

No. 1-11-0297

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 21992
	)	
CORNELL MILTON,	)	Honorable
	)	Margaret Mary Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**ORDER**

¶ 1 **Held:** Where defendant failed to provide affidavits and medical records of injuries sustained in custody to support claim that his trial counsel should have investigated his allegations that he was beaten to force his confession, post-conviction petition did not present arguable claim of counsel's ineffectiveness; the judgment of the circuit court was affirmed.

¶ 2 Defendant Cornell Milton appeals the summary dismissal of his *pro se* post-conviction petition. Defendant argues his petition should have survived the initial stage of post-conviction review because it presented an arguable claim that his trial counsel was ineffective in failing to investigate the voluntariness of defendant's admission that he threw his infant daughter into a wall, causing her death. We affirm.

¶ 3 Following a jury trial in 2007, defendant was convicted of the first degree murder of his daughter, Carrell, who was 25 days old. Carrell was alone in defendant's care on August 16, 2002, while the child's 16-year-old mother, Teginia Martin, was at a nearby house. Defendant was 17 years old at the time of the offense and attended a special education school.

¶ 4 Prior to trial, defense counsel filed a motion to suppress defendant's statements to assistant Cook County State's Attorney Erica Dillon and Detective Richard Milz. Defendant's statement was taken at 3:03 a.m. on August 18, 2002, and was videotaped; a transcript of the statement is included in the record. The transcript reflects that before defendant answered any questions, he was read his *Miranda* warnings. Defendant said that when Carrell was a few days old, Martin brought her to defendant. When the baby cried, defendant would "squeeze her just a little bit until she like calmed down or be quiet or whatever." He stated that if the child was not quiet, he would squeeze her more "and then she would be quiet." Defendant said the baby had cuts left by his fingernails when he squeezed her too tightly, and he admitted he had shaken the child.

¶ 5 On the day in question, defendant picked up Carrell to stop her from crying. Defendant unsuccessfully tried to feed the child a bottle, and she spit up on defendant. Carrell had been in a car seat on a table near the ledge a glass block basement window, and when the child continued to cry, defendant tried to "throw her back in the car seat."

¶ 6 Defendant said he "tossed" Carrell and she "just hit the wall and she went down and hit the floor." When defendant picked her up off the floor, "she was crying just a little bit" and "was breathing a little funny." Defendant said he tried to perform mouth-to-mouth resuscitation. All of these actions occurred during the six or seven minutes that Martin was gone. Defendant informed Martin the baby was "breathing a little funny," and they took the child to defendant's

mother's house, where an ambulance was called. The child was pronounced dead at a nearby hospital.

¶ 7 Defendant admitted he told detectives that the baby had stopped breathing when he and Martin left the child outside a store. He said he was afraid to tell them the truth and that his statement contained the true version of what occurred. Defendant said he had not been threatened during his interview and had been treated well by detectives.

¶ 8 In the motion to suppress, defense counsel argued, *inter alia*, that defendant was unable to appreciate the import of his *Miranda* rights and that his statements were the result of physical and psychological coercion. The motion asserted the statements were obtained when Detective Milz confronted defendant with "medical evidence re: child on 8-17-02." The motion further stated the detective had promised defendant he could go home after making his statement.

¶ 9 The trial court ordered that defendant be examined as to his fitness to stand trial, his sanity or insanity at the time of the offense, and his ability to understand *Miranda* warnings. The reports indicated that when defendant was 11 years old (six years prior to the child's birth and death), defendant's IQ was measured at between 76 and 86, reflecting a borderline to low average intellectual function. Two doctors found defendant fit to stand trial and found that he could understand the *Miranda* warnings.

¶ 10 At the hearing on the motion to suppress, Dr. Christofer Cooper of Forensic Clinical Services testified that he evaluated defendant in 2006 on the issues of fitness and his ability to understand *Miranda* warnings. Dr. Cooper reviewed defendant's videotaped statement and interviewed defendant about the events following his arrest. The doctor stated that defendant provided a clear and specific summary of those events and relayed an understanding of each *Miranda* warning in response to the doctor's questioning.

