FIFTH DIVISION
January 25, 2013

No. 1-11-0186

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. 06 CR 2398
	)	
MITCHELL THOMAS,	)	Honorable
	)	Arthur F. Hill. Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* post-conviction petition was affirmed where trial counsel was not ineffective for failing to investigate a potential witness, and defendant had no right to a fitness hearing.

¶ 2 Defendant Mitchell Thomas appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2010). On appeal, defendant contends that his petition sufficiently alleged an ineffective assistance of counsel claim based on trial counsel's failure to investigate an alleged alibi witness. Defendant

also maintains that his petition made an arguable claim that the trial court erred by not conducting a fitness hearing where there was a *bona fide* doubt as to his fitness. We affirm.

¶ 3 Following a bench trial, defendant was convicted of armed robbery where the victim, Kerry O'Malley, was deprived of several personal items at knife point near 1409 West Superior Street in Chicago on December 9, 2005. The court sentenced defendant to 24 years' imprisonment.

¶ 4 Before trial, on May 12, 2006, the court ordered a psychiatrist, Dr. Roni Seltzberg, to evaluate defendant for fitness and his ability to understand the *Miranda* warnings. A psychiatrist sent a letter to the court on June 23, 2006, opining defendant was fit for trial with medication, sane at the time of the offense, and capable of understanding his *Miranda* rights.

¶ 5 On August 31, 2006, defendant filed a motion to suppress statements he made following his arrest based on his inability to appreciate and understand the meaning of his *Miranda* rights. At the hearing on the motion, the defense presented the testimony of Dr. Bruce Frumkin, a clinical psychologist, who opined that defendant did not understand his *Miranda* rights at the time the police questioned him. Dr. Frumkin testified that defendant had a low IQ, experienced hallucinations, and had schizo-affective disorder. He further indicated that at the time of the hearing, defendant had stabilized on his medication and could comprehend and make a knowing waiver of his *Miranda* rights. In contrast to Dr. Frumkin, Dr. Seltzberg testified at the hearing and stated that defendant was able to understand his *Miranda* rights at the time of his reported statement to police. The court denied the motion, finding that defendant had the ability to understand and waive his *Miranda* rights, and that his statements to police were made knowingly.

¶ 6 At trial, Kerry O'Malley testified that at about 10:25 p.m. on December 9, 2005, she was about to enter her car parked near 1409 West Superior Street in Chicago when defendant pulled

his car next to her car. Defendant got out of his car and approached O'Malley with a switch-blade knife in his hand. Defendant then either pushed O'Malley or she fell to the ground, where he crawled on top of her. Defendant asked her "where is your money." O'Malley screamed and kicked defendant as he searched her pockets. After a couple of minutes, defendant fled in his car, which had a license plate beginning with the numbers "626." The State introduced evidence showing that defendant owned a car with license plate number "6260817." After defendant fled, O'Malley discovered that credit cards, her drivers license, and $40 to $50 were missing from her pocket. On January 9, 2006, O'Malley viewed a lineup and identified defendant as her assailant.

¶ 7 The State also introduced evidence that after defendant was arrested on January 8, 2006, he gave an oral statement, admitting that he robbed O'Malley at knife point in November 2005. In addition, the State established that defendant committed a prior robbery. The victim of that robbery, Laksana Ivchenko, testified that on November 12, 2005, at about 8:35 a.m., she was walking to a beauty salon in the vicinity of 1645 West Superior Street in Chicago. She heard a noise behind her and defendant then began pulling at her, ripping her jacket and screaming something she did not understand. When she realized he was attempting to take her purse, she let it go and defendant pushed her to the ground. He then ran to a car and fled with her purse, which contained $100. An eyewitness to the robbery testified that she saw a man pull something from Ivchenko and then drive away in a car which had a license plate containing the first three numbers "626."

¶ 8 Defendant testified that he was at home in Elgin with his roommate Matthew Gaudas on the day O'Malley was robbed. He initially stated that Thomas Hoss was "probably" at home with him as well, but, on cross-examination, testified that he thought Hoss "wasn't there." Defendant admitted owning a car bearing the license plate "6260817."

