

FIRST DIVISION
MAY 11, 2015

No. 1-13-1754

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 12418
)	
KENDRICK BUTLER,)	Honorable
)	Rosemary Grant-Higgins,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed.

¶ 2 Defendant, Kendrick Butler, 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 This court previously affirmed defendant's 2009 jury conviction of first degree murder in connection with the May 3, 2006, shooting of Gregory Dugar, over his contentions that he was deprived of a fair trial and denied effective assistance of counsel, and remanded his case for clarification of the sentence and imposition of a proper sentence. *People v. Butler*, No. 1-09-0893 (2011) (unpublished order under Supreme Court Rule 23). On remand, the trial court sentenced defendant to 50 years' imprisonment for first degree murder and a consecutive term of 30 years for the firearm enhancement, and we affirmed that judgment on direct appeal. *People v. Butler*, 2013 IL App (1st) 120923 ¶¶ 33, 44.

¶ 4 On February 20, 2013, defendant filed the *pro se* post-conviction petition at bar setting forth his allegations in six specific sections. As pertinent to this appeal, defendant alleged ineffective assistance of trial counsel for failing to call Bryan Smith, Chanel Richmond, and Kewhan Lebranden as witnesses to impeach the State's witnesses, and ineffective assistance of appellate counsel for failing to raise the issue of trial counsel's ineffectiveness on appeal.

¶ 5 In a separate section, defendant alleged newly discovered evidence consisting of an alibi that would show his "actual innocence" based on the testimony of three witnesses, Marlo Riley, Andre Mammol [*sic*], and Kory Butler. Defendant claimed that the three were not available at the time of trial because he "did not have any information as pertaining to communication," including their phone numbers, addresses, or access to them. In support of his claim, defendant attached an affidavit from Mamon in which Mamon stated that he, along with a friend, went to defendant's house about 8 p.m. on May 3, 2006, to go bowling. They arrived at the bowling alley about 8:30 p.m., and he was with defendant the rest of the night. Thus, he concluded, defendant could not have committed the crime.

¶ 6 The circuit court summarily dismissed defendant's petition in a written order. In addressing defendant's ineffective assistance of counsel claim for failing to call three witnesses who would have contradicted the State's account of the shooting, the court stated that defendant did not make the requisite showing in that he failed to attach affidavits from these witnesses or satisfactorily explain their absence. The court thus found defendant's petition legally insufficient as to this claim.

¶ 7 The court also addressed defendant's claim of "actual innocence" based on newly discovered evidence, and found that the evidence in Mamon's affidavit was not "of such a conclusive character that it would be likely to change the result on retrial." The court noted that the shooting occurred at "approximately 8 p.m.," and Mamon stated that he picked defendant up at 8 p.m., allowing for him to meet up with defendant after the shooting. In any event, the court found that the affidavit was not newly discovered evidence because alibi evidence cannot be "newly discovered," unless unavailable at trial despite the exercise of due diligence, and that the facts concerning the alibi were within defendant's knowledge. Accordingly, the court found that his claim of actual innocence also failed.

¶ 8 In this appeal, defendant abandons the arguments set forth in his petition and solely contends that he stated an arguable claim of ineffective assistance of trial counsel for failing to call Mamon as an alibi witness. He maintains that Mamon's testimony would have rebutted the State's case, which was based on the recanted testimony of three convicted felons. The State responds that defendant did not raise this issue in his original petition and, thus, it may not be considered for the first time on appeal.

¶ 9 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 respect 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 only required to set forth 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).

¶ 10 In this case, the State correctly observes that the claim raised by defendant on appeal was not raised in his *pro se* petition or considered by the circuit court. In his petition, defendant delineated his claims using specific headings and separately set forth his allegations relating to them. In alleging ineffective assistance of trial counsel, defendant listed three witnesses who, he believed, trial counsel should have called to rebut the account given by the State's witnesses. Mamon is not included in this section, but is named in the "Newly Discovered Evidence" section in support of his claim of actual innocence. Defendant attached Mamon's affidavit in support of this claim and cited cases that discuss the rules for newly discovered evidence, not ineffective assistance of counsel. Defendant distinguished the separate issues in this manner, and the circuit court ruled on defendant's claims as they were delineated in his petition. The record thus shows

that defendant did not include in his petition the ineffective assistance claim he is purporting to raise on appeal. To be reviewed, however, an issue must be presented in the petition filed in the circuit court; and where, as here, defendant attempts to raise a claim for the first time on appeal, it is forfeited. *People v. Jones*, 211 Ill. 2d 140, 148 (2004).

