

No. 1-12-0801

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. 08 CR 6237
)	
CHARLES COSSOM,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to raise an arguable claim of ineffective assistance of trial or appellate counsel; sentence for possession of a controlled substance vacated and reduced to three years' imprisonment.

¶ 2 Defendant Charles Cossom appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he presented arguable claims of

ineffective assistance of trial counsel for failing to present evidence to rebut the State's case, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal, requiring further proceedings under the Act. Defendant also contends that the trial court erred in sentencing him to an extended term for an offense that was not the most serious offense of which he was convicted, thereby requiring that his cause be remanded for a new sentencing hearing.

¶ 3 The record shows that defendant was charged with possession of contraband following the execution of a search warrant by a team of Chicago police officers on March 10, 2008, at apartment 604 (the apartment) in the Chicago Housing Authority (CHA) building at 2930 West Harrison Street in Chicago, Illinois. Defendant and Kimberly Daughrity, who is not a party to this appeal, were inside the apartment at that time, and, during the search, the officers recovered drugs and a loaded firearm. At the ensuing bench trial, defendant was found guilty of, *inter alia*, armed habitual criminal and possession of a controlled substance, then sentenced to respective, concurrent terms of 10 and 5 years' imprisonment, the latter being an extended term.

¶ 4 On direct appeal, defendant solely claimed that the armed habitual criminal statute violated the *ex post facto* clauses of the United States and Illinois constitutions. This court rejected that argument and affirmed the judgment entered on his convictions. *People v. Cossom*, No. 1-09-2538 (2011) (unpublished order under Supreme Court Rule 23).

¶ 5 On January 12, 2012, defendant filed a *pro se* post-conviction petition alleging that he was deprived of his right to effective assistance of trial and appellate counsel where (1) trial counsel unreasonably elicited damaging evidence from him during direct examination, which bolstered the State's case against him and proved an otherwise unproven element of the offense,

and (2) appellate counsel failed to raise the ineffectiveness of trial counsel on direct appeal. In support thereof, defendant argued that no fingerprint analysis or testimony by Daughrity connected him to the recovered items, that no evidence was presented that Daughrity's apartment was his place of residence or that linked him to the jacket in which the drugs were found, and that trial counsel "failed to illustrate the(se) points that could have contradicted any charging by the State of 'actual' or 'constructive' possession of the items of contraband found." Defendant further argued that in using the phrase "your bed" during direct examination, trial counsel elicited damaging testimony from him which proved a critical element of the offense. In an affidavit filed in support of his petition, defendant averred, *inter alia*, that his place of residence at the time of the incident was 3048 West Jackson, "at my mother's."

¶ 6 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found that trial counsel's use of the phrase "your bed" was a misstatement, which was addressed and subsequently corrected at trial. The court noted that when the State used the same phrase on cross-examination, trial counsel objected, thereby informing the court that his use of that phrase was not intentional, and correcting his error. The court further found that counsel once again cured the error during closing argument when he stated that the apartment belonged solely to Daughrity and that defendant was only a visitor.

¶ 7 Defendant now challenges the propriety of that dismissal order and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Because we review the judgment, and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 8 Defendant contends that he set forth an arguable claim of ineffective assistance of counsel based on counsel's (1) elicitation of damaging testimony from him on direct examination, (2) failure to call his mother as a witness to corroborate his testimony regarding his residence at the time of the incident or to impeach the State witnesses with evidence that he could not live at the apartment due to his prior convictions, and (3) lack of knowledge regarding basic trial procedure and evidence law, and failure to remember what evidence the State had presented.

¶ 9 At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). 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. *Hodges*, 234 Ill. 2d at 11-12, 16.

¶ 10 To prevail on a claim of ineffective assistance of counsel, a 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). However, at the first stage of post-conviction proceedings where defendant alleges ineffective assistance of counsel, the petition 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, citing *Hodges*, 234 Ill. 2d at 17.

¶ 11 In raising the ineffectiveness claim in his petition, defendant primarily asserted that trial counsel elicited damaging testimony from him which proved his constructive possession of the recovered items, an otherwise unproven element of the offense. The trial record shows that the items at issue were discovered in a closet in the apartment in which defendant was found in bed

with Daugherty. During direct examination, trial counsel showed defendant a picture of that bed and asked him if it accurately showed what "your bed" looked like on the day of the incident, to which defendant responded, "yes." According to defendant, in using the phrase "your bed," trial counsel elicited testimony that implied that defendant resided at the apartment with Daugherty, and thus was in constructive possession of the drugs and gun.

