

No. 1-12-0569

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
Respondent-Appellee,)	of Cook County
)	
v.)	No. 06 CR 8073
)	
JOSE LOPEZ-MEDINA,)	Honorable
)	Stanley Sacks
Petitioner-Appellant.)	Judge Presiding.

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

ORDER

- ¶ 1 *HELD*: Summary dismissal of postconviction petition affirmed where defendant failed to attach adequate documentation in support of his claim of ineffective assistance of trial counsel.
- ¶ 2 Defendant Jose Lopez-Medina 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). He

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contends that the circuit court erred in dismissing his petition where he set forth an "arguable" claim of ineffective assistance of trial counsel. We affirm.

¶ 3 In 2009, defendant was convicted of the predatory criminal sexual assault and aggravated criminal sexual abuse of his stepdaughter K.M. She testified at defendant's bench trial that he repeatedly fondled her beginning in 2003, when she was nine years old, and eventually inserted his penis into her anus on several occasions. The State's evidence against defendant included testimony that a culture of K.M.'s rectum tested positive for chlamydia in December 2005. It also included testimony from defendant's wife, K.M.'s mother, that she tested positive for chlamydia in June 2006, and that defendant was her only sexual partner from 2003 to 2006. Defendant was sentenced to terms of 15 years' imprisonment for predatory criminal sexual assault and 5 years' imprisonment for each of his three convictions of aggravated criminal sexual abuse to be served concurrently. He filed a direct appeal, but later voluntarily dismissed it.

¶ 4 On June 6, 2011, defendant filed a *pro se* petition for postconviction relief alleging that trial counsel was ineffective for failing to present evidence that he never had chlamydia and could not have infected K.M. with the disease. He attached to his petition, *inter alia*, a signed letter from a Dr. Burton Andersen dated February 9, 2007, in which Dr. Andersen stated that he tested defendant's blood and that "antibody tests for Chlamydia trachomatis were all negative," *i.e.*, the test "fail[ed] to provide any evidence that [defendant] had a recent or previous infection from this microorganism." Dr. Andersen stated that the test was negative for two other species of chlamydia as well, neither of which are known to cause venereal infections in humans. Defendant also attached the corresponding blood test results from February 2, 2007. The blood test report explains, *inter*

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alia, that "IgG titers of 1:32 or greater may indicate past exposure to a particular species." It also states that "IgA titers may be elevated in recurrent or chronic infection and may be helpful in identifying the infecting species of Chlamydia when cross-reactive IgG is present."

¶ 5 On August 26, 2011, the circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. In its written order, the court found that Dr. Andersen's letter did not qualify as an affidavit because it was not notarized and that defendant did not explain why an affidavit could not be obtained. Citing *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010), the court stated the rule that "'a claim that trial counsel failed to investigate or call witnesses must be supported by an affidavit *from the proposed witness.*'" (Emphasis in original.) The court further noted that "[t]he letter from Dr. Andersen and the Quest Report submitted in their present form, i.e. unsworn to and more so left factually unexplained as to how one could draw the conclusion that [defendant] *never had chlamydia* of any type or strain do not establish ineffectiveness of counsel." Defendant now appeals.

¶ 6 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), i.e., it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

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¶ 7 In this appeal, defendant maintains that he set forth an "arguable" claim that trial counsel was ineffective for failing to offer exculpatory evidence that he never had chlamydia and thus could not have infected K.M. with the disease. He claims that "[c]ounsel's failure to admit this evidence by easily calling Dr. Andersen, who was available to the defense, to testify that the chlamydia antibody test showed that [defendant] never had the disease, resulted in [defendant] losing his best chance to defend against K.M.'s accusations of sexual assault."

¶ 8 Under the Act, defendant must provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). The purpose for requiring these materials is to ensure that the allegations in the petition "are capable of 'objective or independent corroboration.'" *Delton*, 227 Ill. 2d at 254 (quoting *Hall*, 217 Ill. 2d at 333).

¶ 9 Our supreme court has further held that "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380 (2000). The supreme court noted that "[i]n the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380.

¶ 10 Here, defendant claims that trial counsel was ineffective for failing to call Dr. Andersen to testify that his blood tests showed that he never had chlamydia. However, he did not provide a notarized affidavit from Dr. Andersen containing this proposed testimony, but instead, merely attached a signed letter, which has no legal effect. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). He did not explain the absence of an affidavit either, as required. 725 ILCS 5/122-2 (West

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2010). Although the report of defendant's blood test results was attached to the petition, it does not establish that Dr. Andersen would have testified that defendant never had chlamydia. The report contains only equivocal statements regarding what the test results may indicate, such as: "IgG titers of 1:32 or greater *may indicate* past exposure to a particular species" and "IgA titers *may be elevated* in recurrent or chronic infection." Under the circumstances, the circuit court did not err in summarily dismissing defendant's postconviction petition for lack of proper support. *Enis*, 194 Ill. 2d at 380; see also *Delton*, 227 Ill. 2d at 255 (noting that the failure to attach necessary documentation or explain its absence is "fatal" to a postconviction petition and justifies its summary dismissal).

