

THIRD DIVISION
December 9, 2015

No. 1-13-3394

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. 08 CR 13128
)	
LAMONT DONEGAN,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Trial court properly dismissed defendant's postconviction petition claiming that trial counsel was ineffective for failing to call alibi witnesses where defendant did not attach affidavits from the witnesses supporting his claims.

¶ 2 Following a jury trial, defendant Lamont Donegan was found guilty of first degree murder and sentenced to 27 years' incarceration. He filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), which the circuit court summarily dismissed. On appeal, defendant contends that his petition set forth an arguably

meritorious claim that his trial counsel was ineffective for failing to call several of his relatives as alibi witnesses. He also argues that the trial court abused its discretion in denying his motion for an extension of time to file affidavits in support of his petition. We affirm.

¶ 3 The evidence at trial established that defendant and codefendant, Keith Pikes, were members of the Four Corner Hustlers ("Hustlers") gang. In mid-August 2006, the Hustlers were embroiled in a gang war with the rival Gangster Disciples ("Disciples"). On either August 18 or 19, 2006, Quentez Robinson, a Disciple, rode a scooter into an area claimed by the Hustlers, with more Disciples following him in a car. According to several witnesses, defendant ran out of an alley and shot at Robinson several times. The other Disciples then hit defendant with their car. Afterwards, DeAngelo Coleman, another Hustler, found defendant lying on the street. Defendant said he wanted retaliation. On August 20, 2006, Coleman saw defendant enter a house and retrieve his own .45 caliber gun and a .40 caliber "nation gun" owned by the Hustlers. Defendant got into a car with Pikes and Golden Richardson, another Hustler, and drove off.

¶ 4 Robinson and several other Disciples, including Lorne Moseley, were sitting in front of a house on the night of August 20, 2006. A car drove down the street and two shooters inside began to fire at them. Moseley was struck and killed. Herbert Lemon and Brandon Merkson, both Disciples, identified defendant as one of the shooters, although Merkson recanted his identification at trial. A few days later, Coleman overheard defendant and Pikes describing the shooting. Defendant stated, "[I]t was about time we got one." On August 22, 2006, defendant and several other Hustlers were talking in an alley. According to Vernard Crowder, defendant had a .45 caliber gun and stated that he could not "get caught with a gun because it had a body." As they were speaking, police arrived in the alley and the Hustlers attempted to flee. Crowder saw defendant fall as he fled and toss the gun away. Police later recovered the gun. Test bullets from

the gun matched a bullet recovered from Moseley's body and bullet fragments found at the scene of his shooting.

¶ 5 The jury found defendant guilty of first degree murder, but found that the State had not proven that defendant personally discharged a firearm. This court affirmed defendant's conviction on direct appeal. *People v. Donegan*, 2012 IL App (1st) 102325.

¶ 6 Defendant filed a *pro se* postconviction petition on August 30, 2013, which is the subject of the current appeal. He alleged, *inter alia*, that trial counsel was ineffective for failing to call his mother, aunt, and two cousins to testify at trial. His petition states that he informed defense counsel of all four witnesses and they were "willing to testify to his mental state and strange behavior." The petition later refers to the potential witnesses as "witnesses to strange behavior and mistaken identity." In an affidavit attached to the petition, defendant stated that he was celebrating his mother's birthday with the three potential witnesses during the murder. He also refers to the women as "alibi witnesses" in the affidavit. He further indicates that he has been unable to obtain affidavits from the potential witnesses "[d]ue to this facility lockdowns and just my incarceration." The petition indicates that he will send the affidavits "soon."

¶ 7 Along with defendant's petition, the record contains a document entitled "Motion for Extension of Time." The motion bears no filing stamp and does not have a certificate of service. It asks the court for 60 more days to prepare and file affidavits, alleging that lockdowns had kept defendant from the law library and he had only recently discovered the issues in his petition.

¶ 8 The trial court summarily dismissed defendant's postconviction petition. Defendant appeals.

