

No. 1-10-3283

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 23173
)	
RON ADAMS,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed where defendant failed to present an arguable claim of ineffective assistance of trial counsel.
- ¶ 2 Defendant Ron Adams, the defendant, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he presented an arguable constitutional claim of ineffective assistance of trial counsel requiring further proceedings under the Act.

¶ 3 This court previously affirmed the judgment entered on defendant's 2006 jury convictions for first degree murder and aggravated battery of a firearm, and the respective, consecutive sentences of 30 and 15 years' imprisonment imposed thereon. *People v. Adams*, No. 1-06-2620 (2009) (unpublished order under Supreme Court Rule 23). In doing so, we rejected defendant's claim that the evidence was insufficient to sustain his convictions based on an accountability theory, and as a direct participant. *Adams*, order at 32.

¶ 4 On May 18, 2010, defendant filed the instant *pro se* postconviction petition alleging ineffective assistance of trial and appellate counsel. As relevant to this appeal, defendant claimed that trial counsel was ineffective for failing to adequately investigate the extent of his injuries and to call a medical expert to testify that his injuries would have made it impossible for him to run from the scene as testified to by the State's key eyewitness, Derrick Smith. Defendant also maintained that counsel should have cross-examined Dr. Faran Bokahri, one of his treating physicians, regarding the extent of his injuries. Defendant claimed that if counsel had sought medical information regarding his injuries, counsel would have learned that he suffered a shattered left femur and collapsed lung which proved that he was unable to flee the scene running as Smith testified at trial.

¶ 5 Defendant further alleged that counsel was ineffective for failing to call occurrence witnesses "Lovita, Monica Goins, Diana, [and] Mary." He maintained that these witnesses would have contradicted Smith's testimony that as defendant got a few feet away he pulled out a gun while simultaneously pulling the hood from his head, and thus corroborated the testimony of two others that the offender's hood never came off and that no one could identify him. He maintained that none of the four witnesses saw the gunman remove his hood before firing his weapon, and that their statements indicated that "you could not tell who the person identified as defendant was." He further maintains that counsel was familiar with and knew what these witnesses would have testified to at trial.

¶ 6 Defendant verified his petition by a notarized affidavit (725 ILCS 5/122-1(b) (West 2010)), and also attached his own "affidavit" which is not notarized. In that document, defendant maintained that he tried to obtain the affidavit of a medical expert, but was unable to do so because he is incarcerated and indigent, and cannot afford to hire a medical expert. He also claimed that he did not have his medical records and did not know the name of the physician who performed the surgery on his leg, so he was unable to obtain that doctor's current address. He noted that his sister was trying to obtain his medical records, and that he has contacted the Correctional Center Medical Records Department. He claimed that the four occurrence witnesses provided statements which were part of discovery, but that he has been denied a copy of the common law records. Defendant further claimed that he requested a copy of these statements from his appellate counsel, but counsel informed him that the record was sent to the appellate court.

¶ 7 Defendant also attached to his petition a letter from the Health Information Technician for Menard Correctional Center stating that she received his request for copies of medical records, but that there was "nothing in [his] chart from Stroger Hospital." She requested that defendant sign an enclosed authorization and indicated that she would try to obtain his medical records. In addition, defendant attached a letter from the clerk of the circuit court of Cook County indicating that his request for trial transcripts and the common law record had been denied, and that the appellate court had received copies of the record. Defendant also attached a letter from his assistant appellate defender informing him that he received his letter requesting various portions of the common law record, that he did not have the record because it was in the appellate court, and that he did not believe the record contained the report or statement he was referencing.

¶ 8 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant filed a motion to reconsider the dismissal alleging that the allegations in his petition must be liberally construed in his favor, and that he followed the proper postconviction

procedures and either attached exhibits or explained why they were not attached. The circuit court denied defendant's motion, and this appeal follows.

