

2015 IL App (1st) 130879-U
No. 1-13-0879
Order Filed June 5, 2015

SIXTH DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	No. 07 CR 10824
v.)	
)	
JABER WILSON,)	
)	Honorable
Defendant-Appellant.)	Joseph G. Kazmierski,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of the defendant's *pro se* postconviction petition was reversed. The defendant's claim of ineffective assistance of trial counsel had an arguable basis in law and fact.

¶ 2 The defendant, Jaber Wilson, appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, the defendant contends that the circuit court erred when it dismissed his claims of the ineffective assistance of trial and appellate counsel. We agree with the defendant that his claim of the ineffective assistance of trial counsel for failing to investigate and call to testify an eyewitness had an arguable basis in law and fact.

¶ 3 Following a jury trial, the defendant was convicted of first degree murder in connection with the death of the victim, Geno Moffat. The evidence at trial established that on September 20, 2006, the victim was shot while inside Buchanan's Barber Shop. Two eyewitnesses, Jamique Walker and Markis Robinson, testified that the victim was shot when he tried to intervene in an argument between the defendant and Mr. Robinson. Both Mr. Walker and Mr. Robinson identified the defendant as the shooter. The jury found the defendant guilty of first degree murder, and the trial court sentenced him to 65 years' imprisonment. On direct appeal, this court affirmed the defendant's conviction and sentence. *People v. Wilson*, No. 1-08-3493 (2011) (unpublished order under Supreme Court Rule 23).¹

¶ 4 On August 23, 2012, the defendant filed a *pro se* postconviction petition. The petition alleged ineffective assistance of trial counsel, claiming, *inter alia*, that trial counsel failed to investigate and call to testify Eric President, who was present in the barber shop at the time of the shooting and would have testified that the defendant was not the shooter. The defendant also alleged the ineffective assistance of appellate counsel claiming, *inter alia*, that

¹Justice Rochford specially concurred in the judgment.

appellate counsel failed to raise as error the trial court's ruling allowing Mr. Walker to narrate the surveillance video.

¶ 5 On November 30, 2012, the circuit court entered an order summarily dismissing the postconviction petition finding the issues raised frivolous and patently without merit. The defendant filed a motion for reconsideration, which was dismissed on January 11, 2013. On February 5, 2013, the defendant filed a notice of appeal.

¶ 6 ANALYSIS

¶ 7 I. Standard of Review

¶ 8 We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 9 II. Discussion

¶ 10 The defendant's petition was dismissed at the first stage of postconviction proceedings. At the first stage, a petition that has no arguable basis in law or fact may be summarily dismissed as frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. A petition has no arguable basis in law or fact where it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 17.

¶ 11 In determining whether a petition is frivolous or patently without merit, the circuit court reviews the petition without any input from the State. *Tate*, 2012 IL 112214, ¶ 9. All well-pleaded facts are taken as true unless positively rebutted by the original trial record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). The court may examine the records and transcripts from the trial and any action taken by the appellate court. 725 ILCS 5/122-2.1(c) (West 2012).

¶ 12 A. Lack of a Verification Affidavit

¶ 13 Initially, we address the State's argument that this court should affirm the summary dismissal based on the defendant's failure to verify the petition with his sworn affidavit in accordance with section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2012)). The State maintains that lack of a verification affidavit warrants summary dismissal, citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002). *Collins* does not support the State's argument as there the supreme court addressed the requirement in section 122-2 of the Act (735 ILCS 5/122-2 (West 2012)) that the petition be supported with affidavits, records or other evidence, or explain the reason for absence of such documentation. *Collins*, 202 Ill. 2d at 66 (the defendant's sworn verification required by section 122-1(b) could not substitute for the documentation requirement in section 122-2).

¶ 14 In any event, the State's argument was rejected in *People v. Hommerson*, 2014 IL 115638. The supreme court held that the circuit court may not dismiss a petition at the first stage of proceedings solely on the basis that it lacked a verification affidavit. *Hommerson*, 2014 IL 115638, ¶ 11; see *People v. Allen*, 2015 IL 113135, ¶ 27 (supreme court noted that *Collins* was not the court's last word on first-stage dismissal of a petition for lack of completeness, and citing *Hommerson* with approval).

