THIRD DIVISION
August 5, 2015

No. 1-13-0479

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. 06 CR 24151
	)	
PATRICK BRYANT,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed.

¶ 2 Defendant, Patrick Bryant, 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 set forth an arguable claim of ineffective assistance of trial counsel for failing to call an alibi witness in his defense, and that his cause should be remanded for second-stage proceedings.

¶ 3 Following a jury trial on July 23, 2009, defendant was found guilty of the 2006 first-degree murder of Devon Henderson, and personally discharging a firearm which proximately caused the victim's death. The trial court subsequently sentenced him to consecutive, respective terms of 40 and 25 years' imprisonment, and this court affirmed that judgment on direct appeal. *People v. Bryant*, 2011 IL App (1st) 092441-U (unpublished order under Supreme Court Rule 23).

¶ 4 On October 29, 2012, defendant filed the *pro se* postconviction petition at bar alleging, *inter alia*, ineffective assistance of trial counsel for failing to call Larry Law as an alibi witness. Defendant claimed that Law would have testified that he was sitting in his car when the shooting occurred and that he observed defendant in a truck, and was not involved in the shooting. Defendant maintains that this testimony would have been arguably sufficient to "undermin[e] the confidence in the outcome." In an affidavit attached to his petition, defendant averred that prior to trial he requested that trial counsel "investigate and interview Larry Law, who was a[n] eye-witness to the shooting and would provide favorable information, [but] counsel did not conduct any investigation into Mr. Law to corroborate [his] story."

¶ 5 On December 6, 2012, the circuit court summarily dismissed defendant's petition in a written order. In assessing defendant's ineffective assistance of counsel claim for failing to call Law, the court stated that defendant failed to attach an affidavit from Law to his petition, which was fatal to his claim. Defendant subsequently filed a motion to reconsider the summary dismissal of his petition, claiming, in relevant part, that he did submit an affidavit from Law, which was notarized on June 16, 2012, and that the clerk or the court must have overlooked or omitted it. Defendant also attached the affidavit to the motion.

¶ 6 In the affidavit, Law averred that on the night of September 8, 2006, he went "to the 100's" with defendant and was in a car behind defendant's, which was being driven by someone else. When they stopped, defendant got out of the car "with his girl," and went into a house and then came out of the house with "Twin" (Carl Mason). Law further averred that defendant could not have killed Henderson because he was too drunk and that it was someone else who got out of the other car and went to the group of people. When the shots went off and everyone started running to the car, he saw defendant sitting in the car that brought him, while he (Law) was sitting in the car that brought him. Law acknowledged that he was unable to see the shooting or the person who shot the gun, but that defendant was in the car that brought him when the shots were fired. On February 6, 2013, the trial court denied defendant's motion to reconsider the summary dismissal of his petition without further comment.

¶ 7 In this appeal, defendant contends that he set forth an arguable claim of ineffective assistance of trial counsel for failing to call Law as an alibi witness. He maintains that Law's testimony would have corroborated his version of events and rebutted the testimony of the State's witnesses. The State responds that defendant has failed to demonstrate that counsel's performance was arguably deficient or state an arguable claim of prejudice.

¶ 8 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated," and section 122-3 provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived" (725 ILCS

5/122-2 (West 2010); 725 ILCS 5/122-3 (West 2010)). *People v. Jones*, 213 Ill. 2d 498, 503-04 (2004). At the first stage of proceedings, defendant is required to set forth only the "gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 9, 16 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 9 In this case, defendant raised a number of issues in his petition, but on appeal he focuses solely on his claim of ineffective assistance of counsel. In doing so, he has waived the other issues for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 10 Claims of ineffective assistance of counsel are examined under the two-prong test set forth in *Strickland v. Washington*, 446 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, defendant must show that his counsel's performance "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17, citing *Strickland*, 466 U.S. at 687-88. However, at the first stage of postconviction proceedings, a petition alleging ineffective assistance 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 defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19, quoting *Hodges*, 234 Ill. 2d at 17.

¶ 11 Here, defendant claims that prior to trial he asked trial counsel to interview and investigate Law who was an eyewitness to the shooting and would provide favorable information, but that counsel failed to conduct any investigation regarding Law to corroborate his story. At trial, however, defendant testified that he did not know the names of the other men

who were in the cars that followed him, and thus, his claim that he requested counsel to interview and investigate Law is belied by his own testimony. Under these circumstances, defendant failed to meet the "arguable" performance prong of the *Strickland* test where there is no indication that counsel was aware of Law or his proposed testimony prior to trial and, thus, no basis for concluding that counsel failed to conduct a proper investigation, as alleged by defendant. *People v. Rush*, 294 Ill. App. 3d 334, 342 (1998).

¶ 12 Citing *Tate*, 2012 IL 112214, ¶ 23, defendant nevertheless contends that it is at least arguable that counsel's failure to present Law's exculpatory testimony was prejudicial. The State responds that defendant's reliance on *Tate* is misplaced because the factual allegations contained in the affidavits in *Tate* are distinguishable from Law's inadequate and vague affidavit, and that the State's evidence at defendant's trial was overwhelming.

¶ 13 At defendant's jury trial, the State presented the testimony of four eyewitnesses who each testified to substantially similar versions of the events and identified defendant as the gunman. Nadia Pearson, who was the victim's girlfriend, testified that Ciara, a 13-year-old girl, was babysitting Mason's 4-year-old son. Mason's son went missing, and his 13-year-old sister got into a brief fight with Ciara near East 101st Street in Chicago. Pearson, Cornelius Johnson, a friend of the victim, Tony Williams, Johnson's friend, and Marvin Ware, Mason's neighbor, each testified that later that night two or three vehicles with men and women carrying baseball bats arrived in front of Mason's house. Mason and defendant went into Mason's house and then walked across the street to the home of Ciara's uncle.

¶ 14 Each witness further testified that on their way across the street, Mason handed defendant a gun. After visiting the home of Ciara's uncle, the group headed back toward Mason's house, but

encountered Henderson, Johnson, Williams, and others standing in the street on the way. Each witness also testified that after a brief altercation between Mason and defendant and the group standing in the street, defendant pointed a gun at Henderson's forehead, but Henderson swatted it away. When defendant pointed a gun at his forehead a second time, Henderson swatted the gun away again. Defendant then stepped back, aimed the gun at Henderson's chest, and fired.

¶ 15 In his trial testimony, defendant contradicted the State's witnesses regarding his location at the time of the shooting and the identity of the person who fired the fatal shot. Citing *Tate*, he now relies on Law's affidavit to show that he was prejudiced by counsel's failure to interview and investigate Law. In *Tate*, the affiant stated that he saw the victim at the time of the shooting, witnessed the shooting, and was sure defendant was not the shooter. *Tate*, 2012 IL 112214, ¶ 5. Here, by contrast, Law made no specific reference to the others who arrived at the scene, other than Mason and defendant's girlfriend, contradicted defendant as to the presence of his girlfriend at the scene, and acknowledged that he was unable to see the shooting or the person who was shot, but that he saw defendant in the car when the "shots [were] fired." Notably, each of the State's witnesses and defendant testified that there was only one gunshot.

¶ 16 Given the vague and contradictory contents of Law's affidavit, we cannot say that it was sufficient to advance defendant's petition to the second stage of proceedings. Rather, we find that defendant failed to establish that he was arguably prejudiced by counsel's alleged failure to investigate or present Law's proposed testimony in light of the overwhelming evidence of defendant's culpability that was presented at trial. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998).

¶ 17 We, therefore, affirm the summary dismissal of defendant's postconviction petition by the circuit court of Cook County.

¶ 18 Affirmed.