¶ 11 In apparent recognition of this deficiency, defendant contends in his reply brief that he alleged, in the "Cumulative Effect" and "Overall Conclusion of Issues" sections of his petition, ineffective assistance of trial counsel for failing to call alibi witnesses, and since Mamon is the only witness whose affidavit was attached to the petition, and specifically identified as an alibi witness, he must be the person to which defendant was referring in those sections of his reply brief. He maintains that his petition should be liberally construed, and because the cases cited by the State in support of its forfeiture argument were decided well before *Hodges* and *People v. Brown*, 236 Ill. 2d 175 (2010), they fail to take into account the supreme court's more recent forfeiture holdings.

¶ 12 In *Hodges*, the supreme court rejected the State's argument that since the *pro se* defendant chose to focus only on self-defense and not second-degree murder in his petition, he should be limited to that choice on his appeal of the dismissal of his post-conviction petition. *Hodges*, 234 Ill. 2d at 21. In considering defendant's claim, the supreme court noted that second-degree murder is also referred to as "imperfect self-defense," and whether the defendant's petition specifically included an allegation of second-degree murder was the type of borderline question which, under a liberal construction, should be answered in defendant's favor. *Id.* Similarly, in *Brown*, 236 Ill. 2d at 188-89, the supreme court therefore rejected the State's claim that defendant was required to plead all facts necessary to support a constitutional claim. In that case,

the supreme court found that defendant's allegations set forth the gist of a constitutional claim and were not completely contradicted by the record. *Id.*

¶ 13 We initially observe that in *Hodges* and *Brown*, the supreme court did not reverse or distinguish its previous holdings in the cited cases where forfeiture was applied to issues not presented in the original post-conviction petition. Moreover, in *People v. Taylor*, 237 Ill. 2d 68, 76-77 (2010), the supreme court rejected defendant's "implicit claim" of ineffective assistance of counsel, where that claim was not specifically asserted in his post-conviction petition. That said, we are also cognizant of the liberal construction to be applied to *pro se* post-conviction pleadings, but we are also aware that we do not possess the supreme court's supervisory authority to recognize procedurally defaulted claims, and that appellate counsel does not have the authority to raise a claim on appeal on behalf of a defendant that was not raised in the post-conviction petition itself. *People v. Coleman*, 2011 IL App (1st) 091005 ¶¶17-18. Under that reasoning and authority, we reject the present attempt to raise an ineffective assistance of counsel claim based on defense counsel's failure to call Mamon as a witness. That claim was clearly not raised in defendant's post-conviction petition or reviewed by the circuit court.

¶ 14 In contrast to *Hodges* and *Brown*, the factual circumstances that gave rise to the two claims here are irreconcilable. A claim of ineffective assistance depends upon factors that trial counsel knew or should have known at trial (*People v. English*, 403 Ill. App. 3d 121, 137-38 (2010)), and a claim of newly discovered evidence relies on evidence that was not available at trial that could not have been discovered sooner through due diligence (*People v. Morgan*, 212 Ill. 2d 148, 154 (2004)).

¶ 15 Defendant's claim regarding Mamon clearly implicates the rules for newly discovered evidence based on his allegation that Mamon "was not available at the time of trial because defendant did not have information as pertaining to communication." On the other hand, defendant claimed that counsel was ineffective for failing to present witnesses who, the record shows, were known to counsel at the time of trial. Thus, we find no overlap between the two claims, as in *Hodges*, and conclude that defendant has forfeited review of the issue which he raises for the first time on appeal. *Jones*, 211 Ill. 2d at 148.

¶ 16 Accordingly, we affirm the summary dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 17 Affirmed.