¶ 15 In light of the supreme court's decisions in *Allen* and *Hommerson*, the lack of a verification affidavit did not subject the defendant's postconviction petition to summary dismissal at the first stage of postconviction proceedings. We now address the defendant's contention that the circuit court erred when it determined that his claims of ineffective assistance of counsel alleged in the postconviction petition were frivolous and patently without merit.

¶ 16 B. Ineffective Assistance of Counsel

¶ 17 The *Strickland* standard governs claims of ineffective assistance of both trial and appellate counsel. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11; *Strickland v. Washington*, 466 U.S. 668 (1984). In addressing the sufficiency of the petition we are guided by *Strickland's* two-prong test: (1) did counsel's performance fall below an objective standard for reasonableness and (2) did counsel's deficient performance prejudice the defendant. *Hodges*, 234 Ill. 2d at 17. A defendant must satisfy both prongs of the test or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 18 At the first stage of postconviction proceedings, a petition alleging the ineffective assistance of counsel 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." *Hodges*, 234 Ill. 2d at 17.

¶ 19 1. *Factual Basis*

¶ 20 In his petition, the defendant alleged that prior to trial, he told trial counsel that one of the individuals who accompanied him to the Buchanans Barber Shop on the night of the shooting was Eric President. The defendant also told trial counsel that Mr. President could corroborate the defendant's statement on the videotape interview with Detective Golab that the victim was shot by an unknown individual and that the defendant was not the shooter. Trial counsel informed the defendant that he would check into the information. Trial counsel never told the defendant whether he had investigated the information and what his investigation revealed. The defendant's case went to trial without Mr. President's testimony to support the defendant's case.

¶ 21 The defendant further alleged in his petition that Mr. President would have testified that on the night of the shooting, the defendant and he went to Buchanans Barber Shop to get

haircuts. Mr. President would testify that while the defendant was arguing with Mr. Robinson, a black male, whose identity was unknown to Mr. President, entered the barber shop carrying a gun and stated to the victim, " 'Geno where's that shit? Give me that shit!' " When the victim denied knowing what the man was talking about, the man shot the victim. Mr. President would have further testified that Mr. Walker had gone to the back of the shop prior to the unknown black man entering the shop and that after the shooting the defendant and Mr. Robinson ran to the back of the shop. Mr. President would further testify that he had remained in the barber chair during the shooting. After the shooter left, he had screamed for the defendant, and they all ran out of the shop. Mr. President would have testified that he did not see the defendant with a gun on the night of the shooting and that the defendant did not shoot the victim. Mr. President would further testify that trial counsel never contacted him to testify but had he been asked he would have agreed to testify in court to those facts.

¶ 22

Section 122-2 of the Act requires that the 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 (2010). "[T]he purpose of section 122-2 is to establish that a petition's allegations are capable of 'objective or independent corroboration.' " *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting *People v. Hall*, 217 Ill. 2d 324, 333 (2005)). Failure to attach the necessary affidavits or other records or to explain their absence justifies the summary dismissal of the petition. *Delton*, 227 Ill. 2d at 255. When a defendant alleges a claim of ineffective assistance of counsel because trial counsel failed to call or contact a witness, the defendant must attach to his petition an affidavit from that witness. *People v. Barick*, 365 Ill. App. 3d 183, 190-91 (2006).

¶ 23

The defendant did not attach an affidavit from Eric President to his *pro se* petition. However, in the petition, he explained the absence of the affidavit, stating: "Here in the present case Mr. Wilson could not obtain an affidavit from Eric President due to Mr. Wilson's pro-se status and incarceration. Mr. Wilson is also without the means and funds to obtain a private investigator to interview and obtain an affidavit from Mr. Eric President." In addition, attached to the petition was a statement by the defendant, certified pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)), providing as follows:

"I, Affiant, spoke to trial counsel on numerous occasions to summons Eric [P]resident, to testify that affiant was not the shooter But someone else. Affiant tried on variety occasions to retrieve an affidavit from Mr. Eric [P]resident that affiant was not the shooter. Mr. [P]resident told number of people from the neighborhood throughout the years that affiant was not the shooter.