¶ 9 The trial court found defendant guilty of armed robbery. The pre-sentence investigation report (PSI) showed that defendant reported that he had bipolar disorder, suicidal thoughts, and attempted suicide twice. Defendant was taking antidepressants and antipsychotic medication while he was incarcerated. At sentencing, defendant's sister testified that defendant was constantly in the hospital after developing mental health issues and regularly experienced hallucinations.

¶ 10 In response to the State's assertions in aggravation that defendant was dangerous and engaged in a fight in prison, defendant stated in allocution that:

> "I'd like to say that I was listening to the State. And no way I'm a violent person. You know, I'm going to do harm. Like I'm not doing harm. I know I was found guilty. I'm not the type of man, your Honor, to prey on women. My mother is 88. I was found guilty. Another thing, listening to the State. I was attacked last year. It wasn't a fight. In front of a lot of witnesses. *** I haven't had any mishaps during the time I've been here in jail."

¶ 11 Following the sentencing hearing, the court sentenced defendant to 24 years' imprisonment. We affirmed that judgment on direct appeal. *People v. Thomas*, No. 1-08-3260 (2010) (unpublished order under Supreme Court Rule 23).

¶ 12 On September 20, 2010, defendant filed a *pro se* post-conviction petition alleging, in one sentence, that his trial counsel was ineffective because she "neglected to interview his alibi witness Thomas Hoss [who] would have testify [*sic*] he was with the defendant time of offense." Also, in pertinent part, defendant alleged that the trial court should have conducted a mental examination as to his fitness prior to his trial. Defendant appended to his petition a portion of the trial transcripts.

¶ 13 On December 7, 2010, the circuit court issued a written order dismissing the petition as frivolous and patently without merit. In doing so, the court found that defendant failed to attach an affidavit from Hoss and explain the significance of his testimony. The trial court also held that defendant's claim that the trial court should have conducted a mental examination as to his fitness was contradicted by the record in that the court did order an examination before trial on May 12, 2006.

¶ 14 In this appeal, defendant challenges the propriety of that dismissal, arguing that he raised an arguable claim of ineffective assistance of counsel. He specifically maintains that his counsel was ineffective for failing to interview Thomas Hoss, who would have corroborated defendant's testimony that he was at home at the time of the alleged offense. We review the circuit court's dismissal of defendant's petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 15 The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 (the threshold for survival at this stage is low). To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Despite the low threshold for survival at the first stage of proceedings, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 379 (1988). The failure to attach the required documents or explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 16 Here, defendant failed to provide an affidavit from Hoss. Instead, he simply alleged that Hoss would testify that he was with defendant at the time of the offense. Defendant attempts to

circumvent the requirement that post-conviction petitions be accompanied by affidavits by arguing that the trial transcripts he attached to his petition constituted "other evidence" and thus fulfilled the statutory requirement. The attached transcripts, however, do not provide any indication that Hoss would testify that he was with defendant at the time of the offense, and defendant failed to detail any effort he made in attempting to contact Hoss, or explain why he was unable to contact him. Therefore, defendant's unsupported conclusory allegation that Hoss would testify that he was at home with him at the time of the offense is not sufficient to require further proceedings under the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 17 More significantly, we find defendant's petition failed to state the gist of a claim of ineffective assistance of counsel. Specifically, a defendant alleging ineffective assistance of counsel at the first stage of proceedings must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. 2d at 17.

¶ 18 Even assuming that counsel erred in failing to investigate Hoss as a witness, defendant has failed to show that it was arguable that the result of the trial would have been different had Hoss testified at trial that he was with defendant at the time of the crime. We initially note that Hoss' testimony would have, at best, only partially corroborated defendant's testimony. Defendant initially stated that Hoss was "probably" at home with him at the time of the crime, but, on cross-examination, testified that he thought Hoss was not with him. More importantly, the evidence of defendant's guilt was substantial. O'Malley identified defendant as her assailant in a line-up and in court. The credible testimony of one eyewitness is sufficient to convict defendant. *People v. Robinson*, 153 Ill. App. 3d 272, 275 (1987). There was also evidence presented at trial that he robbed another victim, Ivchenko, in a similar manner. In both instances, defendant was linked to the crimes by the license plate of his car. Finally, defendant confessed to

the armed robbery of O'Malley. Accordingly, defendant did not state even an arguable claim of prejudice.

¶ 19 Defendant also contends that it was arguable that the trial court erred in failing to *sua sponte* order a fitness hearing. He maintains that the court was required to do so given the evidence raising a *bona fide* doubt of his fitness for trial.