¶ 11 Defendant disputes this conclusion and claims that the lack of a notarized affidavit from Dr. Andersen does not preclude his petition from advancing to the second stage of proceedings. He initially highlights that the "affidavits, records, or other evidence" requirement of the Act is in the disjunctive and claims that his blood test results and Dr. Andersen's letter fall into the "other evidence" category. He also claims that he attached "affidavits" in support of his claim where he provided affidavits from counsel on direct appeal and two paralegals to show that trial counsel had the blood test results and Dr. Andersen's letter at the time of trial. However, defendant overlooks the previously stated rule that a claim of ineffective assistance of trial counsel based on the failure to call a witness "must be supported by an *affidavit from the proposed witness*." (Emphasis added.) *Enis*, 194 Ill. 2d at 380. Without such an affidavit, we simply cannot say that the doctor could have provided testimony favorable to defendant and are unable to review his claim further. *Enis*, 194 Ill. 2d at 380.

¶ 12 Defendant also argues that summary dismissal is not allowed "simply because supporting

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evidence is not notarized," citing *People v. Wilborn*, 2011 IL App (1st) 092802. In *Wilborn*, the defendant filed a postconviction petition alleging that trial counsel was ineffective for failing to present the exculpatory testimony of his codefendant. *Wilborn*, 2011 IL App (1st) 092802, ¶ 38. He attached a signed, unnotarized affidavit from his codefendant and explained that the affidavit was "not notarized [because the] Menard Correctional Center law library refused to do so." *Wilborn*, 2011 IL App (1st) 092802, ¶ 39. The circuit court dismissed the petition for, *inter alia*, a lack of supporting affidavits. *Wilborn*, 2011 IL App (1st) 092802, ¶ 42. On appeal, the sixth division of this court found that to be an improper proper basis for dismissal. *Wilborn*, 2011 IL App (1st) 092802, ¶ 68. The court initially acknowledged that the codefendant's affidavit was "not a valid affidavit on its face" and that the defendant was required to "tender a valid affidavit from the individual who would have testified." *Wilborn*, 2011 IL App (1st) 092802, ¶ 71. The court then noted, however, that the Second District, in *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011), found that the defendant was not entitled to postconviction relief where his verification affidavit, pursuant to section 122-1 of the Act (725 ILCS 5/122-1(b) (West 2010)), was not notarized. *Wilborn*, 2011 IL App (1st) 092802, ¶ 71. Although there was no issue raised regarding an unnotarized verification affidavit, the court nonetheless "declined to follow *Carr*," citing *People v. Henderson*, 2011 IL App (1st) 090923. *Wilborn*, 2011 IL App (1st) 092802, ¶ 72.

¶ 13 We find the court's reasoning in *Wilborn* to be unclear. It is inexplicable why the court would find the supporting affidavit in that case to be invalid, contrary to what is required by law, but then decline to follow a case addressing a completely different issue, *i.e.*, whether defendant is entitled to postconviction relief where a verification affidavit is not notarized. Nevertheless, *Wilborn* is

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distinguishable from the case at bar. In *Wilborn*, the defendant explained the absence of his codefendant's notarized affidavit in an attempt to comply with section 122-2. Here, defendant has not provided any explanation as to why he could not obtain a notarized affidavit from Dr. Andersen. To the extent defendant relies on *Wilborn* to contravene the rule that "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness," we decline to follow that case. *People v. Fish*, 381 Ill. App. 3d 911, 917 (2008) (noting that the appellate court is bound to follow supreme court precedent).

¶ 14 Defendant finally claims that "summarily dismissing a *pro se* post-conviction petition, for want of notarization, is tantamount to making factual and credibility determinations against the petitioner—at a point where such determinations are improper." We disagree. There is nothing improper about a court summarily dismissing a postconviction petition at the first stage of proceedings where there is insufficient documentary support for a defendant's claim. Indeed, as discussed above, the court is required to dismiss a petition under such circumstances.

¶ 15 For the reasons stated, we affirm the circuit court's summary dismissal of defendant's *pro se* petition for postconviction relief.

¶ 16 Affirmed.