¶ 9 Defendant contends that the summary dismissal was improper where he presented an arguable claim of ineffective assistance of trial counsel. He maintains that counsel was ineffective for failing to investigate his medical records and to call an expert or Dr. Bokahri to testify to the extent of his injuries, and how they rendered him incapable of running from the scene to contradict Smith's testimony. He also cites counsel's failure to call four occurrence witnesses to testify that the shooter's hood was up and that his face was not visible, thereby contradicting the State's witness, Smith, that he was able to identify the shooter as defendant because his hood was down. Defendant raises no issue regarding the other allegations in his petition, and, thus, has forfeited them for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 10 At the first stage of postconviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). However, section 122-2 of the Act requires that defendant attach to his petition affidavits, records, or other evidence supporting his allegations or state why the same are not attached. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of a first-stage summary dismissal is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 11 The State initially responds that summary dismissal was proper because defendant failed to meet the affidavit requirement of section 122-2 of the Act. The State points out that defendant did not attach any affidavits to his petition, either his own or the prospective witnesses referenced, which could support his allegations of constitutional deprivation. In addition, the State points out that

defendant's "affidavit," containing his statements as to why he did not have supporting documentation, is not an "affidavit" because it is not notarized, and is therefore void.

¶ 12 Defendant replies that the Act does not require the explanation for the absence of supporting documentation to be presented in an affidavit. He further maintains that the lack of notarization is not fatal at the first stage of postconviction proceedings (*People v. Henderson*, 2011 IL App (1st) 090923, ¶ 34), and even if this court were to find that the lack of notarization rendered his affidavit legally invalid, the other documentation attached to his petition was sufficient to satisfy the documentation requirement.

¶ 13 Section 122-2 of the Act provides that a postconviction petition shall have attached to it affidavits, records, or other supporting evidence, or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2010). In this case, defendant submitted his petition verified by affidavit, in accordance with section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2010); *People v. Collins*, 202 Ill. 2d 59, 68 (2002)), and an explanation for why he did not provide "affidavits, records or other supporting evidence" for some of his claims. Defendant thus satisfied the pleading requirement of section 122-1(b) through his verified affidavit (*Collins*, 202 Ill. 2d at 67), but fell short of that required under section 122-2 where he did not provide supporting documentation and his explanation for its absence was wanting.

¶ 14 Defendant maintained that he was unable to get an affidavit from a medical expert to explain the extent of his injuries because he was indigent, incarcerated, and did not know the name of the doctor who performed his operation. We first observe that the Act provides relief only to those persons who are imprisoned in the penitentiary. 725 ILCS 5/122-1(a) (West 2010). Thus, defendant's status is a prerequisite to relief under the statute, and will not alone excuse his compliance with the requirements of the Act.

¶ 15 In any event, the record shows that Dr. Bokahri testified at trial that he was a trauma surgeon at the hospital where defendant's surgery was performed, and that he treated defendant's injuries. He also testified to the nature of these injuries, *i.e.*, gunshot wounds to both of defendant's legs, his left arm and right back, and that a chest tube was inserted on the right side of defendant's chest because the lung was deflated. Thus, it is apparent that defendant knew the extent of his own injuries and had the name of one of the treating physicians, and could have attempted to contact him and ask for supporting documentation. *Delton*, 227 Ill. 2d at 258.

¶ 16 Defendant also claimed that he could not get statements from four occurrence witnesses, "Lovita, Monica Goins, Diana, [and] Mary" to contradict Smith's testimony that the offender's hood never came down such that the offender was visible because their statements were in the record in the appellate court. Defendant failed to explain why he could not contact these witnesses for their statements, and, in fact, failed to even provide the last names of three of those witnesses or provide any information as to who interviewed them, or list their probable testimony with any specificity. As such, defendant did not provide a cogent explanation for the absence of supporting documentation, and thus precluding any corroboration of the allegations set forth in his petition. *Hodges*, 234 Ill. 2d at 18; *Collins*, 202 Ill. 2d at 67.

¶ 17 To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214,

¶ 19.

¶ 18 Defendant maintains that trial counsel was ineffective for failing to investigate his medical records and to call an expert or cross-examine Dr. Bokahri regarding the extent of his injuries and how they rendered him unable to run. He maintains that Dr. Bokahri and a medical expert could have revealed that he shattered his left femur and had a collapsed lung rendering him unable to flee from the scene as Smith indicated at trial. He claims that this would have shown that Smith's testimony was incredible, especially where there was no physical evidence connecting him to the shooting.

