SECOND DIVISION
August 18, 2015

No. 1-13-2776

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. 04 CR 17014
	)	
LAMAR WILMINGTON,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed where defendant failed to set forth an arguable claim of prejudice resulting from counsel's alleged failure to investigate an alibi witness.

¶ 2 Defendant Lamar Wilmington appeals the summary dismissal of 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 his petition should be remanded for second-stage proceedings because he set forth an arguable claim of ineffective assistance of trial counsel based on counsel's failure to investigate an available alibi witness.

¶ 3 Following a jury trial, defendant was found guilty of the first degree murder of Guan McWilliams and of concealing that homicidal death, offenses which took place in early March, 2004. Defendant was then sentenced to consecutive, respective terms of 50 and 5 years in prison, and that judgment was ultimately affirmed by the supreme court. *People v. Wilmington*, 2013 IL 112938.

¶ 4 On April 29, 2013, defendant filed the form *pro se* postconviction petition at bar, alleging *inter alia*, actual innocence, coerced confession by the police, and ineffective assistance of counsel. Defendant particularly alleged that he gave trial counsel "alibi evidence" to prove his innocence, but counsel "refus[ed] to go and investigate." In support of his petition, defendant attached an affidavit from Nathaniel McCray dated October 31, 2012. McCray averred that "[he] was with [defendant] from about 4 pm March 3rd to about 11 A.M. March 4th [2004]," and that the two of them were drinking beer and hard liquor, and watching television "until the early hours of March 4" in the basement of McCray's grandmother. McCray and defendant visited a liquor store several times during the night, and defendant fell asleep shortly thereafter. McCray further averred that he "awoke several times during the night and morning March 4, 2004 and [defendant] was asleep on the couch at about 9:30 AM March 4, 2004." After using the washroom, McCray woke defendant, and the two of them left the basement about 11 a.m. McCray stated that he did not see defendant until January 2011 in the Menard Correctional Center, that no one had contacted him about defendant or his case, and that he was willing to testify to his statement.

¶ 5 On July 29, 2013, the circuit court timely examined defendant's petition and summarily dismissed it as frivolous and patently without merit. In its written order, the court noted that

defendant's claim regarding trial counsel's failure to investigate an alibi witness failed because it was "something known to [defendant] prior to trial, never raised by [him] in the trial court or on direct appeal and thus waived." It also noted that McCray's affidavit "would suggest that [defendant's] claim is a fanciful factual allegation; [he] clearly remembered his so-called alibi for the 2004 dates in question, but never reached out to McCray to discuss it until 2011 when they were both incarcerated in the same correctional center."

¶ 6 In this court, defendant contends that his cause should be remanded for second-stage proceedings because he stated a non-frivolous claim that he was denied effective assistance of counsel due to trial counsel's failure to investigate an available alibi witness.

¶ 7 The Act provides a method by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill 2d 1, 9 (2009). Defendant need only present the "gist of a constitutional claim" at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), however, under section 122-2 of the Act, defendant is required to attach affidavits, records, or other evidence supporting the allegations or explain their absence. 725 ILCS 5/122-2 (West 2010); *Hodges*, 234 Ill. 2d at 9-10. We review the circuit court's dismissal of defendant's postconviction petition *de novo* (*Hodges*, 234 Ill. 2d at 9), and may affirm on any ground substantiated by the record, regardless of the trial court's reasons for the dismissal, if the petition patently lacks merit (*People v. Lee*, 344 Ill. App. 3d 851, 853 (2003)).

¶ 8 At the first stage of proceedings, the circuit court is required to review the petition within 90 days, and dismiss it in a written order if it finds it frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010), *i.e.*, it has no arguable basis in law or in fact; or advance it to

the second stage and appoint counsel if it does have merit (725 ILCS 5/122-4 (West 2010); *Hodges*, 234 Ill. 2d at 10, 16)). In this case, defendant alleged ineffective assistance of trial counsel, which is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Pursuant to *Strickland*, a petition alleging ineffective assistance may not be summarily dismissed at the first stage of postconviction proceedings under the Act, 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.

¶ 9 In this appeal, defendant focuses on trial counsel's duty to investigate an alibi witness, contending that it was arguable that he was prejudiced by defense counsel's failure to investigate McCray, because an alibi would have bolstered his primary defense at trial that the statement he made to police was unreliable. In support, he focuses on the various weaknesses in the inculpatory statement he made to the police, such as the lack of physical evidence, his mild mental retardation, his seizure disorder and the time he spent in police custody.