¶ 11 As to defendant's videotaped statement, Dr. Cooper testified that defendant's responses to questioning were "all fairly articulate and logical" and were given without delay. Defendant showed no sign of misunderstanding the questions he was asked, and he described his treatment of Carrell using a doll.

¶ 12 Dr. Cooper testified that defendant had been diagnosed in 1998 with depressive disorder and attention deficit hyperactivity disorder but that those diagnoses would not have prevented defendant from understanding his *Miranda* rights. The doctor also reviewed defendant's educational records, which indicated antisocial behaviors and educational problems as of 1996 that were attributable to behavior issues but not due to a cognitive disability. Dr. Cooper further testified defendant told him he had consumed two beers and smoked marijuana on the day of his arrest; however, the doctor determined that would not have affected defendant's ability to understand his *Miranda* rights. On cross-examination, Dr. Cooper stated it was likely that defendant's intellectual functioning was the same in 2002, when the crime occurred, as it was in 2006, when defendant was examined.

¶ 13 Detective Milz also testified at the suppression hearing, reviewing the facts of defendant's interview and defendant's indication that he understood the *Miranda* warnings. The detective denied coercing defendant into giving his inculpatory statement.

¶ 14 After hearing that testimony, the trial court denied defendant's motion to suppress his statement. The court found defendant did not have an "intellectual deficit" that would have prevented him from understanding the *Miranda* warnings, and the court stated the testimony indicated that defendant was not coerced.

¶ 15 At defendant's jury trial, the State presented the testimony of a paramedic who responded to the emergency call and of the doctor who treated Carrell in the emergency room. The doctor who performed an autopsy on the child testified that she died from head injuries consistent with

child abuse. Detective Milz and assistant State's Attorney Dillon also testified about defendant's arrest and interview.

¶ 16 Martin, the child's mother, testified she left the child with defendant so she could help prepare for her mother's birthday party. Less than 15 minutes later, defendant came to her mother's house and said the child was not breathing. Martin noticed a green mark on Carrell's forehead that was not present earlier in the day. Martin also viewed pictures of the child taken after her death and noted scrapes on the child's back and other marks that were not there before.

¶ 17 Defendant testified in his own defense that he took special education classes. Defendant said he and Martin prepared for the child's birth but he had no experience in caring for a baby and would leave the room when she cried and let Martin or a relative calm the child. Defendant acknowledged shaking the child but said he did not know that would harm her.

¶ 18 Defendant testified he lied to the police about the events preceding the child's death and was "scared that they were going to do something to me." Detective Milz accused him of lying and left him in the interview room. After returning and leaving several times, Detective Milz asked defendant what happened. Defendant testified the detective grabbed his arm and pressed his fingernails into his arm and said those were the marks that Carrell had on her back.

Defendant said Detective Milz struck him three or four times, and defendant then made up a story so the detective would stop hitting him. Defendant also said the detective pushed him against the wall, punched him and pushed on his stomach and chest with his fists. Defendant testified the detective said he would not stop beating defendant until defendant confessed to throwing Carrell against the wall.

¶ 19 The jury was instructed on first degree murder and also on involuntary manslaughter. Defendant was convicted on the former offense and was sentenced to 35 years in prison. On direct appeal, defendant raised a challenge to his sentence, and this court affirmed. *People v.*

*Milton*, No. 1-07-1252 (2009) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied leave to appeal. *People v. Milton*, 236 Ill. 2d 567 (2010).

¶ 20 On October 21, 2010, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Among the claims in the petition is that his trial attorney was ineffective in failing to obtain evidence to support his claim that Detective Milz beat him to coerce his confession. Defendant asserted that the detective "pushed on his stomach and chest" and "dug his fingernails in [defendant's] arm." Defendant stated in the petition that he signed the waiver of his *Miranda* rights and pointed to his trial testimony that "he didn't want to go back in that room" and felt "he didn't have a choice."