¶ 19 As noted above, Dr. Bokahri testified at trial that he was a trauma surgeon and treated defendant for gunshot wounds to both his legs, his left arm and his back, and that a chest tube was inserted in his lung, which was deflated. In addition, Sergeant Don Jerome testified that when he arrested defendant on August 8, 2002, about four weeks after the shooting on July 4, 2002, he was on crutches due to the gunshot wound to his leg. Thus, the extent of defendant's injuries was presented to the jury, and defendant's speculative argument that an additional expert should have been called or more extensive cross-examination of Dr. Bokahri conducted, does not present an arguable claim of ineffective assistance of trial counsel. *People v. Smith*, 195 Ill. 2d 179, 190-91, 206-07 (2000).

¶ 20 This conclusion finds further support in the ample trial evidence that defendant was present during the incident and fired a gun in the direction of the victim based on the testimony of Smith, who had known defendant for over 10 years, and observed him fire the gun in the direction of the victims; Shay Thomas' statement to Assistant State's Attorney Tony Garcia that defendant was the shooter, who had removed his hood right before shooting; and his lineup identification as the shooter by these two eyewitnesses. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 69; *People v. Escobedo*, 377 Ill. App. 3d 82, 90 (2007); *People v. Hernandez*, 351 Ill. App. 3d 28, 39-40 (2004).

¶ 21 Moreover, defendant's claim that he could not run would have been contradicted by his own statement to Sergeant Don Jerome that after he was shot he "ran." A postconviction petition is properly dismissed where the allegations therein are rebutted by the record. *People v. Torres*, 228 Ill. 2d 382, 394 (2008). For these reasons, we find that defendant has failed to demonstrate that he was prejudiced by counsel's failure to produce further medical testimony regarding his injuries. *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 49.

¶ 22 We reach the same conclusion regarding defendant's claim that trial counsel was ineffective for failing to call four occurrence witnesses to contradict Smith's testimony that he was able to identify the shooter because his hood was down, and "Lovita" to testify consistent with Smith's initial statement that she was talking to him at the time of the shooting, thus contradicting his trial testimony that he was not talking to her.

¶ 23 As noted above, defendant has not specifically identified these witnesses and as such, his broad conclusory allegations regarding them is insufficient to withstand scrutiny under the Act. *Delton*, 227 Ill. 2d at 258; *People v. Blair*, 215 Ill. 2d 427, 453 (2005). In addition, defendant maintains that the statements of these witnesses were part of the discovery in the common law record, and that counsel was familiar with and knew what these witnesses would have testified to at trial. Matters apparent in the record, but not raised on direct appeal are waived (*Blair*, 215 Ill. 2d at 450; *People v. Jefferson*, 345 Ill. App. 3d 60, 70-71 (2003)); but even if not procedurally defaulted, defendant's claim fails to raise an arguable claim of ineffective assistance of trial counsel.

¶ 24 Testimony that the offender's hood was up covering his face, would have been merely cumulative to what was already presented at trial. *Smith*, 195 Ill. 2d at 190-91, 206-07; *People v. Phyfiher*, 361 Ill. App. 3d 881, 886 (2005). The record shows that Martice Chatman testified at trial that the offender was wearing a hood covering his head when he fired the gun that left him with two gunshot wounds, and he was unable to identify the offender. This testimony was already presented

to the jurors, and defendant has not demonstrated that he was arguably prejudiced by counsel's failure to present additional testimony that the offender's hood was up. *Douglas*, ¶ 49; *Phyfiher*, 361 Ill. App. 3d at 886.

¶ 25 Defendant, nonetheless, maintains that the fact that two of his co-offenders were acquitted based on Smith's identification testimony shows that his testimony was unbelievable, and that additional testimony regarding the extent of his injuries and four more occurrence witnesses testifying that his hood was up covering his face would have resulted in further contradiction of Smith's testimony and his acquittal. The acquittal of two co-offenders does not establish defendant's innocence (*People v. Martinez*, 389 Ill. App. 3d 413, 418 (2009)), and his inadequate impeachment claim does not establish an arguable claim of ineffective assistance of counsel (*Douglas*, ¶ 48).

¶ 26 In sum, we find that defendant failed to present an arguable claim of ineffective assistance of trial counsel, and, therefore, we affirm the order of the circuit court of Cook County summarily dismissing defendant's *pro se* postconviction petition.

¶ 27 Affirmed.