

No. 1-10-2498

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
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 03 CR 13518
)	
BERNARDINO GONZALEZ,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judges Presiding.
)	

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 **Held:** The circuit court properly dismissed defendant's *pro se* petition as frivolous and patently without merit where the petition had no arguable basis in fact or in law.

¶ 2 Defendant appeals from the circuit court's summary dismissal of his *pro se* postconviction petition. He argues that the court erred in dismissing his petition

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where he stated the gist of a constitutional claim that trial counsel was ineffective for failing to investigate witnesses who would support his theory of defense. For the following reasons we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The evidence at a bench trial established that the victim, Roberto Hernandez, had double-parked his van on a city street which impeded defendant from driving down the street. Defendant was finally able to maneuver around the van, yelled profanities at the occupants of the van and drove away. Hernandez, who had just entered the van as defendant pulled up along side of it, followed defendant. Defendant then backed his van toward Hernandez's van. Hernandez backed up his van to prevent defendant from running into his van. Defendant and another man then exited defendant's van and Hernandez and his brother exited their van. Defendant threw a beer bottle at Hernandez, which missed him and fell to the ground. From this point on, different witnesses give varying versions of events. Some testified that there was no physical altercation between defendant and Hernandez, some testified that there was a physical altercation, some testified that Hernandez and his brother were wielding clubs, some testified that there were no clubs. Defendant gave a custodial statement after his arrest and stated Hernandez and his brother beat him with a metal club.

¶ 5 After he was beaten, he left on foot, went home and retrieved his gun, returned to his van and drove around looking for Hernandez. Defendant, who was in his van, approached Hernandez's van near 25th Street and Central Park. He fired at the van, killing Hernandez and seriously wounding Hernandez's son.

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¶ 6 Defendant was found guilty of first degree murder after personally discharging a firearm, as well as attempted murder, aggravated battery with a firearm and aggravated battery of a child. He was sentenced to 25 years in prison on the murder charge, with a consecutive 25-year sentence based on personally discharging the firearm and a consecutive 10-year sentence for the merged counts of attempted murder, aggravated battery with a firearm and aggravated battery of a child.

¶ 7 On appeal, defendant argued that the trial court: (1) denied him equal protection of the law when it failed to properly admonish him as to the potential minimum and maximum penalties he would face if he proceeded to trial and was found guilty after rejecting a plea offer; and (2) abused its discretion in imposing a 60-year sentence, based on his lack of criminal history, potential for rehabilitation, and the trial court's purported consideration of elements of the offense as an aggravating factor. This court affirmed defendant's conviction in *People v. Gonzalez*, No. 1-05-3444 (November 6, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 Defendant filed a *pro se* postconviction petition on May 14, 2010, wherein he alleged that trial counsel was ineffective for: (1) advising him that he would only be found guilty of second degree murder if he went to trial; and (2) failing to investigate and present evidence at trial to support a second-degree murder defense. Defendant claimed that four witnesses, his initial public defender, Carlos Ayala, Salvador Neon and Gloria Medina, could provide testimony which would support his theory that he was beaten by Hernandez prior to the shooting. Had defense counsel interviewed and called these witnesses, the trial court would have found him guilty of second degree

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murder based on sudden, intense passion resulting from serious provocation. The trial court summarily dismissed the petition as frivolous and patently without merit. It is from this dismissal that defendant now appeals.

¶ 9

ANALYSIS

¶ 10 Defendant argues that the trial court erred in summarily dismissing his *pro se* postconviction petition where he established a gist of a constitutional claim when he argued that trial counsel was ineffective for failing to investigate evidence that would have supported defendant's claim that he was beaten with a metal club shortly before the shooting. Defendant claims that had counsel presented this evidence, the trial court would have found him guilty of second degree murder based on sudden, intense passion resulting from the victim's strong provocation.

¶ 11 The Act allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2008); *People v. Edwards*, 197 Ill. 2d 239 (2001). The Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 12 At the first stage, all well-pleaded facts are to be taken as true. 725 ILCS 5/122-2.1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). A trial court may summarily dismiss a petition at the first stage as frivolous and patently without merit only if the allegations, taken as true, fail to present a " 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418. A defendant must only present, " 'a limited amount of detail.' " *Edwards*, 197 Ill. 2d at 244 quoting *Gaultney*,

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174 Ill. 2d at 418. However, a petition is frivolous and patently without merit only if the petition has no arguable basis in either law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). We review the dismissal of a postconviction petition at the first stage *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 13 At the forefront, the State argues that defendant forfeited the claim he now raises because he should have raised it on direct appeal. Ordinarily, a claim not raised on direct appeal would be considered waived. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). However, the factual basis for defendant's ineffective assistance claim includes matters not contained in the original trial record, and therefore could not have been considered on direct appeal. *People v. Burns*, 332 Ill. App. 3d 189 (2001).

