

No. 1-10-2483

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. 09 CR 15783
)	
BARRETT GORDON,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald-Smith and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of *pro se* post-conviction petition affirmed where defendant alleged ineffective assistance of counsel for not corroborating his trial testimony by presenting security video or certain corroborating witnesses, when the existence of security video was conclusory and speculative and the testimony of the witnesses was not described in the petition or supported with affidavits.
- ¶ 2 Following a 2009 bench trial, defendant Barrett Gordon was convicted of possession of a controlled substance (heroin) and sentenced to three years' imprisonment. On direct appeal, we vacated the \$200 DNA analysis fee imposed by the trial court and affirmed its judgment in all other respects. *People v. Gordon*, 2011 IL App (1st) 101362-U. Defendant now appeals from

the summary dismissal of his *pro se* petition under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that the court erred in summarily dismissing his petition where he set forth an ineffective assistance of counsel claim with an arguable basis in law and fact.

¶ 3 Defendant filed the instant petition in May 2010, alleging that the police lacked probable cause to search him and that trial counsel was ineffective for failing to subpoena security video "from a Walgreen's store" that would have corroborated his trial testimony that he was elsewhere at the time of the offense. He also alleged that counsel "refused to subpoena witnesses which were requested by the defendant," naming and briefly describing the witnesses without describing what their testimony would be. The four witnesses were described as the "owner of vehicle defendant was driving at the time of arrest," a "person defendant was with at the Walgreen's store," an "employer" and a "career counselor and mentor." The petition did not include affidavits from any of the witnesses, and where the petition form used by defendant asked why affidavits were not attached, he wrote only "do not have any."

¶ 4 On June 29, 2010, the court summarily dismissed the petition. The court noted that a search incident to an arrest based on probable cause requires no additional justification and expressly found, based on specific evidence from the trial record, that the police had probable cause to arrest defendant. The court stated that the petition made "a bald conclusory allegation" that a security video existed and that any such video would not necessarily be exculpatory. Lastly, the court noted that the petition lacked affidavits from the proposed witnesses. This appeal timely followed.

¶ 5 On appeal, defendant contends that his petition should not have been summarily dismissed because his ineffective assistance of counsel claim had an arguable basis in law and in fact. The State responds that defendant's failure to provide the necessary affidavits from the

proposed witnesses, as required by the Act, sufficiently justifies summary dismissal¹.

¶ 6 Section 122-2 of the Act provides that a 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 2010). The affidavits and exhibits attached to a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations, so that those allegations may be subjected to objective or independent corroboration, and while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some objective facts amenable to corroboration or explain why such facts are absent. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009), citing *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). Thus, our supreme court has held that the failure to either attach the requisite "affidavits, records, or other evidence" or explain their absence is a sufficient basis for summarily dismissing a post-conviction petition. *Delton*, 227 Ill. 2d at 255.

¶ 7 Here, defendant's petition does not describe the testimony his witnesses are expected to provide, and while defendant claims that "the content of their testimony can be inferred from [his] trial testimony," we conclude that at most one can reasonably infer from his trial testimony the general outlines of what he would like the testimony of two of the four witnesses to be. Moreover, he has failed to provide affidavits from any of his suggested witnesses or to explain in his petition why he did not do so. Lastly, as noted by the circuit court, defendant's petition presumes in a conclusory manner, without providing any factual basis, that there was store security video for trial counsel to subpoena.

¹We initially affirmed the summary dismissal on the basis that defendant completed his sentence after filing his petition and thus lost standing to proceed. *See* 725 ILCS 5/122-1 (West 2010); *People v. Henderson*, 2011 IL App (1st) 090923. However, defendant petitioned for rehearing, challenging the proposition that a defendant who was still under sentence when he filed his post-conviction petition loses standing upon completing his sentence, and the State agreed that the proposition was unsupported. On March 8, 2012, we granted rehearing and withdrew our order of January 19, 2012.

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¶ 8 Accordingly, the judgment of the circuit court is affirmed.

¶ 9 Affirmed.