¶ 20 In Illinois, a defendant is presumed fit for trial and sentencing, and is deemed unfit only if "he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2010). The circuit court has a duty to order a fitness hearing if there is a *bona fide* doubt as to the defendant's ability to understand the nature and purpose of the proceedings or assist in his defense. *People v. Sandham*, 174 Ill. 2d 379, 382 (1996). A *bona fide* doubt arises where there are facts in existence that raise a "real, substantial and legitimate doubt as to [defendant's] mental capacity to meaningfully participate in his defense and cooperate with counsel." *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991).

¶ 21 Defendant asserts that several factors suggested a *bona fide* doubt as to his fitness. In particular, defendant refers to Dr. Frumkin's testimony at the suppression hearing that defendant was psychotic, experienced hallucinations, had a low IQ, and was not able to process data adequately due to his mental health disorder. Defendant also maintains that his allocution at sentencing was incoherent, thus establishing a *bona fide* doubt as to his fitness. He specifically points to his statements that, "You know, I'm going to do harm. Like I'm not doing harm. *** My mother is 88. I was found guilty. Another thing, listening to the State. I was attacked last year. It wasn't a fight. In front of a lot of witnesses." Moreover, defendant refers to his PSI, which notes that he had bipolar disorder and suicidal tendencies. The PSI also indicated that defendant believed he earned his GED when he did not, and defendant denied having a previous fitness examination in 2001, despite the fact that the PSI showed that he did. Defendant asserts

that his inability to remember whether he earned a GED or previously had a fitness exam demonstrates his mental deficiencies and low intelligence.

¶ 22 We find defendant's claims unpersuasive and rebutted by the record. See *People v. Stephens*, 2012 IL App (1st) 110296, ¶¶ 90-98 (summary dismissal of post-conviction petition affirmed, holding the trial court was not required *sua sponte* to order fitness hearing). Dr. Frumkin never indicated at the suppression hearing that defendant was unfit for trial. Instead, his testimony was that defendant was unable to understand his *Miranda* rights at the time of his arrest, an assertion that was rebutted by Dr. Seltzberg and ultimately rejected by the trial court. Moreover, Frumkin's testimony showed that, at the time of the suppression hearing, defendant was able to understand his *Miranda* rights, and Dr. Seltzberg ultimately found defendant fit for trial with medication. We also find that defendant's statements in allocution, when viewed in their entirety, do not show that defendant was unfit for trial. Instead, defendant's comments attempted to show that he was not a violent person and was not engaged in a fight in prison as alleged by the State. More importantly, defendant testified in his own defense in a lucid manner consistent with his innocence, thus establishing that he was fit for trial. Such participation in the proceedings weighs heavily in favor of defendant's fitness. See *People v. Branson*, 131 Ill. App. 3d 280, 290 (1984) (stating that "[d]efendant's active participation in the case and purposive testimony were inconsistent with his assertion of unfitness to stand trial").

¶ 23 In reaching this conclusion, we find *People v. Brown*, 236 Ill. 2d 175 (2010), relied on by defendant, factually distinguishable from the case at bar. In *Brown*, 236 Ill. 2d at 181, the defendant, who was convicted of attempted murder of a police officer, alleged in his post-conviction petition that he told his attorney he was taking psychotropic medication to treat depression and bipolar disorders, and also had attempted suicide around the time of his arrest. He further alleged that he was attempting "suicide by police" on the day of the offense by

provoking police to shoot him. The Illinois Supreme Court found the allegations could support a *bona fide* doubt of the defendant's fitness to stand trial and were sufficient to survive summary dismissal. *Brown*, 236 Ill. 2d at 191.

¶ 24 Here, unlike *Brown*, defendant's fitness and mental health were considered before trial. Even defendant's doctor testified at the pretrial suppression hearing that defendant had stabilized on his medication. Moreover, unlike *Brown*, defense counsel and the court here were clearly aware that defendant was taking pyschotropic medication before trial. Finally, defendant in the case at bar competently testified at trial, whereas the defendant in *Brown* only had brief exchanges with the judge, which the *Brown* court found insufficient to rebut defendant's post-conviction allegations. See *Brown*, 236 Ill. 2d at 190-91.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.