

No. 1-12-0081

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 19316
)	
EDWARD D. MAHOLMES,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Pierce concurred in the judgment.

ORDER

- ¶ 1 **Held:** Summary dismissal of defendant's *pro se* post-conviction petition affirmed over his contentions that trial counsel was ineffective for failing to investigate and call eight witnesses and denying him his right to testify at trial.
- ¶ 2 Defendant Edward Maholmes appeals from an order of the circuit court of Cook County dismissing 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 he raised a meritorious claim of ineffective assistance of trial counsel for failing to investigate and call certain witnesses, and for depriving him of his right to testify at trial.

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¶ 3 Following a 2006 jury trial, defendant was convicted of first degree murder and aggravated discharge of a firearm then sentenced to respective, consecutive terms of 50 and 10 years' imprisonment. Defendant was convicted on evidence showing that on August 8, 2003, he was driving a car and fatally shot the victim, Eric McKinney, who was riding a bicycle. Stephen Patrick, who was in a car behind defendant, observed the incident, and identified defendant as the perpetrator. Defendant maintained at trial that the driver of the car following him was actually chasing him, and that he fired his gun to stop the pursuit. On direct appeal, this court vacated defendant's aggravated discharge of a firearm conviction because it was based on the same act as the murder, and affirmed the judgment in all other respects. *People v. Maholmes*, No. 1-06-0776 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On September 21, 2011, defendant filed a *pro se* post-conviction petition, alleging, in relevant part, that trial counsel was ineffective for failing to investigate and call eight witnesses, and for depriving him of his right to testify. He also alleged that he gave his trial counsel the names, addresses, and telephone numbers of the eight witnesses, and that they would have contradicted the testimony of the State's eyewitness, Stephen Patrick.

¶ 5 He specifically alleged that Idella Hamilton would have testified that Patrick lied and wanted to get back at defendant because Patrick believed that defendant was involved in the shooting of his brother and the fatal shooting of his best friend. Defendant further alleged that Hamilton and Victor Robinson would testify that Patrick told them he was going to kill defendant on sight. Defendant further alleged that Robinson would testify that Patrick told him that police had indicated they would charge him with chasing defendant, so he lied and police told him what to say. Defendant also alleged that Termaine Taylor, and Fernando Gilbert would testify that Patrick planned on killing defendant and lied to police; that Poodie Durham would testify that Patrick had previously driven by him, and someone in his car fired a gun in the direction of defendant, but hit two other people instead; and that Carlos Curry would testify that

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he observed Patrick pursuing defendant in a vehicle. Defendant maintained that Maywood, whose first name he did not know, would testify that Patrick told him while they were cell mates that he lied to police because he was afraid he would be charged with chasing defendant and he wanted defendant imprisoned, that he did not see defendant fire any shots, that he told someone to shoot at defendant, and that someone in his car fired shots at defendant. Defendant also claimed that Stacy, a friend of his ex-girlfriend, Laverne Hall, would have testified that she overheard Patrick threaten defendant and two female witnesses who told police about the car chase. Defendant maintained that the testimony of these named witnesses would have been exonerating.

¶ 6 Defendant also alleged that counsel refused to allow him to testify at trial. He maintained that counsel told him that he could not testify because the trial court refused to rule on his motion *in limine* concerning the admissibility of his criminal history. Counsel advised him that she could not allow him to testify, and had to prepare him on how to answer the trial court's questions concerning testifying, telling him not to speak in court unless she instructed him to do so. He also maintained that it was "strongly necessary" for him to testify in order to inform the jury of his "uncensored account of the facts surrounding his charges," especially where his defense was self-defense and his counsel presented no witnesses on his behalf. He finally maintained that he was not aware of his right to testify until it was violated by trial counsel.

¶ 7 In support of his petition, defendant attached four of his own affidavits in which he repeated the allegations in his petition, and averred that he was incarcerated and had no funds to locate and obtain affidavits from any of the witnesses listed in his petition. He further averred that all the named witnesses told him they were willing to testify on his behalf to the allegations in his petition.

¶ 8 As to counsel, defendant averred that she told him that she did not have time to properly prepare him to testify or to investigate or interview the witnesses named by defendant, and that

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on the day the trial court ruled against his last pre-trial motion *in limine*, he told his trial counsel that he was willing to testify. Counsel told him she could not allow him to do so because the trial court refused to rule on her motion *in limine* concerning the admissibility of his criminal history, and that it would be unprofessional for any defense counsel to allow him to take the stand and risk being prejudiced. Defendant further averred that he asked his trial counsel at least eight times prior to trial to testify, and numerous times during the trial.

¶ 9 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant now appeals from that order, contending that he raised the gist of a meritorious claim of ineffective assistance of trial counsel that required further proceedings under the Act.

¶ 10 In this court, defendant first claims that trial counsel was ineffective for failing to investigate and call eight witnesses whose names, and telephone numbers he provided to her. He maintains that these witnesses would have testified to Patrick's violent nature and previous threats against defendant. We initially observe that the allegations in defendant's petition that he has not raised on appeal are waived for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 11 At the first stage of post-conviction proceedings, a *pro se* defendant only needs to 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).

