2011 IL App (2d) 091183-U
No. 2-09-1183
Order filed Decmeber 21, 2011

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

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-CF-3272
	)	
JOSEPH L. WILKINS,	)	Honorable
	)	Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: The trial court properly summarily dismissed defendant's postconviction petition alleging ineffective assistance of counsel: defendant failed to attach or sufficiently explain the absence of an affidavit from a witness whom counsel allegedly should have called, and he failed to attach evidence of his working environment that counsel allegedly should have introduced, which evidence in any event would have been irrelevant. We affirmed the judgment of the trial court.

¶ 1 Defendant, Joseph L. Wilkins, appeals the summary dismissal of his petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant claims that his trial attorney was ineffective for failing (1) to call a witness to testify that defendant was not present when a stolen credit card was used to purchase items; and (2) to present evidence that

defendant worked in a drug-free environment and, thus, would not have used the proceeds from the sale of the stolen goods to purchase drugs. We affirm.

¶ 2 In September 2007, defendant and some other men obtained a credit card issued to another person and used that card to make purchases at a Meijer store. The men then sold those items and used the money they received to buy drugs. Based on the evidence presented to the jury, which included a video depicting defendant making the purchases at the Meijer store and testimony from a Meijer sales clerk who identified defendant as resembling the man who bought the merchandise with the stolen credit card, defendant was convicted of two counts of unlawful use of a credit card (see generally 720 ILCS 250/8 (West 2006)). Subsequently, he was sentenced to concurrent terms of seven years' imprisonment.

¶ 3 On direct appeal, defendant challenged the sufficiency of the indictment and the classification of the offenses for sentencing purposes, and this court affirmed. See *People v. Wilkins*, No. 02-08-0488 (June 17, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 On September 14, 2009, defendant sent a letter to the trial court. In this letter, defendant asserted, among other things, that his trial counsel was ineffective because he failed to contact Emery Jones, who would have testified that defendant was not there when the stolen credit card was used. Additionally, defendant asserted that counsel was ineffective for failing to present evidence that defendant worked in a drug-free environment, thereby rebutting any claim that defendant sold stolen merchandise and then used the proceeds of that sale to buy drugs.

¶ 5 On October 6, 2009, defendant filed a *pro se* petition, which, together with the letter, formed the basis of defendant's postconviction claims. In the petition, defendant alleged that his counsel was ineffective for failing to show the jury his W2 forms and paycheck stubs and ask defendant about his weekly drug testing. Defendant claimed that all of this evidence would have revealed that

defendant worked in a drug-free environment. Defendant contended that, without this evidence rebutting the State's evidence that proceeds from the sale of the Meijer merchandise were used to buy drugs, the jury was left to believe that defendant was a drug user. Additionally, defendant asserted that his trial counsel was ineffective for failing to contact Jones, who would have stated that defendant was not at Meijer when the stolen credit card was used. Defendant acknowledged that he did not attach Jones's affidavit to his petition because defendant had not been able to contact Jones since defendant was sent to prison.

¶ 6 The trial court summarily dismissed the petition, finding that the allegations in the petition were or could have been raised on direct appeal and were either forfeited or barred by the doctrine of *res judicata*. The trial court also found that the petition was frivolous and patently without merit. Defendant timely appeals from that dismissal.

¶ 7 On appeal defendant contends that the trial court erred when it summarily dismissed his petition, because his trial counsel provided ineffective assistance. "The Act provides a remedy to defendants who have suffered substantial violations of their constitutional rights." *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). As such, the remedy " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. West*, 187 Ill. 2d 418, 425 (1999) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). The scope of the proceeding is limited to constitutional matters that neither have been, nor could not have been, previously adjudicated. *People v. Carballido*, 2011 IL App (2d) 090340, §35 (citing *People v. Rissley*, 206 Ill. 2d 403, 412 (2003)). Any issues which could have been raised on direct appeal, but were not, are procedurally defaulted (*People v. Ruiz*, 132 Ill. 2d 1, 9 (1989)), and any issues which have previously been decided by a reviewing court are barred by the doctrine of *res judicata* (*People v. Silagy*, 116 Ill. 2d 357, 365 (1987)). In addition to these procedural bars, a defendant is not entitled to an evidentiary hearing unless the allegations set forth

in the petition, as supported by the trial record or accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). In making that determination, all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act. *Coleman*, 183 Ill. 2d at 381. We review *de novo* the trial court's first-stage dismissal of a postconviction petition. *Barcik*, 365 Ill. App. 3d at 190.

¶ 8 With these principles in mind, we first determine whether defendant's contention is procedurally defaulted because he did not raise it on direct appeal. Our supreme court has repeatedly noted that a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense. See *People v. Erickson*, 161 Ill. 2d 82, 88 (1994) (and cases cited therein). In this proceeding, defendant is attempting to take issue, not with what trial counsel did (which was clearly apparent from the face of the record), but with counsel's decision not to investigate and present at trial the testimony of Jones. See *Kokoraleis*, 159 Ill. 2d at 328-29 (distinguishing between ineffective-assistance-of-counsel claims based on what counsel did and what counsel ought to have done). Therefore, defendant's contention is not procedurally defaulted, allowing our review.