¶ 21 The petition asserted that defense counsel could have obtained evidence of his physical injuries that he alleged were caused by Detective Milz if counsel had subpoenaed medical records and contacted defendant's "family members and friend who visited [defendant] soon after [he] was placed in the county jail and the defendant showed his scrapes and bruises to them on the visit." The petition continued, "See attached affidavit." Although various transcripts were appended to the petition, no medical records or affidavits as described by defendant were attached to the petition. In fact, defendant never identified the proposed family members and friends by name.

¶ 22 The circuit court dismissed defendant's post-conviction petition as frivolous and patently without merit. As to defendant's claim of abuse by Detective Milz, the court noted defendant's failure to provide hospital or jail records along with his petition. The court further stated that even absent defendant's inculpatory statement, the evidence established his guilt of the offense. Defendant now appeals that ruling.

¶ 23 On appeal, defendant argues his petition presented an arguable claim of the ineffectiveness of his trial counsel for failing to investigate his allegations that he was beaten by

Detective Milz. Defendant argues his attorney could have subpoenaed records of the medical treatment he received in jail, and counsel also could have interviewed family members and friends who saw his injuries.

¶ 24 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq.* (West 2010). At the first stage of a post-conviction proceeding, a defendant need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). The circuit court may dismiss the petition if the allegations contained therein, taken as true, render the petition "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). This court reviews *de novo* the summary dismissal of a post-conviction petition. *Hodges*, 234 Ill. 2d at 9.

¶ 25 If the circuit court does not dismiss the petition, it advances to the second stage, at which counsel may be appointed and the State may file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2010). If the petitioner makes the requisite showing at that stage that the petition and any accompanying documentation present a substantial showing of a constitutional violation, the petitioner is entitled to a third-stage evidentiary hearing. *People v. Domagala*, 2013 IL 113688, citing *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 26 At the first stage of review, a petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Id.* at 16-17.

¶ 27 Even with that lowered threshold for a petition's survival at the first stage of review, a defendant is still required to support the allegations contained therein. As the State points out on appeal, section 122-2 of the Act provides a petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." (Emphasis added.) 725 ILCS 5/122-2 (West 2010); *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The absence of such supporting materials has been deemed fatal to a post-conviction petition, allowing the petition's dismissal solely on that ground. *Collins*, 202 Ill. 2d at 66 (and cases cited therein); see also, e.g., *People v. Johnson*, 377 Ill. App. 3d 854, 859 (2007). Indeed, the State cites *Collins* in arguing on appeal that the summary dismissal of defendant's petition is warranted on the absence of supporting materials alone.

¶ 28 In response, defendant contends he has met the requirement of section 122-2 of the Act by providing "other evidence" as allowed by the statute. Defendant argues that the "other evidence" he has offered consists of the trial record, specifically his trial testimony that Detective Milz physically abused him and threatened to beat him until he admitted to throwing the child. This court has allowed a defendant to support a post-conviction claim of ineffective counsel by referring to the trial record as "other evidence" pursuant to section 122-2. *People v. Payne*, 336 Ill. App. 3d 154, 164 (2002) (concluding that record in fact refuted defendant's ineffectiveness claim); see also *Johnson*, 377 Ill. App. 3d at 859 (exhibits and citations to record are sufficient to meet section 122-2's requirement when claims can be decided on the basis of the record).

¶ 29 Defendant argues that because the record shows his allegations of abuse were capable of independent corroboration by his trial counsel, he has satisfied the standard of section 122-2. In support of that position, he cites *People v. Hall*, 217 Ill. 2d 324, 328-29 (2005), where the defendant entered a guilty plea to aggravated kidnapping but asserted in a post-conviction petition that the plea was not voluntary. The defendant in *Hall* alleged he told his attorney he did

not know the child was in his car's back seat and that his counsel told him that was not a valid defense. *Id.* Defendant also asserted in the petition that the trial court failed to correctly admonish him as to his plea, and he attached to the petition a copy of the charging instrument, a transcript of the plea hearing and his own affidavit. *Id.* The trial court granted the State's motion to dismiss defendant's post-conviction petition, and this court affirmed. *Id.* at 330-31.

