

NOTICE
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2015 IL App (4th) 4130295-U

NO. 4-13-0295

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 8, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOSEPH J. KELLY,)	No. 09CF21
Defendant-Appellant.)	
)	Honorable
)	Mark Fellheimer,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed defendant's *pro se* postconviction petition where it failed to raise the gist of a constitutional claim.
- ¶ 2 In October 2009, defendant, Joseph J. Kelly, was found guilty after a jury trial of seven counts of burglary. He was sentenced to concurrent terms of 16 years' imprisonment. On direct appeal, this court reversed defendant's conviction as to count VII but affirmed all remaining convictions and sentences. *People v. Kelly*, 2012 IL App (4th) 100306-U.
- ¶ 3 On December 24, 2012, defendant filed a postconviction petition, alleging his attorney was ineffective, among other things. On April 6, 2013, the trial court dismissed the petition as "frivolous or patently without merit."
- ¶ 4 This appeal followed.

¶ 5

I. BACKGROUND

¶ 6 On January 29, 2009, an information was filed against defendant charging him with 11 counts of burglary (720 ILCS 5/19-1(a) (West 2008)) in that he knowingly and without authority entered several storage units rented to various individuals in Pontiac, IL with the intent to commit a theft.

¶ 7 On October 29, 2009, defendant was found guilty of seven counts of burglary. On April 15, 2010, defendant was sentenced to 16 years' imprisonment based on Class X eligibility.

¶ 8 On April 20, 2010, notice of appeal was filed. Defendant argued four issues: (1) he was not proved guilty of the offense of burglary charged in count VII of the amended information; (2) the trial court erred in not instructing the jury on the lesser included offense of theft; (3) it was error to admit other-crimes evidence; and (4) the court erred in not ordering a mistrial. This court reversed defendant's conviction as to Count VII and affirmed his remaining convictions and sentences.

¶ 9 On December 24, 2012, defendant filed a *pro se* postconviction petition. Defendant alleged he was denied effective representation because appellate counsel failed to raise the ineffective assistance of trial counsel in failing to submit a motion to suppress and allowing evidence to be seized pursuant to a deficient search warrant; the trial court failed to call defendant's witnesses at trial counsel's motion to withdraw hearing; and the trial court failed to hold a hearing on his effective assistance claim. Attached to the petition were: copies of a search warrant; an order sealing search warrant; complaint for search warrant; a portion of the transcript including the State's opening statement; defendant's statements on hiring another

lawyer; a motion to withdraw as counsel; the trial court's questioning of defendant on his personal knowledge of the alleged conversation showing collusion between the State and defense counsel to assure defendant's conviction; and four witnesses' affidavits concerning the alleged conversation showing collusion between the assistant State's Attorney, Detective Dave Gualandri, and defense counsel.

¶ 10 On March 4, 2013, defendant filed a document entitled "newly Discovered Evidence to Amend to Postconviction Petition Case NO. 09-CF-21." Defendant apparently claims evidence in the State's possession was withheld from him.

¶ 11 On March 6, 2013, the trial court summarily dismissed defendant's petition for postconviction relief. On April 16, 2013, this appeal was filed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues on appeal he was denied his right to counsel because trial counsel acted against his interests by colluding with the prosecutor in an effort to assure defendant would be convicted.

¶ 14 Under the Post-Conviction Hearing Act (Act) a criminal defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. An action for postconviction relief is a collateral attack on the proceedings, not an appeal on the merits. *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). The summary dismissal of a postconviction petition poses a legal question subject to *de novo* review. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 15 At the first stage of the postconviction process, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit.

725 ILCS 5/122-2.1(a)(2) (West 2008). Section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)) requires the petition has attached affidavits, records or other evidence supporting the allegations or explain why they are not attached. *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). A petition is considered frivolous and patently without merit if the allegation and the petition, taken as true and liberally construed, fail to present the gist of a constitutional claim. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). A *pro se* petition seeking relief under the Act for a denial of a constitutional right may be summarily dismissed if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009).

¶ 16 Defendant contends he presented the gist of a meritorious claim his constitutional rights were violated because he presented an arguable claim counsel was ineffective for colluding or conspiring with the prosecutor to obtain his conviction. The trial court found this allegation to be frivolous and patently without merit and summarily dismissed his petition.

¶ 17 In support of his argument trial counsel colluded with the prosecution to convict him, defendant attached to his postconviction petition affidavits from friends and family members stating the prosecutor, defense counsel, and Detective Gualandri talked in the hallway outside the courtroom after the detective's testimony at the hearing on a motion to suppress defendant's confession. The witnesses claimed in their affidavits Detective Gualandri asked if his testimony came out the way the attorneys wanted it and both the prosecutor and defense counsel replied "I think we'll be alright." Based solely on these affidavits, defendant maintains he was denied effective representation because his attorney colluded and conspired with the State to have him convicted of the charged crimes.

¶ 18 While defendant's allegations must be taken as true, and liberally construed in defendant's favor, the record rebuts defendant's claim of collusion. Shortly before defendant's trial, the trial court held a hearing on defense counsel's motion to withdraw. During the hearing, defendant told the court he was not present for the alleged conversation and did not hear any of it. Defense counsel stated he had no idea what defendant was referring to in reference to the alleged conversation. Counsel denied conspiring with the State or anyone to keep critical evidence from the court or to have defendant convicted. He attempted to present the best possible defense for defendant.

¶ 19 The prosecutor also denied having any conversations with defense counsel and Detective Gualandri to have defendant convicted. The trial court asked the prosecutor if he had any idea what defendant or his friends were referring to. The prosecutor explained after listening to an audio recording of defendant's jail house telephone calls, he heard defendant trying to have these friends and family members come to court and testify, and after Detective Gualandri testified that the detective, the prosecutor, and defense counsel stepped outside the courtroom and said something to the effect "that was how we expected the testimony to go down." The prosecutor was not aware of anything defense counsel was doing to conspire or have defendant convicted. The trial court found defendant's contentions counsel had colluded and conspired to have him convicted to be false.

¶ 20 Defendant's claim defense counsel was supposedly talking in the hallway with the prosecutor and agreed Detective Gualandri's testimony was acceptable does not arguably show he colluded or conspired to have defendant convicted. This single statement by defense counsel, even if true, would not arguably constitute any illegal conduct or unprofessional conduct by

defense counsel. Defendant has failed to allege the gist of a constitutional claim to survive the first stage of his postconviction proceedings. Accordingly, we affirm the trial court's summary dismissal of defendant's *pro se* petition.

¶ 21

III. CONCLUSION

¶ 22 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 23 Affirmed.