

NOTICE
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2011 IL App (4th) 100646-U

Filed 8/25/11

NO. 4-10-0646

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
KELVIN E. CARTER,)	No. 06CF1433
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and McCullough concurred in the judgment.

ORDER

- ¶ 1 *Held:* Unless the record already corroborates the allegations of a postconviction petition, the petition must have, attached to it, affidavits, records, or other evidence supporting its allegations, or, alternatively, the petition must give a reasonable explanation for the omission of these supporting materials. Absent corroborating evidence or an explanation for its absence, the petition does not make a substantial showing of a constitutional violation.
- ¶ 2 Defendant, Kelvin E. Carter, is serving a 20-year term of imprisonment for criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2004)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)), two convictions that merged for purposes of sentencing. He filed a petition for postconviction relief, and the trial court granted the State's motion to dismiss the petition. See 725 ILCS 5/122-5 (West 2008). Defendant appeals, and in his brief, he contends that, contrary to the court's decision, his petition made a substantial showing of a constitutional violation

with respect to one of his claims (see *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)): his claim that his trial counsel rendered ineffective assistance by failing to subpoena his medical records and to present them at trial. According to defendant, these medical records would have shown that he underwent hernia surgery a few days before November 11, 2005, when the charged offenses allegedly occurred, and that he therefore was physically incapable, at that time, of carrying the victim, D.O., into a bedroom and having sex with her, as she testified he had done.

¶ 3 It would be improper for us, however, to simply take defendant's word for it that (1) these medical records exist and (2) they would have tended to prove his physical inability to carry D.O. and to have sex with her. The medical records are not attached to the postconviction petition, and the petition gives no explanation for their absence. See 725 ILCS 5/122–2 (West 2008). Without corroborating "affidavits, records, or other evidence" or, alternatively, a statement of "why the same are not attached," the petition does not make a substantial showing of a constitutional violation. *Id.* Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 Defendant was charged with three counts. Count I charged him with committing criminal sexual assault through the use of force (720 ILCS 5/12–13(a)(1) (West 2004)). Count II charged him with committing criminal sexual assault while being in a position of trust or authority (720 ILCS 5/12–13(a)(4) (West 2004)). Count III charged him with aggravated criminal sexual abuse (720 ILCS 5/12–16(d) (West 2004)). All three counts were premised on his sexual conduct with 14-year-old D.O. on November 11, 2005.

¶ 6 The jury trial occurred in February 2007. At trial, D.O. testified that in the second week of November 2005, late at night, she was asleep on the couch in the living room of her home

when her mother's boyfriend, defendant, awakened her by picking her up off the couch. She testified that he then carried her into her mother's bedroom, set her down on the bed, took his pants off and pulled down his underwear, pulled her pajama pants and underwear off, and stuck his penis into her vagina. The State presented other evidence against defendant, which, for purposes of this appeal, we need not recount. On February 7, 2007, a jury acquitted defendant of count I but found him guilty of counts II and III.

¶ 7 On March 19, 2007, the trial court sentenced defendant to 20 years' imprisonment for count II.

¶ 8 On November 5, 2007, on direct appeal, we affirmed the trial court's judgment. *People v. Carter*, No. 4-07-0266 (November 5, 2007) (unpublished order under Supreme Court Rule 23).

¶ 9 On February 20, 2009, defendant filed, *pro se*, a postconviction petition. One of the claims in the petition—the only claim he pursues in this appeal—is that his trial counsel, Janie Miller-Jones, rendered ineffective assistance by failing to subpoena some of his medical records and to present the medical records to the jury. The petition reads as follows:

"Evidence would have shown that I could not have committed such act, being that I had hernia surgery doing [*sic*] that month and week in question. I asked counsel to subpoena hospital records from Christie Hospital and Provena Hospital. Janie Miller-Jones stated to me over the phone that she contacted the hospital and they stated that I had surgery, by [*sic*] Jamie Miller Jones stated to me that a jury will not believe me if my defense is that I couldn't have carried the person

to the bedroom and had sex with her after having surgery."

¶ 10 Although defendant submitted his own affidavit that the facts in his postconviction petition were true, he did not submit any medical records. Nor did he submit any evidence, sworn or otherwise, that hernia surgery would in fact have deprived him of the ability to pick up D.O. from the couch, carry her into the bedroom, and have sex with her.

¶ 11 On March 18, 2009, the trial court appointed counsel, Walter Ding, to represent defendant in the postconviction proceeding. Ding did not file an amended petition. On March 12, 2010, he filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 12 On March 23, 2010, the trial court granted a motion by the State to dismiss the postconviction petition. The dismissal order stated:

"With respect to [defendant's] assertion that he was physically unable to commit the offenses, Mr. Carter fails to specify or identify any evidence to support that assertion, other than a vague and generalized claim that on an unspecified date he had hernia surgery. He has not named any witnesses, provided any facts or attached any medical records or affidavits or evidence of any kind to back up his statement or establish how it would be relevant to this case. And petitioner has not provided or attached any statement or explanation of why those items were not supplied."

Accordingly, the court found that defendant had failed to make a substantial showing of a constitutional violation.

¶ 13 This appeal followed.

¶ 14

II. ANALYSIS

¶ 15 Under section 122–1 of the Post-Conviction Hearing Act (725 ILCS 5/122–1 (West 2008)), a postconviction proceeding is initiated by the filing of a petition "verified by affidavit." This verification—which defendant has provided—has the purpose of "confirm[ing] that the allegations are brought truthfully and in good faith." *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 16 In addition, section 122–2 of the Act (725 ILCS 5/122–2 (West 2008)) requires supporting "affidavits, records, or other evidence." These supporting materials serve a purpose distinct from the verification required by section 122–1. By verifying the petition with his own affidavit, defendant attested that he made his allegations in good faith. By contrast, the "affidavits, records, or other evidence" referenced in section 122–2 are necessary to "show[] that the verified allegations are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 67. According to the plain terms of section 122–2, if the defendant does not provide the supporting "affidavits, records, or other evidence," the petition must explain why the defendant is unable to do so. 725 ILCS 5/122–2 (West 2008).

¶ 17 Defendant has fulfilled neither the evidentiary requirement nor the pleading requirement in section 122–2. His allegation that medical records would have proved his inability to carry D.O. and to have sex with her is precisely the sort of allegation that could be corroborated—by medical records, for a start. Nevertheless, this allegation is uncorroborated, and the petition offers no explanation for the lack of supporting materials.

¶ 18 The supreme court has held that "[a] hearing is called for only when the petitioner makes a substantial showing of a violation of constitutional rights and to accomplish this the allegations in the petition must be supported by the record in the case or by accompanying

affidavits." (Internal quotation marks omitted.) *People v. Gaines*, 105 Ill. 2d 79, 91-92 (1984). Defendant's claim of ineffective assistance premised on the failure to subpoena and present the medical records is supported neither by the record nor by accompanying affidavits. Therefore, as to that claim, the petition fails to make a substantial showing of a constitutional violation. See *id.*

¶ 19

III. CONCLUSION

¶ 20 For the foregoing reasons, we affirm the trial court's judgment. We award the State \$50 in costs against defendant.

¶ 21 Affirmed.