

No. 1-10-0056

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 10179
)	
CHANCELLOR AARON,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed where the record directly contradicts defendant's claim that one witness identified him from an overly suggestive lineup, so defendant cannot show he received ineffective assistance of counsel.

¶ 2 Defendant Chancellor Aaron appeals from the summary dismissal of his *pro se* postconviction petition. On appeal, defendant contends that the petition presented an arguable claim of ineffective assistance of trial and appellate counsel for failing to contest an allegedly suggestive lineup. We affirm.

¶ 3 On May 7, 2002, at around 9 p.m., Aaron Crawford was fatally shot near a vacant lot. Defendant was arrested for the murder in April 2003. Following a jury trial, defendant was convicted of first degree murder and sentenced to 45 years in prison, which included the 20-year enhancement for personally discharging a firearm during the offense.

¶ 4 At trial, Daniel Wesley, an occurrence witness, identified defendant and co-offender Kirk Horshaw, who had not been arrested at the time of trial, as the two men who were shooting at the victim. Wesley had known defendant, who was a member of a rival street gang, for seven or eight years. In May 2003, Wesley testified before the grand jury and named defendant as the shooter. Karen Luckett testified that she saw defendant drive a car with a passenger to the location where the shooting was going to occur and saw defendant retrieve a pistol handgun from a cylindrical can. After the shooting, she saw, with the use of binoculars, defendant and the other man running away. On July 11, 2002, Luckett identified defendant from a police lineup and the lineup photograph was introduced at trial as State's Exhibit 7. In December 2002, she identified co-offender in another lineup. The police recovered 11 shell casings from two different guns at the crime scene.

¶ 5 Following his jury conviction, this court affirmed defendant's conviction and sentence on direct appeal. *People v. Aaron*, No. 1-06-3187 (2008) (unpublished order under Supreme Court Rule 23).

¶ 6 In October 2009, defendant filed the instant *pro se* postconviction petition, alleging, in relevant part, that his trial counsel was ineffective for failing to move to suppress Luckett's identification from the lineup as suggestive and that his appellate counsel was ineffective for failing to raise this issue on direct appeal. Specifically, defendant alleges that the lineup was suggestive because he "was the only 6' 2", 250 pounds [*sic*] person in the lineup. *** Everyone in the lineup with [him] was of small stature." In support of his allegation, defendant attached an

affidavit in which he averred that he was "the only large person in the lineup," taller than the other participants, and that the other participants were under 150 pounds. A photo of the lineup was not attached to the petition.

¶ 7 On December 3, 2009, the trial court summarily dismissed defendant's postconviction petition in a written order.

¶ 8 On appeal, defendant contends that his petition adequately presented the gist of a claim of ineffective assistance of appellate counsel based on a failure to argue, on direct appeal, ineffective assistance of trial counsel for not filing a motion to suppress Lockett's identification on the basis that the lineup was suggestive.

¶ 9 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Accordingly, we may affirm based on any reason supported by the record because we review the judgment, not the trial court's reasoning. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). Summary dismissal is proper if the allegations in the petition are positively rebutted by the record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 10 At the first stage of proceedings, a petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A petition is considered frivolous or without merit only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16.

¶ 11 A first stage petition claiming ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17. "Appellate counsel is only required to raise meritorious issues on appeal." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 12. Therefore, a defendant can only show he was prejudiced by

appellate counsel's failure to raise an issue on appeal if the underlying issue has merit. *Id.*; see also *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 42 (" 'unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal' ") (quoting *People v. Easley*, 192 Ill. 2d 307, 329 (2000)).

¶ 12 Defendant's underlying claim, that the lineup from which Lockett identified him was overly suggestive, is based on his allegations that he was the biggest and tallest person in the lineup. However, defendant did not attach a photo of the lineup to his original petition or explain why he failed to do so as required by the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2008)). Although defendant failed to include a photo of the lineup in the record on appeal, explaining he was unable to locate it, the State managed to obtain State's Exhibit 7, the lineup photo used at trial, and supplemented the record. The photo directly contradicts defendant's claim that the lineup was suggestive and defendant concedes the issue in his reply brief, saying that the photo "does not depict a lineup in which [he] 'was the only 6'2", 250 pounds [*sic*] person in the lineup," and, in fact, shows "that two of the other lineup participants are roughly [his] height and build." Based on the photo, defendant's underlying claim has no arguable basis in fact and is not meritorious. Accordingly, neither trial nor appellate counsel can be considered ineffective on the basis of failing to challenge the lineup identification.

¶ 13 Nevertheless, defendant maintains that the lineup was suggestive based on a photo he attached to his reply brief as an appendix, which depicts defendant in another lineup wearing the same clothing as he did in State's Exhibit 7. But, whereas State's Exhibit 7 cuts off the photo at the lineup participants' knees, the appended photo shows their entire bodies. Defendant argues that the appended photo clearly shows he was wearing an electronic monitoring device (EMD) on his ankle, thus making the lineup Lockett viewed unduly suggestive. However, we cannot take the appended photo into consideration for several reasons.

¶ 14 First, it is well-established that a reviewing court may only consider matters that are a part of the record on appeal; attachments to the briefs cannot be used to supplement the record. *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 853 (2010); *People v. Benson*, 256 Ill. App. 3d 560, 563 (1994). Defendant did not supplement the record with the appended photo and therefore, we may not consider it.

¶ 15 Second, defendant represents that the appended photo is part of his co-offender's record on appeal in *People v. Horshaw*, No. 1-11-1072, which is currently pending before this court. Defendant observes we may take judicial notice of our own records, citing to *People v. Hoffman*, 25 Ill. App. 3d 261 (1974). However, in *Hoffman*, the court took judicial notice of the records from the defendant's own direct appeal, which was decided while the postconviction petition at issue in the current appeal was pending. *Hoffman*, 25 Ill. App. 3d at 267. In contrast, defendant is asking that we take judicial notice of part of his co-offender's record on appeal, though the subject of his co-offender's case on appeal is unclear other than the representation in Horshaw's file that he is appealing multiple convictions of first degree murder and multiple convictions of attempted first degree murder. Furthermore, defendant has provided us with no context as to when or for what purpose the photo was taken. Notably, nothing in defendant's record shows that Lockett viewed the lineup depicted in this appended photo. Defendant is only able to suggest that the appended photo *might* have been taken on the same day as State's Exhibit 7 and therefore he *might* have been wearing an EMD during Lockett's lineup identification. We will not take judicial notice of an appended photo solely based on speculation that it might be connected to the present case.

¶ 16 Finally, defendant cannot raise new arguments in a reply brief. Ill. S. Ct. R. 341(j) (eff. July 1, 2008) (a reply brief "shall be confined strictly to reply to arguments presented in the brief of the appellee"). In his petition and his opening appellate brief, defendant only argued that the

lineup identification was impermissibly suggestive based on the purported differences between the physical characteristics of defendant and the other lineup participants. In his reply brief, defendant concedes that the lineup photo admitted as State's Exhibit 7 does not indicate a suggestive lineup based on physical traits but, rather, seeks to raise a new argument based on the appended photo where defendant was the only participant wearing an EMD. Defendant's new argument in his reply brief is not proper under Rule 341(j), especially where the new argument is based on a document that is not even in defendant's record and obviously was not, and could not have been presented in the State's brief.

¶ 17 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 18 Affirmed.