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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 01—CF—2593
)	
BILLY LEE WARREN,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The trial court properly summarily dismissed defendant's postconviction petition alleging that trial counsel was ineffective for failing to present alleged impeachment evidence; the evidence would not have actually impeached, so counsel's failure to present it was neither deficient nor prejudicial.

In 2005, a Du Page County jury found defendant, Billy Lee Warren, guilty of two counts of murder (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(1)) in connection with the 1978 deaths of Glen and Betty Schulz. Defendant was sentenced to two terms of life imprisonment. This court affirmed defendant's conviction on direct appeal. *People v. Warren*, No. 2—05—0591 (2008) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a petition for relief under the

Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)), claiming that he did not receive the effective assistance of counsel at trial. The trial court summarily dismissed the petition (see 725 ILCS 5/122—2.1(a)(2) (West 2008)), and this appeal followed. We affirm.

The Schulzes' bodies were discovered in their Downers Grove home on the morning of May 17, 1978. Both had been bound and stabbed repeatedly. Two of the Schulzes' grandchildren had been spending the night in the home, but they were not physically harmed. The Schulzes had spoken with their daughter and son-in-law by telephone at about 8 p.m. the previous evening.

Defendant and Glen Schulz worked for the same company, a manufacturer of burial vaults. Mr. Schulz was defendant's supervisor, and the State presented evidence that there was considerable hostility between the two men. In the course of the investigation of the murders, defendant and his coworkers were interviewed by police. Defendant was evasive when asked about his relationship with Mr. Schulz. Shortly after defendant's interview, the detective who conducted it overheard defendant tell a supervisor that he had made arrangements to travel to Arkansas with his family to visit his grandmother and would be gone about a week. The supervisor responded that the company was shorthanded and that defendant could not go. Defendant was then taken into custody and interviewed again. He initially told police that on May 16, 1978, he had been at his apartment with his wife and child from 9:30 p.m. onward. He later admitted, however, that he had been away from the apartment the entire night. Defendant was then residing in Broadview, in an apartment on the second floor of the manufacturing facility where he and Mr. Schulz worked. Defendant told police that he was out with a friend until about 10:40 p.m. They parted outside defendant's apartment (defendant's friend had parked his car there), and defendant drove into Chicago to visit his brother Billy Gene. He arrived at Billy Gene's apartment about an hour later, and they went out to steal

hubcaps for defendant's car. They returned to Billy Gene's apartment at about 4 a.m., but decided to go out again about 45 minutes later. In the course of doing so, defendant accidentally locked his keys in his car with the engine running. Defendant called his wife, who arranged to have her stepfather pick up defendant, so that he could retrieve a spare set of keys. After getting his keys and returning to his car, he drove home. He made a couple of stops on the way home and arrived at his apartment at about 6:55 a.m. Billy Gene was also interviewed by police, and he largely confirmed defendant's account.

Defendant was not charged with the murders until 2001, after a task force was assembled to review and move forward with the investigation. Defendant was reinterviewed early in September of that year, as were Billy Gene and several other individuals. Police also collected DNA samples from defendant and Billy Gene pursuant to a warrant. The interviews were conducted simultaneously and without prior warning to the interviewees. Billy Gene admitted that he had not been truthful when he had originally spoken with the police. On September 25, 2001, a Du Page County grand jury indicted defendant on eight counts of murder.

At trial, Billy Gene testified that defendant arrived at his home at about 1 a.m. on May 17, 1978. According to Billy Gene, he and defendant talked for a while, and as defendant was leaving, he told Billy Gene to watch the news. Defendant returned to the apartment about 10 minutes later, indicating that he had locked his keys in his car. Defendant and Billy Gene went outside to try to unlock the car. Billy Gene observed that the engine was running. After unsuccessful attempts to unlock the car, defendant left to get a spare set of keys. Defendant told Billy Gene that if anyone asked what they had been doing, he should say that they had been drinking. Defendant returned a few hours later and gave their brother Jimmy a ride to work.