¶ 9 We note that the common-law record also contains a letter written by defendant's mother which is notarized and dated July 27, 2011, while defendant's initial appeal was pending. In the

letter, defendant's mother addresses "Whom it May Concern" and states that defendant was at her home celebrating her birthday with his aunt and cousin on the night of the murder. The letter states, "I still don't know why his lawyer refuse[d] to use his witnesses. She never told us we would not testify." The letter was not file stamped and is not reflected in the trial court's memorandum of orders.

¶ 10 Defendant first contends that his *pro se* petition set forth an arguable claim that trial counsel was ineffective for failing to call his mother and other relatives as alibi witnesses. While he acknowledges that his petition lacks supporting affidavits, he argues that his mother's letter contained within the record provides adequate support. The State responds that defendant has forfeited his claim because he did not include it in his petition. It argues alternatively that the trial court properly dismissed the petition because it was not supported by sufficient documentation.

¶ 11 The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). Proceedings under the Act are collateral in nature and are not a substitute for an appeal. *People v. Williams*, 186 Ill. 2d 55, 62 (1999). Accordingly, any issues which could have been raised on direct appeal, but were not, are procedurally defaulted. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). A petitioner also forfeits any claim he or she fails to raise in an original or an amended petition. 725 ILCS 5/122-3 (West 2012). Therefore, we may only review those claims that were presented in the postconviction petition before the trial court. *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (Appellate court reviews "whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act." (Emphasis in original.))

¶ 12 Before we address the merits of defendant's claim, we must determine whether he has forfeited the claim by failing to include it in his petition. We view *pro se* petitions with a "lenient eye" to determine whether they "clearly set forth" a defendant's claim that his or her rights were violated. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32. In order to survive forfeiture, the pleading must bear some relationship to the issue raised on appeal. *Id.* We find defendant's petition adequately sets forth a claim that defense counsel was ineffective for failing to call four witnesses. While he initially states that those witnesses would testify to his state of mind, he also refers to them as witnesses on the issue of "mistaken identity." Furthermore, his attached affidavit refers to the witnesses as "alibi witnesses" and describes how they were with defendant on the night of the shooting. Construing defendant's petition liberally, we find that defendant's claims bear a sufficient relationship to the claim raised on appeal. As such, we address the claim on its merits.

¶ 13 A postconviction proceeding consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the initial stage of proceedings, as in the current case, a postconviction petition may be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A post-conviction petition is frivolous or patently without merit only if the allegations in the petition, liberally construed in favor of the petitioner, do not state the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. All factual allegations in the petition must be taken as true, unless they are contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). Petitioners are not required to include legal argument or citation to legal authority. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). However, *pro se* petitioners are not excused "from providing any factual detail whatsoever on the alleged constitutional deprivation." *Id.* A petitioner must attach "affidavits, records, or other evidence" to a petition in support its

claims, or otherwise "state why the same are not attached." 725 ILCS 5/122-2 (West 2012). Our supreme court recently explained that while some form of corroborative evidence must be attached to the petition, a defendant is not necessarily required to present a notarized affidavit at the first stage. See *People v. Allen*, 2015 IL 113135, ¶¶ 25-38. We review the first stage dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 14 To prevail on a claim of ineffective assistance of counsel a defendant must show that counsel's performance "was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In a first stage postconviction petition proceeding, a petition alleging ineffective assistance of counsel must show "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Where a petitioner alleges that trial counsel was ineffective for failing to investigate or present evidence at trial, the petition must include "affidavits and exhibits which ***identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *People v. Delton*, 227 Ill. 2d 247, 254 (2008). A failure to attach such supporting documentation or adequately explain its absence is "fatal" to a postconviction petition and justifies its dismissal. *People v. Turner*, 187 Ill. 2d 406, 414 (1999); *Collins*, 202 Ill. 2d at 66.