¶ 10 It is well settled that defense counsel has an obligation to explore and investigate a client's alibi defense, and that failure to present available witnesses to corroborate a defense has been found to be ineffective assistance. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *Id*.

¶ 11 In this case, the record shows that the victim's body was found in a garbage can, and defendant was investigated in connection with the crime after he voluntarily inserted himself into the police investigation. In a handwritten statement taken by an Assistant State's Attorney,

defendant said that he met the victim at the Jeffery Pub's "gay night" in January 2003, and the two of them had sexual relations several times over the next year, which defendant kept secret from his friends and fellow Black Disciples gang members. Defendant admitted that he shot the victim several times in the head following an argument, and subsequently disposed of the body in an alley behind his residence.

¶ 12 In affirming defendant's convictions and sentence, the supreme court noted that it was defense counsel's decision to pursue a strategy of questioning the reliability of the confession, but offering the jury the option of a second degree murder conviction if the strategy failed. *Wilmington*, 2013 IL 112938 at ¶ 51. The supreme court noted that defendant's statement that he shot and killed the victim, and his description of how he disposed of the body was corroborated by ample forensic evidence presented in the case. *Id.* at ¶ 39. This included evidence that the victim sustained two bullet wounds to the top of his head, and that in each case the bullets took a downward path through the skull, which was consistent with defendant's statement that he shot the shorter victim in the top of the head as he was hunched over and charging at him. *Id.* The supreme court also noted that the victim's body bore scratches and bruises consistent with the body having been dragged and dropped on the sidewalk as described in defendant's statement; the body was found in a garbage can located about a block away from defendant's residence; and the garbage can in which the body was found was registered to a location across the alley from defendant's residence. *Id*. The same court noted that "the only inconsistency of any significance" between defendant's statement and the physical evidence in the case was that the victim was found in additional items of clothing than what defendant had described dressing the victim in,

but that this "lone inconsistency [was not] sufficient to render the evidence in this case closely balanced for purposes of first-prong plain error." *Id.* at ¶ 42.

¶ 13 Given this evidence, we conclude that defendant failed to set forth an arguable claim that he was prejudiced by counsel's alleged failure to investigate McCray and present an alibi defense through him. As noted, defendant inserted himself into the case, and his subsequent inculpatory statement was corroborated by the ample forensic evidence presented at trial. Moreover, as the State correctly points out, McCray's affidavit, if presumed true, would directly contradict defendant's secondary defense of second-degree murder arising from his statement. On these facts, we find that defendant's assertion fails for lack of an arguable claim of prejudice resulting from counsel's alleged failure to pursue an alibi defense.

¶ 14 In reaching this conclusion, we are not persuaded otherwise by defendant's attempt to analogize his case to *People v. Douglas Tate*, 2012 IL 112214, *People v. Morris*, 335 Ill. App. 3d 70 (2002), and *People v. Grover Tate*, 305 Ill. App. 3d 607 (1999). In *Douglas Tate*, 2012 IL 112214 at ¶ 24, the supreme court reversed the summary dismissal of defendant's postconviction petition because it was arguable that defendant was prejudiced by counsel's failure to investigate alibi witnesses where there was no physical evidence, and no confession by defendant. In stark contrast, here, defendant made an inculpatory statement, which was corroborated by forensic evidence.

¶ 15 *Morris* and *Grover Tate* involved appeals from second stage postconviction proceedings and we find them factually inapposite to the case at bar. In *Morris*, 335 Ill. App. 3d at 81, the only evidence offered by the defense at trial was defendant's own testimony as to his alibi, and this court found that defendant made a substantial showing at the second stage of postconviction

proceedings that counsel's failure to investigate defendant's alibi witnesses had prejudiced him under the circumstances. Similarly, in *Grover Tate*, 305 Ill. App. 3d at 612, defendant's theory at trial was that he was misidentified, and counsel failed to investigate witnesses who would have corroborated that misidentification. Unlike *Morris*, and *Grover Tate*, no alibi defense was evident in the facts, where defendant gave an inculpatory statement after injecting himself into the investigation of the victim's murder, which was corroborated by forensic evidence presented at trial. Counsel's initial attempt to suppress the statement failed, and thereafter, counsel attempted to offer reasons to discredit the statement, and tendered a second-degree murder instruction to mitigate defendant's actions as reflected therein. In light of the above, we find that defendant failed to articulate an arguable claim of prejudice resulting from counsel's omission, and his claim fails. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 16 We, therefore, affirm the summary dismissal of his postconviction petition by the circuit court of Cook County.

¶ 17 Affirmed.