

No. 1-11-2196

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.)	Nos. 06 CR 20172
)	06 CR 26116
)	06 CR 26117
)	
ABDUL ALI,)	Honorable
)	William J. Kunkle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶1 *Held:* Court did not err in summarily dismissing post-conviction petition raising claim that trial counsel rendered ineffective assistance by failing to call a witness because defendant failed to support with an affidavit or the like that a witness would testify as alleged.

¶2 Following a bench trial, defendant Abdul Ali was convicted of attempted first degree murder and witness harassment and was sentenced to a prison term of 35 years, consecutive to two concurrent 7-year terms for a total prison sentence of 42 years. We affirmed on direct appeal. *People v. Ali*, No. 1-08-0633 (2009) (unpublished order under Supreme Court Rule 23). Defendant

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now appeals from the summary dismissal of his *pro se* post-conviction petition. He contends that he stated an arguably meritorious claim that trial counsel rendered ineffective assistance by not calling as a trial witness a police officer experienced in gang-crimes, who would have provided an alternative explanation for a marking or graffiti used at trial to link defendant to the shooting. The State responds that defendant has failed to (1) raise a claim of arguable merit, or (2) provide proper supporting documentation for his claims or an explanation for its absence. For the reasons stated below, we affirm.

¶3 Defendant was charged with attempted first degree murder, aggravated battery with a firearm, and other offenses for allegedly shooting Brian Cowins on or about June 15, 2006. Defendant was also charged with witness harassment and other offenses for, on September 6 and 13, 2006, threatening to injure Cowins.

¶4 At trial, Brian Cowins testified that, at about 3 a.m. on June 15, he had parked his car to make a telephone call when defendant shot him from the passenger seat of a maroon Cadillac Catera. He knew defendant, whom he knew as Orr rather than by his name, as defendant grew up with his brother. The shot struck Cowins in the face, and because he could not speak due to his injuries but feared that he might die, he exited the car and wrote “Orr” in his own blood on the windshield. While in the hospital, Cowins named the shooter as a man he knew as Orr or Abdulel and later identified defendant as the shooter from a photographic array; when he was able to speak, he described the maroon Catera to police. On September 6, a maroon Catera again approached Cowins while he was outside his home; defendant, inside the car, brandished a gun and told Cowins that he would shoot him again, then drove away. Cowins at first testified that defendant was alone in the Catera but then admitted that he could not recall whether he was alone. A similar incident occurred on September 13, when defendant threatened to kill Cowins. Cowins denied being friends with Reggie Rupert, though he knew him from the neighborhood. Cowins was at a club earlier on the night of June 15, 2006, but denied drinking alcohol as it is contraindicated for medication he takes; he also denied that he was at the club with Rupert.

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¶ 5 A police officer testified that Cowins told him that defendant was a passenger in the Catera on September 6, while another officer testified that Cowins did not say that there was another person in the Catera when he identified defendant as the man who threatened him. A police detective testified that Cowins wrote the name “Abdulel Mohmed” when asked to name the shooter; on a later date when he could speak, he described the Catera and named the shooter as “Ali Abdul.” Cowins’s father corroborated the September 13 incident. The parties stipulated that defendant was arrested in November 2006 while in a maroon Catera registered to Ellen Williams, and that defendant never gave the nickname Orr upon any of his 17 arrests since 1995.

¶ 6 Reggie Rupert testified for the defense that he was with Cowins on the night of the shooting but not at a club. At about 3 a.m., just after Cowins dropped Rupert at a friend’s home that night, Rupert heard a shot and saw a gold Pontiac Bonneville driving away. He did not see Cowins write anything on his windshield. Cowins later told him on two occasions that two different people were driving the shooter’s car. Rupert had previously seen defendant driving a red Catera. He did not believe defendant has a nickname and never heard him referred to as Orr.

¶ 7 Defendant testified that he knew Cowins but had no reason to shoot him, did not shoot him, and did not know who did. He also denied threatening Cowins. He could not recall where he was on the night of June 15 nor on September 6 or 13. Williams was his girlfriend and on occasion let him drive her maroon Catera.