¶ 12 The record further shows, however, that trial counsel used the phrase "your bed" only once at the bench trial, and that he did so inadvertently. When the State used the same phrase on cross-examination, defense counsel objected, and, until informed otherwise by the trial court, was unaware that he had been the first to use that phrase. Even assuming that it is arguable that counsel's inadvertent single use of the phrase "your bed" constituted objectively unreasonable performance, we find that defendant has failed to show that it is arguable that he was prejudiced thereby.

¶ 13 This court has held that where trial counsel elicits testimony that establishes a critical element of the offense which was otherwise unproven by the State, such representation constitutes ineffective assistance. *People v. Jackson*, 318 Ill. App. 3d 321, 328 (2000). Here, prior to defendant's testimony, and during its case in chief, the State presented the following evidence related to the issue of possession: (1) defendant told Officer Lara that his address was apartment 604 at 2930 West Harrison, (2) defendant told Officer Granas that the gun and the drugs belonged to him, and (3) the drugs and gun were found in a closet containing both male and female clothing and the gun was found in a man's coat. Accordingly, this element was not "otherwise unproven," as defendant alleged in his petition. To the contrary, the State presented evidence that defendant not only lived at the apartment, and therefore constructively possessed

the items contained therein, but that he admitted to police that the recovered gun and drugs, in particular, belonged to him.

¶ 14 Defendant, nevertheless, maintains that he suffered prejudice due to counsel's use of the phrase "your bed," in part, due to counsel's failure to mitigate his error by conducting redirect examination. However, the record shows that after defense counsel objected to the State's use of the phrase "your bed," and was informed by the trial court that he was the first to use that phrase, defendant testified that Daughrity was the only person who lived in the apartment. Accordingly, there was no need for defense counsel to conduct redirect examination on the issue of whether defendant lived in the apartment. Further, as noted by the circuit court, defense counsel stated during closing argument that defendant did not live in Daughrity's apartment, and was solely a visitor.

¶ 15 Under these circumstances, we find that defendant has failed to show that it is arguable that he was prejudiced by counsel's single use of the phrase "your bed" during direct examination. Accordingly, his claim of ineffective assistance of counsel fails. *Hodges*, 234 Ill. 2d at 17.

¶ 16 In reaching this determination, we have considered *People v. Phillips*, 227 Ill. App. 3d 581 (1992), relied on by defendant for the proposition that the element of the offense to which the damaging testimony related need not have been wholly unproven for trial counsel's actions to constitute ineffective assistance of counsel, and find it readily distinguishable. In *Phillips*, the victim identified defendant at his jury trial as the person who robbed her, and defense counsel subsequently elicited hearsay testimony from a police officer that one of defendant's relatives also identified him as the culprit. *Phillips*, 227 Ill. App. 3d at 582, 584. On appeal, this court

reversed defendant's conviction and remanded the cause for a new trial, finding that the hearsay testimony was "devastating" to defendant's case, and that defendant had pointed out the limitations inherent in the victim's identification of him. *Phillips*, 227 Ill. App. 3d at 588, 590.

¶ 17 Although, in *Phillips*, the element at issue, *i.e.*, defendant's identification, was not otherwise unproven, it rested on the testimony of a single witness whose opportunity to observe defendant was limited, who gave police a description of him that differed with his actual appearance, and who did not identify defendant as her attacker in a photo array until 10 weeks after the incident. *Phillips*, 227 Ill. App. 3d at 582, 585. Here, in contrast, substantial evidence was presented by the State on the issue of defendant's possession of the drugs and gun through the testimony of numerous police officers who had executed the warrant. That evidence included testimony that defendant admitted that the items in question belonged to him, that he lived in the apartment where the items were found, and that male clothing was found in the closet of the apartment. As such, we find *Phillips* inapposite to the case at bar.

¶ 18 Defendant next contends that counsel was ineffective for failing to call defendant's mother to corroborate his testimony that he lived with her at the time of the incident. The State argues that this claim is defeated due to defendant's failure to include an affidavit from his mother with the petition.

¶ 19 Section 122-2 of the Act requires, *inter alia*, that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). The purpose of this requirement is to show that the allegations in the petition are capable of independent or objective corroboration. *Delton*, 227 Ill. 2d at 254. An allegation that trial

counsel provided ineffective assistance because he failed to investigate and present testimony from witnesses must be supported by affidavits from those proposed witnesses. *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010), citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Without such affidavits, the reviewing court cannot determine whether those witnesses could have provided testimony favorable to defendant, and thus, further review of the claim is unnecessary. *Jones*, 399 Ill. App. 3d at 371.

