

No. 1-12-1720

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. 10 CR 8094
)	
JOSE SUAREZ,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition affirmed where defendant failed to present an arguable claim of ineffective assistance of counsel.

¶ 2 Defendant, Jose Suarez, appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he alleged the gist of a constitutional claim that his trial counsel provided ineffective assistance, and requests that his cause be remanded for second-stage proceedings.

¶ 3 Following a bench trial, defendant was found guilty of possessing 900 grams or more of cocaine with intent to deliver, and sentenced to 15 years in the Illinois Department of Corrections. Defendant's conviction was based on evidence showing that he was found sitting inside a parked minivan with codefendant Luis Sanchez holding a lidless box containing a large plastic bag of cocaine. This court affirmed that judgment on direct appeal over defendant's challenge to the sufficiency of the evidence. *People v. Suarez*, No. 1-10-3070 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 On March 28, 2012, defendant filed the *pro se* postconviction petition at bar. In his petition, defendant alleges numerous violations of his constitutional rights, including, *inter alia*, ineffective assistance of trial counsel for failing to investigate and call two witnesses, Gabriel Espinoza and Eva Ruiz, whose testimony he claimed was necessary to counter the responding police officer's "false testimony" regarding the incident. He claimed that Espinoza would have verified that defendant "was employed and working, and in fact had just left his place of work 30 minutes prior to his arrest." Ruiz, he stated, would have "provided credible testimony regarding [defendant's] lifestyle as well as cordial relationship with Mr. Luis Sanchez, as Mr. Sanchez had visited us in our home." On April 27, 2012, the circuit court dismissed defendant's petition as frivolous and patently without merit, observing that defendant failed to attach affidavits from the proposed witnesses or explain the significance of their testimony.

¶ 5 In this appeal from that ruling, defendant contends that his petition should advance to second-stage proceedings because he raised an arguable constitutional claim of ineffective assistance of trial counsel based on counsel's failure to investigate and call Espinoza and Ruiz. We initially note that defendant argues only this claim, and thus has abandoned the remaining

claims set forth in his postconviction petition, forfeiting them for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 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). Defendant need only set forth the “gist” of a constitutional claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)); 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 2008); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). A petition is frivolous or patently without merit if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16. We review the summary dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 7 Here, defendant claims that he presented an arguable claim of ineffective assistance of trial counsel. 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. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 8 The State contends that the summary dismissal of defendant's petition should be affirmed because he failed to provide any documentary support for his claim that Espinoza and Ruiz had information relevant to his defense, or that counsel failed to investigate them. The State notes that defendant failed to attach affidavits from Espinoza and Ruiz detailing their proposed

testimony or stating that they would have been willing to testify had they been contacted.

Defendant disputes this conclusion and claims that the lack of affidavits from these witnesses should not be fatal to his claim because he averred the truth of the allegations contained in his petition, and the affidavits may be secured at the second stage after the appointment of counsel.

¶ 9 Under the Act, defendant must clearly set forth in his petition the manner in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting those allegations or explain their absence. 725 ILCS 5/122-2 (West 2010). The purpose of 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; *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 10 The supreme court has specifically 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). It further 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.

¶ 11 Here, defendant claims that trial counsel was ineffective for failing to call Espinoza and Ruiz, but he did not attach their affidavits or explain their absence. In *Delton*, 227 Ill. 2d at 255, the supreme court found that the failure to attach necessary documentation or explain its absence is "fatal" to a postconviction petition and justifies its summary dismissal. See also *Collins*, 202 Ill. 2d at 66. Thus, defendant has failed to allege facts that would demonstrate the gist of a constitutional claim.

¶ 12 Notwithstanding, defendant's petition was also subject to summary dismissal because his ineffective assistance claim lacked an arguable basis in law and in fact. In his petition, defendant claimed that his boss, Espinoza, could have verified his employment, and that he had left his workplace about 30 minutes before his arrest. Defendant contends that this evidence is relevant to the amount of time defendant would have had to "acknowledge, possess and understand the contents of the box" and "limits or restricts his access to and presence at the scene."

¶ 13 We fail to see how defendant's employment, or whether he left work 30 minutes prior to his arrest, has any bearing on whether he committed the crime of which he was convicted. Defendant does not claim that he was misidentified, or that he was not present at the scene. Indeed, in his own statement of facts set out in his postconviction petition, defendant concedes that he was present, and merely takes issue with the version of events testified to by the responding officer.

¶ 14 On direct appeal, this court concluded, based on the evidence showing that defendant was found holding a lidless box with its illicit contents in plain view of the arresting officer, that it was reasonable for the trial court to have found that defendant was equally able to observe the contents of the box, thus strengthening the inference of guilty knowledge. *People v. Suarez*, 2011 Ill. App. Unpub. LEXIS 1636, *11. Even assuming that Espinoza's testimony could establish that defendant arrived at Sanchez's home only a short time before he was found holding the box, such testimony would not alter this conclusion.

¶ 15 Defendant also claimed that Ruiz would have testified regarding his "lifestyle" and his "cordial relationship" with Sanchez. In this court, defendant contends that this claim "[p]erhaps inartfully *** point[s] out that Ms. Ruiz could have provided evidence that given the relationship with Mr. Sanchez, it would not be unusual for defendant to be in his presence, or at Mr. Sanchez'

home, and therefore his presence at Sanchez' home was not for the purpose of illegal possession of narcotics, but for a more innocent purpose." He further contends that her testimony as to his "lifestyle" refers to her knowledge of defendant as a "working person, who had no financial motivation to engage in the possession with intent to deliver narcotics."

¶ 16 "To be convicted of possession with intent to deliver, the State must prove beyond a reasonable doubt that (1) defendant had knowledge of the presence of the controlled substance; (2) the controlled substance was in the immediate control or possession of defendant; and (3) defendant intended to deliver the controlled substance."¹ *People v. Beasley*, 384 Ill. App. 3d 1039, 1046 (2008). We similarly fail to see the relevance of such testimony. Defendant's friendly relationship with Sanchez, or his status as a "working person" would not be a defense to the trial court's determination that defendant possessed the cocaine at issue, or that defendant intended to deliver the cocaine at issue. Defendant's friendly relationship with Sanchez and his status as a "working person" do not negate the fact that he was in possession of over 900 grams of cocaine, which is much greater than the average amount possessed for personal use. The proposed testimony of Espinoza and Ruiz would not support defendant's allegations that their testimony would support the gist of a constitutional claim that defense counsel provided ineffective assistance. As a result, we cannot say that defendant provided an arguable basis for concluding that he was prejudiced by counsel's alleged failure to investigate and call them as witnesses.

¹ To show an intent to deliver in cases involving large quantities of controlled substances, a witness for the State typically testifies that the quantity far exceeds the average quantity for personal use. *People v. Tovar*, 169 Ill. App. 3d 986, 990, 994 (1988). In the case at bar, Officer Gonzales did not testify that the over 900 grams of cocaine in defendant's possession was significantly more than the average amount possessed for personal use. However, on this appeal, defendant does not argue that the State's evidence was insufficient to prove the element of intent to deliver.

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¶ 17 In sum, defendant failed to provide affidavits to support his claim regarding the witnesses (*Delton*, 227 Ill. 2d at 255), and his account of the witnesses' proposed testimony fails to present an arguable basis in fact or in law that counsel was ineffective for failing to investigate or present them as witnesses. We thus affirm the trial court's order dismissing defendant's petition at the first stage of proceedings.

¶ 18 Affirmed.