

NOTICE
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2012 IL App (4th) 100394-U

Filed 1/13/12

NO. 4-10-0394

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Ford County
ROBERT MARTIN SCHAUB,)	No. 07CF45
Defendant-Appellant.)	
)	Honorable
)	Stephen R. Pacey,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the summary dismissal of defendant's postconviction because defendant failed to comply with section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2010)), and because defendant's claim was belied by the record.

¶ 2 I. BACKGROUND

¶ 3 In June 2007, the statewide grand jury returned an eight-count indictment against defendant, Robert Martin Schaub. Defendant was charged with (1) four counts of criminal drug conspiracy (720 ILCS 570/405.1 (West 2006)), (2) three counts of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 2006)), and (3) one count of conspiracy (720 ILCS 5/8-2 (West 2006)).

¶ 4 Following a January 2008 trial, a jury convicted defendant of (1) unlawful possession of a controlled substance with intent to deliver, (2) criminal drug conspiracy, and (3)

conspiracy. At the March 2008 sentencing hearing, the trial court merged defendant's convictions for conspiracy and unlawful possession of a controlled substance with intent to deliver into his conviction for criminal drug conspiracy. The court sentenced defendant to 35 years in prison.

¶ 5 On direct appeal, defendant argued the following: (1) Illinois Supreme Court Rule 415(c) (eff. Oct. 1, 1971) violated his constitutional due process rights, (2) the State illegally taped telephone conversations between defendant and his attorney while defendant was in jail, (3) the trial court erred in admitting as evidence a recorded conversation between defendant and his girlfriend, and (4) the court erred in denying defense counsel's motion to withdraw. In August 2009, this court rejected defendant's claims and affirmed. *People v. Schaub*, No. 4-08-0327 (Aug. 27, 2009) (unpublished order under Supreme Court Rule 23), *appeal denied*, 234 Ill. 2d 545, 920 N.E.2d 1079 (2009).

¶ 6 In February 2010, defendant filed a postconviction petition including 20 individual claims. The trial court summarily dismissed defendant's postconviction petition at the first stage, finding defendant's first claim failed to state the gist of a constitutional claim and the remaining claims could have been raised on direct appeal and were thus procedurally defaulted or barred by *res judicata*.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues the trial court erred only in dismissing claim 17 of his postconviction petition at the first stage. Claim 17 asserts defendant was denied his sixth amendment right to the effective assistance of counsel because trial counsel failed to discuss

defendant's potential testimony with him, preventing defendant from testifying at trial. As part of this claim, defendant alleges he informed his attorney he wanted to testify during a recess, but his attorney responded as follows: "the [p]rosecution would bring up his 2002 [d]rug conviction [sic] and from it an entire can of worms will open itself up once the State began asking him about his many accounts of using [c]rack." As a result of this advice, defendant chose not to testify.

¶ 10 Defendant asserts claim 17 could not have been raised on direct appeal and was not procedurally defaulted or barred by *res judicata* because the conversation at issue was not part of the record. Further, defendant contends the trial court erred in summarily dismissing his petition without an evidentiary hearing because he may have been denied his fundamental right to testify. The State argues dismissal was appropriate because Claim 17 is procedurally forfeited since it was not raised on direct appeal, and further, is frivolous and patently without merit, lacking an arguable basis in both law and fact. Additionally, the State contends defendant's claim fails because he failed to comply with section 122-2 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2 (West 2010)), which requires a petitioner to supply evidence supporting his allegations.

¶ 11 A. Propriety of Dismissal Based on Forfeiture

¶ 12 A postconviction proceeding is a "collateral attack on a prior conviction and sentence, and the scope of such a proceeding is generally limited to constitutional matters that have not been, or could not have been, previously adjudicated." *People v. Cummings*, 375 Ill. App. 3d 513, 518, 873 N.E.2d 996, 1001 (2007). Any issues which could have been raised on direct appeal are procedurally defaulted and any issues actually considered are barred by the

doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010).