¶ 20 Defendant maintains that an affidavit is not required where the records, court file and exhibits allow for objective and independent corroboration of his allegation, citing *People v. Hanks*, 335 Ill. App. 3d 894, 899 (2002). In *Hanks*, defendant filed a post-conviction petition alleging that he was denied a fair trial because a member of his jury had worked with him in the past. *Hanks*, 335 Ill. App. 3d at 896. In support of his petition, defendant attached an excerpt of the transcript of *voire dire* in his case, which reflected the juror's answers regarding her employment during the relevant time period. *Hanks*, 335 Ill. App. 3d at 899. This court found that an affidavit from defendant's brother regarding his recollection of that juror was not necessary, given that the record contained independent corroboration of defendant's claim regarding the juror's employment, thereby differentiating it from a case in which a defendant makes a bald allegation with no factual support. *Hanks*, 335 Ill. App. 3d at 899.

¶ 21 Defendant argues that, as in *Hanks*, the record in this case provides independent corroboration of his claim, and directs us to the social history section of his PSI, where the investigator states that he spoke with an individual who identified herself as defendant's mother, and that she "corroborated [] defendant's statements regarding his address and social history." In *Hanks*, the independent corroboration in the record consisted of statements that the juror made in

open court during *voire dire*, the relevant excerpts of which defendant attached to his petition. Here, in contrast, the record is lacking such reliable independent corroboration. Unlike *Hanks*, the only document defendant attached to his petition in the case at bar was his own self-serving affidavit, and the record is devoid of a statement made under oath by someone other than defendant which would support his allegation. Thus, the record does not allow for any objective and independent corroboration of defendant's allegation that he lived with his mother at the time in question, leaving a bald allegation with no factual support, or reason for its omission.

¶ 22 Under these circumstances, we find that defendant has set forth no more than a broad conclusory allegation of ineffective assistance of counsel, which is not allowed under the Act (*Delton*, 227 Ill. 2d at 258), and that his failure to meet the pleading requirements of section 122-2 of the Act was fatal to his claim of ineffective assistance of counsel based on counsel's failure to present his mother as a witness at trial (*People v. Collins*, 202 Ill. 2d 59, 66 (2002)).

¶ 23 Defendant also maintains that counsel was ineffective for failing to impeach State witnesses with evidence that he could not reside at the apartment due to his prior convictions. Defendant points out that the apartment is owned by the CHA, whose policy of denying applicants with a criminal conviction in the past three years would have precluded him from living in the apartment.

¶ 24 We first note that defendant's CHA policy-related argument consists of one paragraph, which does not cite any authority save for support for the premise that a trial court may take judicial notice of certain rules and regulations. As such, defendant has failed to abide by Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), which requires that an appellant's brief include citation to authority in support of his arguments. A failure to cite such authority results in waiver

of that issue. *People v. Ward*, 215 Ill. 2d 317, 332 (2005). Notwithstanding, defendant's claim fails for lack of arguable prejudice.

¶ 25 The limitations placed on CHA residency does not in any way negate the overwhelming evidence of defendant's guilt. Defendant's credibility was challenged by his criminal history, and his testimony did not diminish the strength of the State's evidence against him. That evidence included Officer Granias's testimony that defendant admitted that the drugs and gun belonged to him, and Officer Lara's testimony that defendant stated his address as apartment 604 at 2930 West Harrison Street, the place where defendant and the recovered items were found on the day of the incident. Further, Officers Sandoval and Serrano both testified that the closet in which the recovered items were found contained both male and female clothing, and Officer Sandoval testified that he found the drugs in the pocket of a man's coat that was hanging in that closet. Due to the substantial evidence of defendant's guilt, we find that defendant has failed to show that it is arguable that he suffered any prejudice from counsel's allegedly deficient performance. See *People v. Smith*, 341 Ill. App. 3d 530, 533, 547 (2003) (summary dismissal of defendant's petition alleging, *inter alia*, ineffective assistance of counsel, affirmed in light of overwhelming evidence of guilt, which included testimony regarding defendant's oral confession).

¶ 26 In reaching this determination, we have considered defendant's argument that the State has conceded that the evidence here was not overwhelming, given its assertion in its brief that, "[a]s defendant argues, there are reasons to believe that the evidence against defendant was not overwhelming." However, our further review shows that the State went on to argue that at trial defense counsel argued all of the points "*defendant* now argues establish that the evidence against him was not overwhelming," thereby indicating that it was not conceding the point, but

rather, merely discussing defendant's argument on the subject. In any event, we are not bound by a party's concession (*People v. Horrell*, 235 Ill. 2d 235, 241 (2009)), and reiterate our finding that the evidence in this case was overwhelming.