¶ 9 When the death penalty is not involved, there are three stages to the proceedings. *People v. Taylor*, 405 Ill. App. 3d 421, 422 (2010) (citing *Barcik*, 365 Ill. App. 3d at 190). During the first stage, the trial court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief. *Coleman*, 183 Ill. 2d at 380. The trial court may summarily dismiss the petition if it finds that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is "frivolous or patently without merit" if it does not state the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

Because we review the trial court's judgment and not the reasons the trial court gave for ruling the way it did, we may affirm on any basis the record supports. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 10 According to defendant, his petition stated the gist of a constitutional claim of ineffective assistance of trial counsel. Defendant argues that trial counsel was ineffective for failing to call Jones as a defense witness, because Jones would have testified that defendant was not at Meijer when the stolen credit card was used. Defendant also argues that trial counsel was ineffective for failing to present evidence that defendant worked in a drug-free environment. Defendant claims that this evidence would have rebutted the State's theory that defendant used the proceeds from the sale of the Meijer merchandise to buy drugs.

¶ 11 A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). However, if a defendant fails to satisfy the prejudice prong, a court does not need to consider whether the attorney's performance fell below an objective standard of reasonableness. *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009).

¶ 12 In considering defendant's claims of ineffective assistance of trial counsel, we observe that the Act provides that a petition filed under it "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). While a *pro se* postconviction petition is not expected to set forth a complete and detailed factual recitation, the petition " 'must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' " *People v.*

Hodges, 234 Ill. 2d 1, 10 (2009) (quoting *People v. Delton*, 227 Ill. 2d 247, 254–55 (2008)); 725 ILCS 5/122-2 (West 2008) (stating that a petition must have attached "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached"). Thus, a trial court may summarily dismiss a petition if the defendant fails to attach the required "affidavits, records, or other evidence" or fails to explain their absence from his or her postconviction petition. *Delton*, 227 Ill. 2d at 255 (quoting *People v. Collins*, 202 Ill. 2d 59, 66 (2002)) ("failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal" (internal quotation marks omitted)).

¶ 13 The success of defendant's claim, therefore, is dependent upon the strength of the supporting affidavits to his petition, viewed in light of the original trial record. We are, of course, aware that at the dismissal stage of these proceedings, all well-pleaded allegations in the petition are to be taken as true; however, those allegations must be supported by the original trial record or by the petition's accompanying affidavits. *West*, 187 Ill. 2d at 427. Without those affidavits, a court does not know to what the witnesses would have testified and how that testimony would have altered the outcome of the defendant's trial. See *People v. Enis*, 194 Ill. 2d 361, 380 (2000); *People v. Jones*, 399 Ill. App. 3d 341, 371-72 (2010).

¶ 14 In this case, defendant supplied neither the trial court nor this court with any supporting affidavits or exhibits that support the conclusory allegations contained in his petition. Because defendant failed to attach Jones's affidavit detailing to what Jones would have testified, we cannot conclude that defendant was prejudiced by trial counsel's failure to call Jones as a defense witness at trial. That said, we note that defendant claims in his petition that he did not attach Jones's affidavit to his petition because, since he has been in prison, he has been unable to contact Jones.

We recognize that, in some instances, incarceration may excuse a defendant's failure to provide supporting materials in a postconviction petition (see *People v. Washington*, 38 Ill. 2d 446 (1967)); however, incarceration, in and of itself, cannot be grounds for relaxing the Act's affidavit requirement. To hold that incarceration automatically excuses the affidavit requirement would essentially nullify the affidavit requirement. Postconviction relief is limited to those who, like defendant, are incarcerated. See 725 ILCS 5/122-1(a) (West 2008). Although defendant is incarcerated, he did not claim he was kept incommunicado. Defendant did not indicate that he made any efforts to contact Jones to obtain his affidavit. In the absence of any demonstrated effort to substantiate his claim (see *People v. Edsall*, 94 Ill. App. 3d 469 (1981)), defendant's explanation of his failure to procure an affidavit from Jones does not satisfy his duty under the statute to provide the necessary evidentiary support for his petition. See *People v. Reed*, 36 Ill. 2d 358 (1967).

¶ 15 We also find unfounded defendant's claim that his trial counsel was ineffective for failing to present evidence that defendant worked in a drug-free environment. In essence, defendant claims that this evidence would have rebutted the State's suggestion that, because defendant used the proceeds from the sale of the stolen goods to buy drugs, defendant was a drug user. Aside from defendant's failure to attach any evidence to support his claim that he worked in a drug-free environment, we fail to see how such evidence would have been relevant, especially when we consider that defendant was charged with unlawful use of a credit card (not a drug offense) and that one does not necessarily have to be a drug user to buy drugs. See *People v. Arias*, 309 Ill. App. 3d 595, 598 (1999) (whether the defendant was transferred to a cell or was moved there because of a job assignment was irrelevant in deciding whether the defendant was properly convicted of unlawful possession of contraband in a penal institution, as the evidence established that the defendant had control over the contraband). Moreover, any claim that the evidence that defendant bought drugs

affected the outcome of the trial is similarly unfounded, because the evidence against defendant, which included the video showing defendant making the purchases at Meijer, was strong. See *People v. Dixon*, 409 Ill. App. 3d 915, 924 (2011). Accordingly, the trial court's first-stage dismissal of defendant's postconviction petition was proper.

¶ 16 For these reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 17 Affirmed.