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¶ 12 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 post-conviction 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 he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶19.

¶ 13 The State maintains that defendant's failure to attach affidavits from the eight named witnesses, and his failure to sufficiently explain their absence is fatal to his petition. Defendant responds that he explained their absence where he averred that he could not provide them because he lacked the funds to do so.

¶ 14 Section 122-2 of the Act provides that a post-conviction petition shall have attached thereto affidavits, records, or other supporting evidence, or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2010). The purpose of section 122-2 is to establish that the verified allegations are capable of objective or independent corroboration. *Delton*, 227 Ill. 2d at 254; *People v. Collins*, 202 Ill. 2d 54, 65 (2007). A post-conviction petition that is not properly supported by affidavits or other evidence is dismissed without an evidentiary hearing unless the allegations stand uncontradicted and are clearly supported by the record. *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011).

¶ 15 Here, defendant alleged that the eight named witnesses in his petition would have testified that the State's eyewitness, Patrick, was violent, had threatened his life, and was chasing him at the time of the incident. The allegations of what these eight witnesses would have testified to at trial are not clearly supported by the record, but, rather, are contradicted by Patrick's testimony that he only followed defendant shortly before the incident when he realized that defendant was a person in a rival gang that normally fired shots when driving through his

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neighborhood. Accordingly, supporting documentation was required for defendant's contrary claim. *Carr*, 407 Ill. App. 3d at 516. Defendant's own affidavits, attesting to what others would testify to are insufficient to satisfy section 122-2 of the Act. 725 ILCS 5/122-2 (West 2010). To support his claim, defendant needed objective or independent corroboration of his allegations, namely, affidavits from the eight witnesses, where his allegation of ineffective assistance of trial counsel was based on what these witnesses would have testified to at trial. *People v. Hall*, 217 Ill. 2d 324, 333 (2005); *Collins*, 202 Ill. 2d at 67; *People v. Teran*, 376 Ill. App. 3d 1, 3-4 (2007). Defendant's own affidavits are not independent or objective corroboration of the allegations (*Teran*, 376 Ill. App. 3d at 3-4); thus defendant's failure to provide such supporting documentation is fatal to his petition (*Delton*, 227 Ill. 2d at 255).

¶ 16 Defendant maintains, nonetheless, that he provided an explanation for why he did not attach the affidavits, namely, that he was incarcerated and lacked funds. We observe, however, that the Act provides relief only to those persons who are imprisoned in the penitentiary. 725 ILCS 5/122-1(a) (West 2010). As such, defendant's status is a prerequisite to relief under the statute, and, therefore, cannot alone excuse his failure to comply with the requirements of the Act.

¶ 17 Defendant's claim that he lacked funds to get the necessary affidavits also fails to explain the absence of affidavits or other supporting documentation. In one of his affidavits, defendant averred that all of the named witnesses told him that they were willing to testify on his behalf to the allegations in the petition. This indicates some form of communication between defendant and the witnesses, which contradicts his claim that lack of funds prevented him from contacting these people. Thus, his bare allegation did not provide a cogent explanation for the absence of supporting documentation, which precludes any corroboration of the claims he set forth in his petition. *Collins*, 202 Ill. 2d at 67-68. Under these circumstances, defendant failed to comply

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with the requirement of section 122-2 of the Act, thereby subjecting his petition to summary dismissal. *Carr*, 407 Ill. App. 3d at 516.

¶ 18 We further observe that defendant briefly contends within his ineffective assistance of trial counsel argument that the trial court improperly excluded evidence of Patrick's "prior act of violence" against defendant's mother, Linda Clark. This issue could have been raised on direct appeal where it is based on facts ascertainable from the record, and, accordingly, it is waived. *People v. Jefferson*, 345 Ill. App. 3d 60, 70-71 (2003).

¶ 19 Defendant next contends that he raised the meritorious claim that his counsel was ineffective for depriving him of his right to testify in his own defense at trial. He further claims that counsel instructed him on how to answer the trial court's admonishments regarding testifying.

¶ 20 A defendant's right to testify at trial is a fundamental constitutional right, and that decision ultimately rests with defendant. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997). Therefore, it is not one of those matters which is considered a strategic or tactical decision left to counsel. *Madej*, 177 Ill. 2d at 146. The decision whether to testify belongs to defendant. *Madej*, 177 Ill. 2d at 146. If defendant fails to allege in his post-conviction petition that he made a contemporaneous assertion of his right to testify when the time came to testify, an evidentiary hearing is not warranted. *People v. Thompkins*, 161 Ill. 2d 148, 178 (1994); *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

¶ 21 Here, defendant averred in his affidavit and alleged in his petition that he repeatedly informed his counsel that he wanted to testify on his own behalf, but that counsel refused to allow him to testify and instructed him on how to respond to the court's instructions regarding him testifying. The record shows that the trial court advised defendant of his right to testify and that defendant indicated that he understood that right and that no one threatened him or promised him anything in exchange for him not testifying at trial. Defendant did not allege that when the

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time came for him to testify that he made a contemporaneous assertion that he wanted to testify, and, accordingly, the summary dismissal was proper. *Thompkins*, 161 Ill. 2d at 178.