¶ 27 Defendant next contends that counsel was ineffective where he displayed a lack of knowledge regarding trial procedure and evidence law, and forgot or ignored what evidence the State had presented. Defendant's allegations pertain to the following statements counsel made in closing argument: (1) referring to the State's request for a continuance, (2) arguing that the only evidence the State presented to establish defendant's possession of the items were his alleged admission that the gun and drugs belonged to him, and (3) arguing that the State did not present evidence that the apartment contained men's clothing.

¶ 28 The record reflects that when, during closing argument, defense counsel referred to the State's request for a continuance, the trial court was under the initial impression that counsel was attempting to argue that the request constituted evidence. However, counsel clarified that this was not the case, and stated that his intent was to argue that reasonable doubt of defendant's guilt existed due to the State's failure to call Daugherty as a witness, in spite of being granted a continuance. Defendant's claim is thus refuted by the record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 29 The record further reflects, as defendant points out, that trial counsel went on to argue that no evidence was presented that the apartment contained men's clothing, and that Officer Grantias's testimony regarding defendant's oral statement was the sole evidence establishing defendant's possession of the recovered items. In response to these arguments, the trial court stated that counsel was making "all these misstatements about the evidence." The record shows

that counsel's arguments were belied by the evidence presented, and that it is thus arguable that counsel's performance in this respect fell below a reasonable standard of performance. However, as discussed above, we find that defendant has failed to show that he suffered arguable prejudice as a result, given the overwhelming evidence of his guilt in this bench trial, which included testimony regarding his oral confession as to his habitation on the premises and ownership of the contraband. *Smith*, 341 Ill. App. 3d at 547.

¶ 30 Defendant further contends that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. The aforementioned two-prong *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *Enis*, 194 Ill. 2d at 377.

However, unless an underlying issue has merit, there can be no prejudice from appellate counsel's failure to raise it on appeal. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109.

Because we have found that defendant's claims of ineffective assistance of trial counsel are not meritorious, defendant's claim of ineffective assistance of appellate counsel for failing to raise those claims on appeal is equally nonmeritorious, given the lack of prejudice. *Stephens*, 2012 IL App (1st) 110296, ¶¶ 109-10. In sum, we conclude that defendant failed to set forth an arguable claim of ineffective assistance of trial or appellate counsel, which subjected his petition to summary dismissal. *Hodges*, 234 Ill. 2d at 16-17; *Smith*, 341 Ill. App. 3d at 547.

¶ 31 Defendant next contends that the trial court erred in sentencing him to an extended term for possession of a controlled substance, and requests that his cause be remanded for a new sentencing hearing. Defendant correctly argues that this issue may be raised at any time and that our review is *de novo*. *People v. Thompson*, 209 Ill. 2d 19, 22, 27 (2004).

¶ 32 The State concedes, and we agree, that the trial court erred in imposing an extended term sentence on defendant's possession of a controlled substance conviction because, pursuant to 730 ILCS 5/5-8-2 (West 2008), an extended term could only be imposed on the most serious offense of which he was convicted (*Thompson*, 209 Ill. 2d at 23), which in this case was armed habitual criminal, a Class X offense (720 ILCS 5/24-1.7(b) (West 2008)). We also agree with the State that a remand for resentencing is unnecessary, and that we may amend defendant's sentence for possession of a controlled substance to the maximum applicable non-extended term.

¶ 33 Where, as here, a trial court improperly imposes an extended term, but it is clear from the record that it intended to impose the maximum available sentence, we may use our power under Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) to reduce the sentence to the maximum available non-extended term. *People v. Taylor*, 368 Ill. App. 3d 703, 709 (2006). The trial court's intention here is reflected in its reference to defendant's lengthy criminal history and his choice to "live a life of crime," and statement that "it's time that [defendant] got some kind of a message from the system."

¶ 34 Accordingly, we vacate the extended term portion of defendant's conviction for possession of a controlled substance, and reduce that sentence from five years to the maximum non-extended term for a Class 4 felony, three years. 720 ILCS 570/402(c) (West 2008); 730 ILCS 5/5-8-1(a)(7) (West 2008).

¶ 35 For the reasons stated above, we affirm the order of the circuit court of Cook County summarily dismissing defendant's petition for post-conviction relief.

¶ 36 Affirmed in part, vacated and modified in part.