Later that day, while watching television, Billy Gene learned that the Schulzes had been killed. Billy Gene knew that defendant and Glen Schulz did not get along. During the six months prior to the killings, defendant had told Billy Gene that Mr. Schulz had been giving him a hard time and that defendant was going to be fired. Defendant had asked Billy Gene to kill Mr. Schulz. Defendant visited Billy Gene a day or two after the killings, and they went out for a walk. While they were walking, defendant showed Billy Gene a knife and a garage door opener. He told Billy Gene that he used the garage door opener to get inside the Schulzes' house and that he had killed Mr. Schulz with the knife. Defendant dropped the knife and the garage door opener into a sewer. Defendant and Billy Gene agreed that, if they were questioned by the police, they would say that they had been out stealing hubcaps. Billy Gene related a subsequent conversation in which defendant revealed more details of the killings. Defendant told Billy Gene that he had gone to the Schulzes' house and that "he was by a window or something by Glen's and he heard some dogs barking." Defendant was wearing rubber gloves. He opened the garage door, entered the garage, and then closed the door. Fearing that he might have awoken the Schulzes, defendant hid in the garage under a pickup truck for 45 minutes before entering the house through the garage. Billy Gene testified that he had not given the police a truthful account of these events until September 2001.

Other witnesses who testified for the State included Debra Shackelford and Richard Knack. Shackelford was married to defendant at the time of the murders, and she lived with him in the apartment on the second floor of the plant where he worked. She testified that, in the months before the murders, defendant had become irritable, agitated, and angry as a result of conflicts with Mr. Schulz. Defendant was frequently late for work and was sometimes sent home for the day without pay. When defendant arrived at the apartment on the morning of May 17, 1978, he was very anxious

and nervous. He got into bed and she noticed small orangish specks on his underclothing. Later that day, she observed defendant washing clothes. Defendant cleaned a coat he had been wearing the previous evening. It sounded like he was using a brush to clean it, and she smelled a strong solvent. She recognized the smell as belonging to an industrial solvent used in the plant where defendant worked. She further testified that she had no plans to travel to Arkansas during the period following the murders, and she was not aware that defendant had any such plans.

Richard Knack testified that he was one of defendant's coworkers and that he also worked as a reserve police officer for the Forest Park police department. He and defendant commiserated about problems with Mr. Schulz, whom Knack also disliked. About three months before the murders, defendant and Knack had a conversation in which defendant said that Knack should kill Mr. Schulz. Defendant also said that his brother Billy Gene was very proficient with a knife. Defendant stated that he wanted to see Mr. Schulz suffer. About a week before the murders, defendant inquired whether Knack would "come after" defendant if defendant killed Mr. Schulz. On May 17, 1978, Knack visited defendant's apartment. While there, he detected the strong odor of a solvent that was used in the plant. At some point thereafter, defendant (who had separated from his wife) moved to an apartment in Berwyn. He and Knack became roommates in April 1979. During a conversation that took place about a month later, defendant told Knack how he killed the Schulzes. Defendant indicated that he had parked his car across the street from their house. He used a garage door opener stolen from Mr. Schulz's truck to enter the garage. A light went on when the garage door opened, and defendant entered the garage and hid for a few minutes to make sure nobody had detected his presence. He then entered house. He saw two children in a bedroom. He then went to the basement and found some rope. He woke the Schulzes up, bound them, and then killed them. Defendant told

Knack that he gave the murder weapon and the garage door opener to his brother. No physical evidence linking defendant to the crimes was ever discovered.

As noted, this appeal arises from the summary dismissal of defendant's postconviction petition. Except where the death penalty has been imposed, proceedings under the Act are divided into three stages. Initially, the trial court conducts an independent examination of the petition to determine whether it should be docketed for further proceedings. See 725 ILCS 5/122—2.1 (West 2008). The Act provides for summary dismissal of the petition if the trial court, after examining the petition, concludes that it 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 "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Although a petition need only "present a limited amount of detail" in order to avoid summary dismissal (*id.* at 9), the defendant must provide evidentiary support for the facts set forth in the petition (see *id.* at 10). Section 122—2 of the Act provides that "[t]he petition 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). This requirement is designed to establish that the facts underlying a postconviction claim "are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10. Summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Davis*, 377 Ill. App. 3d 735, 745 (2007).