¶ 8 On this evidence, the court convicted defendant, and later sentenced him, as stated above.

¶ 9 On direct appeal, we affirmed defendant’s conviction and sentence against contentions of insufficient evidence to convict him of attempted murder and of excessive sentences. We rejected various challenges to Cowins’s credibility and the reliability of his identification of defendant as the shooter, including that Rupert’s testimony contradicted Cowins’s account.

¶ 10 Defendant filed the instant *pro se* post-conviction petition in December 2010, raising various claims of ineffective assistance of counsel, including that trial counsel failed to investigate the discovery photographs and present an alternative explanation of that evidence. Specifically,

defendant alleged that an investigation would have revealed to trial counsel, and “any gang-crime officer” could have testified, that the “Orr” marking was gang graffiti meaning “of Reggie Rupert,” that is, that the shooting was committed by Rupert. The petition was signed by defendant but had no affidavits attached nor any documents supporting the “Orr” claim.

¶ 11 On March 4, 2011, the court summarily dismissed the petition, finding in relevant part that a claim that trial counsel was ineffective for not calling certain witnesses must be – but was not here – supported by affidavits establishing the witnesses’ potential testimony. Defendant timely filed a motion to reconsider, arguing that summary dismissal was inappropriate because his claims had arguable merit.¹ On June 3, 2011, the court denied reconsideration, noting in relevant part that the documentation requirement is separate from the arguable-merit standard for surviving summary dismissal. This appeal timely followed.

¶ 12 On appeal, defendant contends that the court erred in summarily dismissing his petition because it stated the gist of a meritorious claim of ineffectiveness of trial counsel for failing to call as a trial witness a police officer experienced in gang crimes, who would have provided an alternative exculpatory explanation for the “Orr” marking.

¶ 13 A “petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached,” and the failure to comply with this statutory requirement is a sufficient basis for summary dismissal. 725 ILCS 5/122-2 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 255 (2008). The purpose of this requirement is to establish that a petition’s allegations are capable of “objective or independent corroboration.” *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 55, quoting *Delton*, 227 Ill. 2d at 254. In particular, to support a claim of failure to present a witness, a defendant must tender a valid affidavit from the proposed witness, without which a court cannot determine whether the proposed witness could have provided testimony favorable to the defendant. *Wilborn*, ¶ 71. The statutory requirement of supporting documentation is separate

¹ Defendant appealed from the summary dismissal of March 4, but upon his timely filing of a motion to reconsider, that notice of appeal was stricken pursuant to Supreme Court Rule 606(b) (eff. Feb. 6, 2013). *People v. Ali*, No. 1-11-1151 (2011).

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from, and serves a different purpose than, the statutory requirement that a defendant verify his petition with an affidavit (725 ILCS 5/122-1 (West 2010)), so that while the absence of a verification affidavit has been held to be an improper basis for summary dismissal, summary dismissal for the failure to provide a supporting or third-party affidavit is proper. *People v. Gardner*, 2013 IL App (2d) 110598, ¶¶ 14-17. Cf. *Wilborn*, ¶¶ 55, 66-72 (while this court held that the failure to notarize a supporting affidavit was not a proper basis for summary dismissal, it reiterated that the absence of supporting documentation is a valid basis for summary dismissal and held that the absence of notarization was a technicality that could be remedied at the second stage of proceedings).

¶ 14 Here, defendant alleges that there is an alternative exculpatory explanation for the “Orr” marking and that trial counsel could have discovered so through investigation. Thus far, the matter would rest upon defendant’s own allegations. However, defendant’s post-conviction claim was and is that a police officer with experience in gang crimes would testify to his alternative explanation so that counsel rendered ineffective assistance by not calling such a witness. Once defendant claimed that a potential witness would testify in a certain manner, he was obligated to support that claim with an affidavit from such a witness. He did not. We conclude that the court did not err in summarily dismissing defendant’s petition.

¶ 15 Accordingly, we affirm the judgment of the circuit court.

¶ 16 Affirmed.