It's very difficult from being sent to 2 different prisons to obtain an affidavit from Mr. Eric [P]resident. Affiant is an indigent citizen of Illinois and can not afford a private investigator. Affiant has tried every way to obtain an affidavit from Mr. Eric [P]resident."

¶ 24

In *Collins*, the supreme court found that the postconviction petition in *People v. Washington*, 38 Ill. 2d 446 (1967), where the defendant attributed his inability to obtain supporting affidavits to his incarceration and indigence, "explicitly complied with section 122-2's mandate" to attach the supporting documents or state why they are not attached. *Collins* 202 Ill. 2d at 67-68. Therefore, the defendant has complied with section 122-2 by providing an explanation as to the failure to obtain Mr. President's affidavit in support of his

claim of ineffective assistance of trial counsel. The State's reliance on *People v. Brown*, 2014 IL App (1st) 122549, is misplaced. In *Brown*, we held that summary dismissal was appropriate where, unlike the present case, the defendant did not provide an explanation as to why the supporting documentation could not be obtained. *Brown*, 2014 IL App (1st) 122549, ¶ 60-61.

¶ 25 None of the defendant's factual allegations could be viewed as delusional or fantastic. Both Mr. Robinson and Mr. Walker testified that, on the night of the shooting, "Eric" entered the barber shop with the defendant. Mr. Walker also identified "Eric" on the surveillance video showing the entrance to the barber shop. Mr. President's testimony would corroborate the defendant's statement to Detective Golab that the victim was shot by an unidentified man.

¶ 26 *Tate* is instructive. In that case, the defendant was convicted of murder and filed a postconviction petition alleging that trial counsel was ineffective for failing to call four witnesses, two of whom could provide an alibi for the defendant and two who were occurrence witnesses. The defendant supported his petition with affidavits from these witnesses. According to his affidavit, Mr. Hebron, one of the occurrence witnesses, would testify that he witnessed the shooting close up, that he knew the defendant and that the defendant was not the shooter. *Tate*, 2012 IL 112214, ¶ 5. The circuit court dismissed the petition summarily, and the appellate court affirmed. On further appeal, the supreme court reversed the summary dismissal and remanded the case to the circuit court for second-stage proceedings. *Tate*, 2012 IL 112214, ¶ 25.

¶ 27 The supreme court rejected the State's argument that not calling Mr. Hebron to testify was a strategic decision because his testimony would confirm the testimony of the State's witnesses who identified Mr. Hebron as being at the scene of the shooting and thus would

bolster their testimony identifying the defendant as being there as well. *Tate*, 2012 IL 112214, ¶¶ 21-22 (the court noted that a strategy argument was better raised at the second stage). The State's case consisted of the testimony of four eye witnesses, but there was no physical evidence linking the defendant to the shooting, and the medical examiner's testimony did not directly link the defendant to the shooting. The defendant did not confess to the murder. Therefore, it was at least arguable that the lack of Mr. Hebron's first-person account of the incident prejudiced the defendant and that "counsel's performance or lack thereof fell below an arguable standard of reasonableness." *Tate*, 2012 IL 112214, ¶ 24.

¶ 28 Here, the defendant alleged that trial counsel was ineffective for failing to investigate and call Mr. President to testify, who, like Mr. Hebron, could have provided a first-person account of the victim's shooting countering the testimony of Messrs. Robinson and Walker. Like *Tate*, there was no physical evidence connecting the defendant to the shooting. The medical examiner's testimony that the victim was not shot at close range contrasted with the testimony of Messrs. Robinson and Walker, indicating that the defendant was close to the victim when he shot him. Moreover, defendant did not confess to shooting the victim but consistently maintained that the victim was shot by an unknown man. While the defendant in *Tate* supported his claims with affidavits, the defendant fulfilled the requirement of section 122-2 of the Act by providing an explanation for the absence of Mr. President's affidavit.