¶ 13 Defendant asserts the trial court erred in dismissing Claim 17 of his post-conviction petition because it is neither procedurally defaulted nor barred by *res judicata*. Specifically, defendant argues his trial counsel rendered ineffective assistance of counsel because his trial attorney (1) failed to discuss his potential testimony at trial with him; (2) was specifically informed by him during a recess he wanted to testify but responded "the [p]rosecution would bring up his 2002 [d]rug conviction [*sic*] and from it an entire can of worms will open itself up once the State began asking him about his many accounts of using [c]rack"; and (3) failed to file a motion *in limine* to prevent the State from introducing this 2002 drug conviction into evidence. Defendant posits "this claim could not have been raised on [direct] appeal because it contained an allegation [a conversation between defendant and his trial attorney] that was not part of the record."

¶ 14 "[T]he failure to raise a claim of ineffectiveness of trial counsel in the direct appeal renders the issue waived in post-conviction proceedings" subject to three exceptions. *People v. Wilson*, 307 Ill. App. 3d 140, 145-46, 717 N.E.2d 835, 840 (1999); *People v. Blair*, 215 Ill. 2d 427, 450-51, 831 N.E.2d 604, 619 (2005). The first exception is when fundamental fairness so requires. *Blair*, 215 Ill. 2d at 450, 831 N.E.2d at 619. The second exception arises when the attorney who represented the defendant at trial also represented the defendant on appeal, and the defendant is claiming incompetence of counsel in his postconviction petition. *Id.* at 450-51, 831 N.E.2d at 619; *Wilson* 307 Ill. App. 3d at 146, 717 N.E.2d at 840. This exception does not apply here, because defendant was represented by another attorney on his direct appeal. The third exception exists where either (1) "the evidentiary basis for the claim of ineffectiveness

is not contained within the original trial court record and, therefore, could not be considered by a reviewing court on direct appeal or [(2)] if the facts relating to the competency of trial counsel are newly discovered." *Wilson*, 307 Ill. App. 3d at 146, 717 N.E.2d at 840. Here, defendant argues the first prong of the third exception applies, because the evidentiary basis for defendant's claim of ineffective assistance of counsel stems from a conversation occurring off the record.

¶ 15 The Illinois Supreme Court further clarified the third exception by stating "it is not so much that such a claim 'could not have been presented' or 'raised' by a party on direct appeal, but rather that such a claim could not have been *considered* by the reviewing court because the claim's evidentiary basis was *de hors* the record." (Emphases in original.) *People v. Whitehead*, 169 Ill. 2d 355, 372, 662 N.E.2d 1304, 1312 (1996), *overruled in part on other grounds by People v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998). Further, the court held "the exception recognizes that waiver ought not to preclude that species of claim which, though theoretically capable of being 'presented' on appeal, is nonetheless incapable of consideration by a reviewing court because of rules governing the scope of appellate review." *Id.* Here, defendant argues even if he had asserted this claim in his direct appeal, this court would have been restricted to reviewing only matters contained in the record. However, under the facts here, if we were to presume the alleged conversation took place, defendant's claim would still be subject to summary dismissal, for the reasons stated below.

¶ 16 B. Standard of Review

¶ 17 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010) (citing *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998)). "To be entitled to post-conviction relief, a

defendant must demonstrate a substantial deprivation of federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *People v. McNeal*, 194 Ill. 2d 135, 140, 742 N.E.2d 269, 272 (2000).

¶ 18 At the first stage of a postconviction proceeding, a *pro se* defendant must allege enough facts to make out the "gist" of a constitutional claim; the petition does not need to contain formal legal arguments or citations to legal authority. 725 ILCS 5/122-2 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A *pro se* defendant must however, "set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008). A postconviction petition must "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). At the dismissal stage of a postconviction petition, all well-pleaded facts which are not positively rebutted by the record are taken as true. *Coleman*, 183 Ill. 2d at 385, 701 N.E.2d at 1073.