¶ 30 The Illinois Supreme Court reversed and remanded the defendant's case for an evidentiary hearing, finding that the defendant adequately explained the absence of documentation for his post-conviction claims. *Hall*, 217 Ill. 2d at 324. Noting that supporting documents need not be attached to a petition pursuant to section 122-2 where the petition contains facts that could only have been furnished by the defendant or his counsel, the supreme court observed that the defendant's petition described consultations with his attorney and concluded that "the only affidavit defendant could have furnished to support his allegations, other than his own, was that of his attorney." *Hall*, 217 Ill. 2d at 333.

¶ 31 The supreme court in *Hall* also distinguished *Collins* as involving the dismissal of a petition at the initial stage of post-conviction proceedings for failure to comply with section 122-2. For the same reason, we find *Collins* applicable to the instant case. In *Collins*, the supreme court affirmed the summary dismissal of a petition in which the defendant alleged his trial attorney failed to assist him in filing an appeal and seeking a reduction in his sentence. *Collins*, 202 Ill. 2d at 62. The supreme court noted the defendant's petition was not supported by documentation and that the defendant also did not explain the absence of such documentation, as required by section 122-2. *Id.* at 66.

¶ 32 Here, as in *Collins*, defendant presented a claim of his trial counsel's ineffectiveness that could have been supported by additional documentation, as opposed to claims that can be decided on the basis of the record. Defendant cites counsel's failure to obtain medical records

and potential attestations of friends and family as to injuries he sustained while giving his statement to investigators. However, defendant did not append to his petition any affidavits from those individuals. Thus, the facts here are distinguishable from *Hall*, where the defendant's post-conviction claim only could have been substantiated by the defendant or his attorney.

¶ 33 Defendant points out in his reply brief that he explained in a separate motion, which was filed in the trial court on the same date as his *pro se* petition, that he was unable to obtain supporting affidavits prior to the petition's summary dismissal. The motion asked the court to grant him an additional 50 days to obtain the affidavits, and he contends he was "forced to file" his petition "due to time limitations." Therefore, at the time defendant filed the petition, he recognized that such affidavits were required to be attached, in contrast to his present argument that the trial record alone provides adequate support for his claim.

¶ 34 As the State points out, defendant's motion requesting more time also fails to address the absence of medical records to support his petition. Moreover, the State notes that defendant had an additional five-month window in which to obtain the necessary documentation and file his petition because defendant had until February 2011 to file his petition.<sup>1</sup> In conclusion, defendant's unsupported assertion of his trial counsel's ineffectiveness is insufficient to require further proceedings under the Act.

¶ 35 Even were we to assume, *arguendo*, that counsel provided deficient representation by failing to obtain allegedly available evidence to support defendant's assertion that his confession was coerced by Detective Milz, defendant did not state an arguable claim that his attorney's performance resulted in prejudice to his case.

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<sup>1</sup> Defendant's petition for leave to appeal to the Illinois Supreme Court was denied on May 26, 2010, and any petition for *certiorari* to the United States Supreme Court would have been due 90 days later, on August 24, 2010, and defendant was required to file his petition no more than six months after that date, or by February 24, 2011. See 725 ILCS 5/122-1(c) (West 2010).

¶ 36 To state a claim of the ineffective assistance of his trial counsel, a defendant must show that his counsel's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In the context of a first-stage post-conviction proceeding, the summary dismissal of a petition alleging ineffective assistance of counsel incorporates the standard set out in *Hodges* in that the petition may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. App. 3d at 17; see also, e.g., *People v. Tate*, 2012 IL 112214, ¶ 19 (applying that standard). Defendant therefore must show it was arguable that the result of his trial would have been different had his attorney provided substantiation of his injuries to support his claim of coercion. Defendant cannot make such a showing because even without his inculpatory statement, the evidence was sufficient to support defendant's conviction. The marks and bruises found on the child after death were consistent with defendant's account that he threw her against the wall to stop her from crying. Defendant also acknowledged his inability to care for the child and his frustration when he could not quiet her. Defendant was alone with the child when she sustained the fatal head injuries which, according to the doctor's testimony at trial, were consistent with child abuse.

¶ 37 Accordingly, the circuit court's order summarily dismissing defendant's post-conviction petition is affirmed.

¶ 38 Affirmed.