the defendant are deficient in that none of the witnesses averred

that they were available and willing to testify to the content stated. An affiant must not only identify the source and character of the alleged evidence, but also its availability. *People v. Johnson*, 183 Ill. 2d 176, 190 (1998); *People v. Brown*, 371 Ill. App. 3d 972, 982 (2007). Here, the affidavits which the defendant had attached to his petition do not meet that criteria, and thus do not establish his claim of ineffective assistance of trial counsel. *Brown*, 371 Ill. App. 3d at 982.

Hebron's vague and doubtful identification of the shooter as someone other than defendant, *i.e.*, a black male wearing jeans and a baseball cap who quickly came upon the scene, would not have overcome the strong, positive identifications made by the four eyewitnesses who saw the defendant fatally shoot the victim (*People v. Slim*, 127 Ill. 2d 302, 307-09 (1989)). Moreover, Wilson did not indicate in his affidavit that he actually saw the shooter, but, rather, he stated that he heard gunshots, then looked in that direction. As such, the defendant cannot establish the prejudice prong of the *Strickland* test to further his claim.

We reach the same conclusion regarding counsel's failure to call Tina and Pass. Given the familial relationship of the defendant and the women, their credibility may have carried little weight (*People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003)). Neither stated that they were with the defendant the entire day, and Tina admitted talking with defense counsel, but did not offer the alibi presented until three years after the trial. Thus, the defendant cannot show the requisite prejudice to state a cognizable claim of ineffective assistance of counsel for failing to call them as witnesses (*People v. Harris*, 206 Ill. 2d 293, 306 (2002); *People v. Williams*, 252 Ill. App. 3d 1050, 1059 (1993)).

The defendant next claims that he presented a valid constitutional claim of actual innocence, offering in support, the same affidavits used for his ineffective assistance of trial counsel claim. He maintains that these show that he was not the shooter and was not at the scene of the murder.

To be entitled to relief under the theory of actual innocence based on newly discovered evidence, the supporting evidence must be new, material, non-cumulative, and of such conclusive

character that it would probably change the result on retrial. *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001). A free-standing claim of actual innocence means that the newly discovered evidence cannot be used to supplement an assertion of a constitutional violation with respect to the trial. *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998).

Since the defendant used the four affidavits to support his ineffective assistance of trial counsel claim, they cannot also be used to support his free-standing claim of actual innocence. *Brown*, 371 Ill. App. 3d at 984. Accordingly, we find that the defendant did not present an arguable claim of actual innocence, and his petition was properly dismissed at the first stage of proceedings.

In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

Affirmed.