¶ 14 The State also suggests that because defendant did not attach any affidavits of his alleged witnesses to his postconviction petition, he cannot get past the procedural hurdle which requires defendants to provide affidavits in support of their claims, or explain their absence. *People v. Collins*, 202 Ill. 2d 59 (2002). The purpose of such affidavits is to establish that the allegations could be independently and objectively corroborated. *Id.*

¶ 15 Contrary to the State's assertion, defendant explained the absence of the affidavits in his postconviction petition. Defendant stated that he did "not have affidavits from either Gloria Medina or Salvador Neon, because he doesn't personally know these witnesses" and he gave his defense attorney the information these witnesses provided to defendant while he was in jail. Furthermore, defendant stated that he had "repeatedly written to Carlos Ayala at his last known address" but Ayala had not responded. In

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addition, defendant claimed that he did not remember the name of the female public defender initially assigned to his case.

¶ 16 Procedural issues aside, we must determine whether the issues raised by defendant in his petition have an arguable basis in law or in fact. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must show that: (1) trial counsel's representation fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

¶ 17 Under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action, 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

¶ 18 A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). Where the defendant fails to prove prejudice, the reviewing court need not determine whether counsel's performance constituted less than reasonable assistance. *Strickland*, 466 U.S. at 697, 699; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

¶ 19 Defendant clearly set forth the gist of an alleged violation of his constitutional

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rights when he claimed that defense counsel failed to investigate and call witnesses who would support a finding of second degree murder. Defendant alleged that defense counsel failed to investigate or interview his initial public defender, whose name defendant had forgotten. She had taken pictures of defendant while he was in Cook County jail several days after his arrest and could have supported defendant's claim that the victim and his brother beat defendant with a metal car club while he was unarmed and lying on the ground. Defendant also alleged that defense counsel failed to interview Carlos Ayala who was the passenger in defendant's van on the night of the shooting. Ayala did not fight with anyone and would have corroborated defendant's version of the events, *i.e.*, that the victim and his brother beat defendant with a metal car club. Furthermore, defendant alleged that counsel failed to investigate Gloria Medina and Salvador Neon, who witnessed the confrontation between the victim and defendant. Medina and Neon visited defendant in Cook County jail, and although defendant did not know them, offered to testify on his behalf. Both Medina and Neon relayed to defendant that they observed the victim and his brother beat defendant with a metal car club, while he was lying on the ground defenseless. Defendant also attached his own affidavit to his petition, wherein he averred that he provided information about Medina and Neon to his defense attorney, but that his defense attorney never interviewed them. He also re-alleged that his initial public defender took pictures of his face and upper body shortly after his arrest, which showed bruises from being beaten with a metal car club.

¶ 20 Considering the allegations in the petition as true, we cannot conclude that

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defendant's petition lacked an arguable basis in fact.

¶ 21 We now turn to whether defendant's legal theory, that counsel was ineffective for failing to investigate or call witnesses to support his defense, was "indisputably meritless." *Hodges*, 234 Ill. 2d at 19. Counsel's theory of defense at trial was that the circumstances of the shooting justified a second degree murder conviction. Defense counsel argued that prior to the shooting, defendant threw a beer bottle at Hernandez, which missed, and then defendant and Hernandez and his brother were involved in a physical altercation wherein defendant was beaten with a metal pipe or club. Defendant then ran home, which is a block away, got a gun, ran back and got into his van and drove around looking for the victim. All of these actions took less than 5 minutes.

¶ 22 At the conclusion of the evidence the court found that "certainly concerning self-defense, that is not present, even an unreasonable belief in self-defense." The court further stated that it was required to "look and see if the sudden and intense passion lasted as long as that period of time." Ultimately, the court found that it had not been presented with sufficient evidence to establish that a mitigating factor existed to reduce first degree murder to second degree murder.

¶ 23 Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients. *People v. Mackle*, 358 Ill. App. 3d 102, 107 (2005). Counsel's failure to conduct an investigation and to develop a defense has been found to be ineffective assistance. See *People v. Wright*, 111 Ill. 2d 18 (1986); *People v. Coleman*, 267 Ill. App. 3d 895, 899 (1994). In addition, trial counsel's failure to present

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a witness to corroborate a defense has been regarded as ineffective assistance of counsel. *People v. Solomon*, 158 Ill. App. 3d 432 (1987)

¶ 24 Nevertheless, in this case, even if counsel's assistance could be construed as unreasonable, the testimony of the four witnesses would not have supported defendant's theory of sudden, intense passion, even had they been interviewed and called as witnesses. In order to mitigate first degree murder, the law requires serious provocation or "conduct sufficient to excite intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2008). Illinois courts have recognized four circumstances that qualify as serious provocation: substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989).

¶ 25 In this case, while defendant may have suffered substantial physical injury as a result of defendant's conduct, we cannot find that defendant was acting under a sudden and intense passion as a result of sufficient provocation at the time of the shooting. There was a sufficient pause in the action or cooling off time between the physical altercation and the homicide. See *People v. Johnson*, 4 Ill. App. 3d 279 (1972). Defendant left the scene, went home to get a gun, came back, got into his van and began driving around looking for the victim. This was a sufficient amount of time to "permit the voice of reason to be heard," particularly since defendant drove around looking for Hernandez. *People v. Coleman*, 184 Ill. App. 3d 285 (1994). Accordingly, defendant cannot establish the prejudice prong of *Strickland*. Therefore, defendant's

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petition lacked an arguable basis in law and was properly dismissed by the circuit court as being frivolous and patently without merit. *Hodges*, 234 Ill. 2d at 22.

¶ 26 For the foregoing reasons the judgment of the circuit court is affirmed.

¶ 27 Affirmed.