

No. 1-13-0364

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. 07 CR 4565
)	
MARVIN SUMLIN,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 **Held:** Summary dismissal of defendant's post-conviction petition affirmed over defendant's contention that he presented an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Marvin Sumlin 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 2012)). He contends that the court erred in summarily dismissing his petition where he set forth an arguable claim of ineffective assistance of trial counsel.

¶ 3 This court previously affirmed defendant's 2009 jury convictions for aggravated criminal sexual assault and aggravated kidnapping which took place in a garage at 1031 North Spaulding Avenue in Chicago, and his sentence of natural life imprisonment. *People v. Sumlin*, No. 1-09-0746 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 On August 31, 2012, defendant filed a *pro se* post-conviction petition, alleging, in relevant part, that his trial counsel was ineffective for failing to file a motion to suppress the evidence obtained from the garage owned by his cousin, Antwan Carson. Defendant alleged that police entered the garage without a search warrant or consent from the owner or anyone else there, and that he was in custody when the officers illegally searched the garage. Defendant maintained that he had standing to either allow or deny the police entry, but did not give his consent.

¶ 5 In support of his petition, defendant attached an affidavit from his cousin Carson, who averred that he gave defendant a key to his garage and allowed him to "put people out of it." He also averred that he knew defendant would get "high" in his garage, that he did not give police permission to search his garage, and that they did not have a search warrant when they did so. Carson further averred that the contents of his affidavit are true and correct, and made upon his personal knowledge, and that he is "competent to testify thereto."

¶ 6 Defendant also alleged that he consistently used the garage for personal reasons, that he had the right to allow or exclude others from the garage and had personal belongings inside it, including a moped, clothing, and "other items." He further alleged that the search of the garage was not contemporaneous with his arrest because he was in custody at the time of the search, and

that he had a reasonable subjective expectation of privacy, which society would recognize as legitimate.

¶ 7 The circuit court summarily dismissed defendant's petition finding that defendants' claims were frivolous and patently without merit. In its written order, the court found, in relevant part, that defendant waived the issue regarding the warrantless search of the garage by failing to raise it on direct appeal, where the issue was "a matter clearly manifest from the trial record." The court also found that the failure to file a motion to suppress did not constitute ineffective assistance since the motion was not his only viable defense where he argued at trial that the sexual encounter was consensual. The court further found that a motion to suppress evidence found in the garage would not have changed the outcome of the trial where a DNA sample linked him to the assault, the victim testified that the sexual encounter was not consensual, and her testimony was corroborated by the officers and the picture of her injuries following the assault.

¶ 8 On appeal, defendant disputes the court's conclusion, contending that he presented an arguable claim of ineffective assistance of trial counsel. He maintains that counsel was ineffective for failing to file a motion to suppress the evidence found in Carson's garage after an illegal, warrantless entry. Defendant raises no issue regarding the other allegations in his petition, and, thus, has waived them for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 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). 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). 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 dismissal is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 10 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. Where an ineffectiveness claim is based on counsel's failure to file a suppression motion, defendant must demonstrate that the unargued suppression motion would be meritorious, and that at least a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶¶12, 15.

¶ 11 Here, defendant maintains that counsel was arguably ineffective for failing to file a motion to suppress the evidence found in Carson's garage, which included the victim's backpack, female clothing, a sanitary pad, and a bus pass. The State maintains that defendant forfeited this issue because it could have been raised on direct appeal. Defendant responds that the issue is not forfeited because it is based on evidence outside the record, namely, Carson's affidavit. We agree that where facts relating to a claim do not appear on the face of the original appellate record, waiver does not apply. *People v. Harris*, 206 Ill. 2d 1, 13 (2002).

¶ 12 Notwithstanding, we find that defendant cannot establish that counsel was arguably ineffective for failing to file a motion to suppress evidence where there is no reasonable probability that the trial outcome would have been different had the evidence been suppressed. *Henderson*, 2013 IL 114040, ¶¶12, 15; *Tate*, 2012 IL 112214, ¶19. As noted by the court, defendant relied on a defense of consent, arguing that he and the victim had a prior relationship. The victim, on the other hand, testified that she was attacked and raped by defendant, who initially denied having sex with her that night, but when he was confronted with the possible collection of DNA evidence against him, he stated they had consensual sex. The contradictory nature of defendant's version of events thus undermined his credibility and enhanced the credibility of the victim's testimony. *People v. Nelson*, 148 Ill. App. 3d 811, 822 (1986).

¶ 13 In addition, the victim's testimony was corroborated by a picture which showed swelling to her face and the officers' testimony regarding her condition right after the incident. The officers testified that the victim was crying, disheveled, and nervous and had swelling to her face. In light of this strong evidence of defendant's guilt, defendant cannot establish that he was arguably prejudiced by counsel's decision not to file a motion to suppress the evidence found in the garage. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶69.

¶ 14 We, therefore, conclude that defendant failed to set forth an arguable claim of ineffective assistance of counsel (*Tate*, 2012 IL 112214, ¶19), and affirm the order of the circuit court of Cook County summarily dismissing his post-conviction petition.

¶ 15 Affirmed.