Defendant argues that his petition properly stated a claim of ineffective assistance of counsel arising from his trial attorney's failure to introduce evidence that (according to defendant) would have impeached his brother's testimony. Specifically, defendant alleged that his attorney "failed to impeach [Billy] Gene Warren's testimony—that he claimed [defendant] told him about hearing a dog barking

during the break-in—by police reports that indicated the only neighbor with a dog, who was playing cards with her daughter at the time of the break-in, said her dog never barked.”

Under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming a deprivation of the right to the effective assistance of counsel must establish that counsel’s performance “fell below an objective standard of reasonableness” and that the deficient performance was prejudicial in that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 688, 694. Defendant’s petition satisfies neither prong, because he has failed to supply evidence demonstrating any basis for impeaching his brother’s testimony.

In support of his petition, defendant attached the following written statement prepared by one of the Schulzes’ neighbors, Bessie Galgano, on May 17, 1978:

“I saw Glen & Betty on the evening of May 16 about 7:30 p.m. Glen had cut our lawn for us and around 8:00 p.m. he had finished[.] I talked to Betty for about twenty minutes. She was walking her little granddaughter and was going to take her grandchildren home because they were getting cold. That was the last time I saw them. I came in and turned my lights on in the family room—and closed the drapes. Watched the television and went to bed at midnite [*sic*]—and at that time I looked out my bedroom window but saw nothing.

We have a big Doberman and I kept her upstairs last night but the dog didn’t do any barking.”

Defendant also submitted an excerpt from a police report, indicating that Galgano had told police that her Doberman “was on the main floor all night and never made any noise to her

knowledge.” The police report recounted that a second neighbor reported that he “had seen or heard nothing unusual,” and a third neighbor indicated that her husband had passed the Schulzes’ house at around 9:30 p.m. and had seen nothing unusual.

Defendant is presumably of the view that, if his attorney had presented evidence that no dog barked during the time frame when the Schulzes were killed, the jury might have concluded that defendant never made the incriminating statements that Billy Gene attributed to him. After all, defendant would have had no obvious reason for adding a false detail when confiding in his brother about the murders. The jury might thus have concluded that the detail was incorrect because Billy Gene’s testimony about his conversation with defendant was fabricated. The matter is purely academic, however, because defendant has supplied no evidence inconsistent with Billy Gene’s testimony. Galgano’s statement and the police report submitted with defendant’s postconviction petition do not support the factual premise of defendant’s argument—that no dog barked during the relevant time frame. Galgano merely indicated that *her own* dog did not bark. Neither Galgano’s statement nor the police report attached to defendant’s petition suggests that Galgano was the only dog-owner in the vicinity of the victims’ home. Other neighbors of the Schulzes indicated that they saw or heard nothing unusual, but there is no evidence that it would have been unusual to hear a dog bark in the neighborhood. Evidence that a particular dog did not bark and that neighbors of the victims heard nothing unusual would have had no impeachment value.

We note that the State has argued that the evidence submitted with defendant’s petition would have been inadmissible under rules barring impeachment on collateral matters. Because the evidence simply would not have impeached Billy Gene’s testimony, we need not reach this argument. Suffice it to say that, because the evidence was not inconsistent with Billy Gene’s testimony and was not

otherwise exculpatory, it was entirely reasonable for defense counsel to refrain from offering it. For the same reasons, there is no reasonable probability that the jury's verdict would have been different if the evidence had been before it. Accordingly, defendant cannot even arguably satisfy either prong of the *Strickland* test with the materials attached to his petition. Therefore, summary dismissal of the petition was proper.

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.