¶ 19 If a trial court "determines the [postconviction] petition is frivolous or is patently without merit, it [must] dismiss the petition in a written order[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). A claim is "frivolous or patently without merit" if it lacks an arguable basis in law or fact. *People v. Alcozer*, 241 Ill. 2d 248, 257-58, 948 N.E.2d 70, 77 (2011). A reviewing court may affirm the dismissal of a postconviction petition on any basis contained in the record, even if the trial court did not rely on those grounds. *People v. Patton*, 315 Ill. App. 3d 968, 972, 735 N.E.2d 185, 189 (2000).

¶ 20 C. Propriety of Dismissal Based on Failure to Attach Supporting Evidence

¶ 21 Defendant argues in his postconviction petition he may have been denied his fundamental constitutional right to testify, because his decision not to testify was based on false information given by his attorney concerning his possible impeachment with a 2002 drug charge. Because this was a first-stage dismissal, defendant asserts the trial court should have accepted his allegation as true (*Coleman*, 183 Ill. 2d at 385, 701 N.E.2d at 1073) and should have conducted an evidentiary hearing to explore this claim further. *People v. Lester*, 261 Ill. App. 3d 1075, 1079-1080, 634 N.E.2d 356, 361 (1994); see also *People v. Almodovar*, 235 Ill. App. 3d 144, 153, 601 N.E.2d 853, 859 (1992) (holding even if there is only a dispute about trial tactics, which may have denied a defendant a fundamental constitutional right, the court should hold an evidentiary hearing).

¶ 22 Specifically, defendant asserts because he alleged his attorney misled him into not testifying, the trial court should have held an evidentiary hearing to explore this claim. See *Lester*, 261 Ill. App. 3d at 1079-80, 634 N.E.2d at 361 (defendant was entitled to an evidentiary hearing because he made a sufficient allegation, supported by his affidavit, his attorney misled him into not testifying). The State argues defendant's claim independently fails because defendant failed to comply with section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)), which requires a petitioner to supply evidence supporting his allegations.

¶ 23 Generally, "the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." (Internal quotation marks omitted.) *Delton*, 227 Ill. 2d at 255, 882 N.E.2d at 520. We recognize the "[f]ailure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains

facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *People v. Hall*, 217 Ill. 2d 324, 333, 841 N.E.2d 913, 919 (2005).

¶ 24 In the present case, defendant's allegation pertains to a private conversation he had with his attorney. It necessarily follows the only other person who could have submitted an affidavit to corroborate defendant's claim is his attorney. However, this exception is not applicable in defendant's case because he failed to even mention the alleged conversation with counsel in his own affidavit. See *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002) (holding the defendant's sworn verification stating his petition was true and correct to the best of his knowledge did not satisfy section 122-2 of the Act, because a sworn verification is not a substitute for the "affidavits, records, or other evidence" mandated by the Act). Defendant's sworn affidavit states only what he would have testified to if he had done so and does not even touch on the alleged reason he chose not to testify.

¶ 25 Defendant's claim fails because he neither (1) attached affidavits, records, or other evidence to support the existence of the alleged conversation mentioned in his postconviction petition as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)) nor (2) mentioned the alleged conversation in his own affidavit. See, *Patton*, 315 Ill. App. 3d at 972, 735 N.E.2d at 189 (a reviewing court may affirm the dismissal of a postconviction petition on any basis contained in the record, even if the trial court did not rely on those grounds). Furthermore, the record belies defendant's claim. The trial court, on at least three occasions, admonished defendant correctly about his right to testify or not to testify. Defendant acknowledged on the record he understood this was his decision alone to make. The record also shows a recess

was taken to give defendant time to consult with counsel about his decision. Further, the record clearly shows defendant was told by the court, on more than one occasion, if he chose to testify, he could not be impeached with any conviction, including the 2002 cannabis-related "conviction." In addition, the record shows defendant acknowledged the decision not to testify was his voluntary decision, and no one forced him, threatened him or promised him anything about his testimony. Lastly, defendant stated he was satisfied with his counsel's advice and with his decision not to testify. Accordingly, the summary dismissal of defendant's postconviction petition at the first stage was appropriate.

¶ 26 Finally, we note the trial court made a thorough record throughout the trial proceedings on matters pertaining to defendant's claim. The thorough record was most helpful to this court in resolving this appeal.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment.

¶ 29 Affirmed.