¶ 29 The State maintains that the defendant's allegation that trial counsel never investigated Mr. President to confirm his testimony was contradicted by the record. The State points out that trial counsel sought a continuance of the trial in an effort to locate a witness. That Mr. President could not be located finds support in Detective Golab's testimony that the police also conducted a search for "Eric" with no success. In addition, in his interview with

Detective Golab, the defendant refused to identify a "friend" who was with him in the barber shop on the night of the shooting. Finally, in closing argument, trial counsel referred to "Eric" suggesting to the jury that he may have been the shooter.

¶ 30 We accept as true a defendant's well-pleaded facts unless they are positively contradicted by the record. *Coleman*, 183 Ill. 2d at 385. The record in this case raises questions as to the defendant's allegations of fact, but does not "positively" contradict them. The fact that the defendant did not identify Mr. President when questioned by Detective Golab did not establish that he would not have given the information to trial counsel. While trial counsel told the court he was trying to locate a witness, he did not identify the witness as "Eric" or Mr. President. While trial counsel's reference in closing argument to Mr. President as the possible shooter could explain why he did not call Mr. President to testify, counsel's reference could just as easily be construed as suggesting to the jury that someone other than the defendant shot the victim. It does not positively contradict the defendant's allegation that trial counsel was ineffective for failing to investigate and call Mr. President as a witness.

¶ 31 The defendant's allegations set forth an arguable basis in fact for his claim of ineffective assistance of trial counsel. The record and the testimony of the State's witnesses confirm Mr. President's presence in the barber shop when the victim was shot. The defendant explained why he was unable to obtain an affidavit from Mr. President and set forth what Mr. President would testify to if he had been called as a witness. None of the facts Mr. President would have testified to could be termed fantastic or delusional.

¶ 32 We now must determine if the defendant has an arguable legal basis for his claim that trial counsel was ineffective.

¶ 33 *2. Legal Basis*

¶ 34 Decisions about which witnesses to call at trial and what evidence to present are for trial counsel to make and, as matters of trial strategy, are generally immune from ineffective assistance of counsel claims. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003). However, trial counsel's failure to interview a known witness who would contradict the State's theory of the case or who could have provided exonerating testimony constitutes ineffective assistance of counsel. *People v. Campbell*, 332 Ill. App. 3d 721, 731 (2002).

¶ 35 In order to determine if the defendant's legal theory that trial counsel was ineffective for failing to investigate and call a witness to testify, the reviewing court focuses on the defense at trial and whether the witness's testimony would have supported that defense. The defendant admitted to police that he had been in the barber shop at the time of the shooting but denied being the shooter. The State's case was based on the testimony of Messrs. Robinson and Walker identifying the defendant as the shooter. There was no physical evidence linking the defendant to the victim's shooting or a confession by the defendant. Trial counsel sought to create reasonable doubt in the minds of the jurors by concentrating his cross-examination on the inconsistencies in the details of the shooting as testified to by the witnesses. Trial counsel also called two police officers as defense witnesses. Officer Edens testified that on the night of the shooting he and his partner stopped a man who possessed a Colt 357 revolver, the same make as the weapon thought to be the murder weapon. Officer Doherty testified that Mr. Walker told him that the defendant was wrestling with the victim and that he was running to the back of the shop when he heard the shots.

¶ 36 Like Mr. Hebron in *Tate*, Mr. President's testimony would have provided a first-person account which directly contradicted the testimony of Messrs. Walker and Robinson. It is at least arguable that the defendant was prejudiced by the lack of testimony from Mr. President

and that trial counsel's failure to investigate and call Mr. President to testify, fell below an arguable standard of reasonableness.

¶ 37

CONCLUSION

¶ 38

The defendant has set forth an arguable basis in law and fact that he did not receive the effective assistance of counsel from trial counsel. Therefore, the defendant's *pro se* postconviction was not frivolous or patently without merit, and summary dismissal of the petition was erroneous.

¶ 39

Since under the Act, partial summary dismissals are not permitted at the first stage of postconviction proceedings, we need not address the defendant's ineffective assistance of appellate counsel claim. See *Hodges*, 234 Ill. 2d at 22 n.8.

¶ 40

We reverse the circuit court's dismissal of the defendant's *pro se* postconviction petition and remand for second-stage postconviction proceedings.

¶ 41

Reversed and remanded with directions.