¶ 15 Defendant acknowledges that he did not attach the required supporting affidavits to his petition. The trial court's dismissal of his petition is therefore proper. *Collins*, 202 Ill. 2d at 66. Nonetheless, defendant argues that the letter from his mother found in the record provides the required support and that we should presume that the trial court considered it. We disagree. The

Act mandates that supporting evidence be attached to the petition itself. 725 ILCS 5/122-2 (West 2012). While the Act allows the trial court to consider the court file of a petitioner's trial proceedings when considering whether to dismiss a petition, such examination is purely discretionary. 725 ILCS 5/122-2.1 (c) (West 2012) ("[T]he court may examine the court file of the proceeding in which the petitioner was convicted.") The trial court was not required to scour the record to find support for defendant's claims, which he failed to provide as required by statute. Moreover, defendant's petition acknowledges that it does not contain the required support and promises that it is forthcoming. It would be illogical to find that the trial court was required to ignore defendant's own representations that his claims lacked support and comb the record for potential evidence.

¶ 16 Defendant argues that we "shall *presume* that the trial court properly examined the record in deciding whether a petition should survive the first stage" (emphasis in original), citing *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 113. The *Stephens* opinion does not support this statement. In *Stephens*, this court stated that it would presume that a new trial judge had reviewed the trial record where the defendant argued that the judge had only considered a prior judge's comments regarding the evidence. *Id.* ¶¶ 112-14. *Stephens* is clearly inapposite.

¶ 17 Defendant also notes that a trial court should examine the record to determine whether the petitioner's claims are affirmatively rebutted. See *People v. Little*, 335 Ill. App. 3d 1046, 1051 (2003). He argues that it would be "incongruous" for a court to be required to dismiss a petition based upon an examination of the record, but not advance one based on the record. This argument is unpersuasive. At the first stage, a trial court's examination of the record is a responsive action to the defendant's pleading to determine if his or her allegations are clearly rebutted. See *id.* at 1050-51. It is not a spontaneous and meticulous exploration of every line of

the record to see whether it potentially supports or hinders the defendant's allegations. Defendant was required to attach corroborative support to his petition (see *Collins*, 202 Ill. 2d at 66), we decline his request to transfer that burden onto the trial court.

¶ 18 Defendant also analogizes his case to *People v. Wilson*, 2013 IL App (1st) 112303, where this court found that the defendant had raised an arguable claim that his attorney was ineffective for failing to call a witness. However, the defendant in *Wilson* attached an affidavit from the potential witness, and thus *Wilson* is inapposite to the current case. *Id.* ¶ 10. Here, defendant failed to attach corroborative affidavits to his petition. On appeal, he does not argue that his petition adequately explained his failure to do so. Therefore, defendant has failed to meet the requirements of subsection 122-2 of the Act, and the trial court's dismissal of his petition was proper. *Delton*, 227 Ill. 2d at 258-59.

¶ 19 Defendant next contends that the trial court erred by denying his request for an extension of time to obtain affidavits for his petition. He notes that his request for a 60-day extension would not have delayed the trial court's consideration of his petition beyond the 90-day limit for first stage review mandated by section 122-2.1 of the Act. See 725 ILCS 5/122-2.1 (West 2012). We review the trial court's denial of defendant's request for an abuse of discretion. See *People v. Harris*, 224 Ill. 2d 115, 139 (2007). Defendant was sentenced on July 7, 2010. He filed his petition three years later. In his motion, he gives no explanation for why he had not obtained an affidavit from his mother or his other relatives in those three years. As such, we cannot find that the trial court abused its discretion in denying defendant's motion for an extension of time.

¶ 20 For the foregoing reasons, we find that defendant failed to attach supporting affidavits to his postconviction petition claiming ineffective assistance of counsel, and thus the trial court's dismissal of the petition was proper. Defendant has also failed to show that the trial court abused

1-13-3394

its discretion in denying his motion for an extension of time to file affidavits. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.