¶ 22 Furthermore, defendant has failed to show that he was arguably prejudiced where he has not alleged what the substance of his testimony would have been at trial, but merely that his testimony would have been his account of what took place. *People v. Coleman*, 2011 IL App (1st) 091005, ¶34; *Buchanan*, 403 Ill. App. 3d at 608-09; *Barkes*, 399 Ill. App. 3d at 989-90. Moreover, the evidence against defendant was overwhelming where it showed that an eyewitness observed defendant shoot the victim multiple times. *Buchanan*, 403 Ill. App. 3d at 608-09. Where, as here, defendant fails to establish that he was arguably prejudiced, summary dismissal is proper. *People v. Pineda*, 373 Ill. App. 3d 113, 120 (2007).

¶ 23 Defendant, however, in support of his contention, contends that *People v. Lester*, 261 Ill. App. 3d 1075 (1994), is germane to his case, and that *People v. Dredge*, 148 Ill. App. 3d 911 (1986), is instructive. In *Lester*, defendant alleged in his post-conviction petition that when he informed his counsel he wanted to testify, his counsel told him that his testimony would hurt his appeal. *Lester*, 261 Ill. App. 2d at 1076. The trial court dismissed the petition, but the Second District remanded for an evidentiary hearing finding that defendant made a sufficient allegation of incompetence, and that if an evidentiary hearing demonstrated that counsel had indeed told him prior to trial that he should not testify because it would jeopardize his appeal, such a statement would indicate that counsel misled defendant by making the assumption that the trial was lost before it began. *Lester*, 261 Ill. App. 3d at 1079-80.

¶ 24 More recently, the Second District declined to follow its decision in *Lester*. In *People v. Buchanan*, 403 Ill. App. 3d 600, 606-08 (2010), defendant raised a similar argument, and the Second District rejected *Lester* finding that it was not necessarily misleading to advise defendant that his testimony could hurt his appeal and that *Lester* failed to address the prejudice prong of *Strickland*.

¶ 25 Then, in *Barkes*, the Second District held that a defendant making a post-conviction claim that trial counsel was ineffective for refusing to allow defendant to testify, must allege that he made a contemporaneous assertion of his right to testify. *Barkes*, 399 Ill. App. 3d at 989. The Second District further held that defendant must also show prejudice resulted from the denial of his right to testify to make out a claim of ineffective assistance of counsel. *Barkes*, 399 Ill. App. 3d at 989. *Barkes* found no prejudice in its case where defendant's allegation that he was denied his right to testify was conclusory and he did not indicate what he would have testified to at trial. *Barkes*, 399 Ill. App. 3d at 989-90. *Lester* is thus no longer the standing law on this issue in the Second District, and we therefore find *Buchanan* and *Barkes*, which were decided after *Lester*, persuasive.

¶ 26 Applying *Barkes* to this case, we find that defendant's allegation that he was denied his right to testify is conclusory, and thus insufficient to warrant further proceedings under the Act. *Barkes*, 399 Ill. App. 3d at 989-90; see also *People v. Miller*, 393 Ill. App. 3d 629, 640 (2009). Furthermore, where defendant has not indicated what his testimony would have been and the evidence against him was overwhelming in that it showed that he was seen shooting the victim numerous times, he admitted to shooting the gun numerous times, and there was no evidence that Patrick's car was hit by any of the bullets, defendant has failed to demonstrate how he was arguably prejudiced. *Buchanan*, 403 Ill. App. 3d at 608-09; *Barkes*, 399 Ill. App. 3d at 989-90.

¶ 27 We also decline to follow *Dredge*, and, in turn, *People v. Brown*, 336 Ill. App. 3d 711 (2002), and *People v. Von Perbandt*, 221 Ill. App. 3d 951 (1991), which are cited by defendant, and relied on *Dredge*. In *Dredge*, 148 Ill. App. 3d at 912-13, the Fourth District remanded for an evidentiary hearing based on defendant's allegation that he was denied his right to testify. *Dredge*, however, like *Lester*, failed to discuss the prejudice prong (*Youngblood*, 389 Ill. App. 3d at 219), and was a conclusory allegation which is not sufficient to warrant further proceedings under the Act (*Barkes*, 399 Ill. App. 3d at 989-90). Accordingly, here, where defendant merely

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alleged that his counsel refused to allow him to testify but did not indicate the substance of that testimony and the evidence against him was overwhelming, we find no error in the summary dismissal of defendant's petition. *Buchanan*, 403 Ill. App. 3d at 608-09.

¶ 28 Notably, defendant claims in his appellate brief that he would have testified that he fired his gun at Patrick because he was scared. Defendant, however, failed to allege this in his post-conviction petition, and, thus, it cannot be considered on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2004).

¶ 29 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition.

¶ 30 Affirmed.