FOURTH DIVISION
June 16, 2016

No. 1-13-0898

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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. 05 CR 27823
	)	
DASMEN THOMAS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition was proper where defendant's claims of ineffective assistance of trial and appellate counsel lacked an arguable basis in fact and in law.

¶ 2 Following a jury trial, defendant, Dasmen Thomas, was convicted of first degree murder and residential burglary, and was sentenced to respective consecutive terms of 38 and 6 years' imprisonment. In this appeal, defendant challenges 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 the court erred in dismissing his petition because he presented an arguable claim that his trial and appellate counsels provided ineffective assistance.

¶ 3 Because this court has never previously outlined the evidence adduced at trial, and because a review of that evidence is relevant to the resolution of this appeal, we will begin our discussion by describing the trial evidence and testimony. The following is a summary of the trial testimony provided by Karl Duke and Wayne Hardy regarding the events of October 14, 2005.

¶ 4 Around 10:30 p.m. on October 14, 2005, Wayne was speaking to his friend, Sharon Elliot[1] outside of her home. Sharon lived in a house across the street from 7221 South Morgan Street in Chicago, where the victim, 72-year-old Earl Duke Sr., lived with his adult son Karl. Wayne testified that Sharon showed him what appeared to be a counterfeit $50 bill and asked him to get change for it. Wayne declined, because he did not want to "get in any trouble." Wayne acknowledged at trial that he had a prior conviction for home invasion, for which he had received a six year sentence. Wayne testified that he told Sharon that he "didn't want to have anything to do with that fifty dollar bill" and Sharon asked to borrow his cell phone. Wayne complied, and Sharon called defendant and told him that she "needed two." Wayne testified that he knew defendant as Sharon's cousin.

¶ 5 After the phone conversation, Sharon and Wayne walked across the street to the victim's house. Karl came outside, and Sharon asked him if he would "purchase something for her." Karl agreed, and Sharon gave him the $50 bill. Wayne testified that he nodded at Karl to try and indicate to him to "not go along with it," but Karl took the bill. Karl testified that he did not know that the bill was counterfeit.

[1] The record shows that Sharon passed away prior to the trial in this case.

¶ 6 About five minutes later, defendant arrived in a green Pontiac Bonneville, and walked over to the victim's house, where Karl, Sharon and Wayne were gathered. Karl handed defendant the $50 bill, and defendant reached into his pocket and pulled out "a bag with some little balls of white stuff in it." Defendant took out two balls of crack cocaine, and gave them to Karl. Defendant started to walk away, and Karl said "hey, man I gave you a fifty." Defendant came back, looked at the $50 bill under the light of his cell phone, then told Karl to return "the merchandise." Karl complied, and defendant asked Karl if the bill was real. Karl testified that he responded "I guess it is real, I don't know, it look[s] real." Defendant looked at the bill again, then gave Karl the drugs and $30 in change. Defendant returned to his car and drove away.

¶ 7 After defendant left, Karl turned over the drugs and money to Sharon, who gave him "a couple of dollars and a piece of the rock." Sharon and Wayne walked back across the street to her front porch, and Karl went back inside the victim's house where he smoked the crack cocaine Sharon had given him.

¶ 8 About half an hour later, defendant returned and began banging on the front door of the victim's house. When no one answered, defendant walked over to Sharon and Wayne, and asked Sharon where Karl was. Sharon responded that he was inside the house. Defendant complained that the money was "phony" and that he wanted "[his] money." Sharon responded that she "had nothing to do with that[,] you got that money from Karl."

¶ 9 At that point, Karl came outside onto the front porch. Defendant walked back over to the victim's house, where "they had a loud confrontation." Defendant told Karl "I want my money back, that money wasn't right." Karl responded that he "got that from your cousin," and defendant said, "Well I got it from you." Defendant then told Karl that he had "to get something

from your house worth the money you gave me." Karl testified that defendant looked "[a]ngry and pissed off and mad" during this conversation.

¶ 10 Defendant then walked around to the back of the victim's house, and Wayne heard a loud boom. Karl heard the sound of his back door breaking, and two or three minutes later, defendant returned, carrying the television from the victim's basement. Karl told defendant that he was "not just going to take my TV like that" and the two men began "tussling." Karl called for the victim, saying, "Daddy, daddy, they broke in the house, *** they robbing us, they took the TV."

¶ 11 The victim came outside, carrying a pistol wrapped in a newspaper. He fired a "warning shot" into the air, and defendant placed or dropped the television in the street and ran towards his car, which was on the west side of the street near Sharon and Wayne. Defendant then made two phone calls, and was speaking loudly. Wayne testified that he was about 15 feet away from defendant at this time and could hear the conversations. During the first phone call, defendant said "Folks, I need some assistance," and during the second call, he said "Folks, get over here right now and bring those things." Karl also testified that he could hear defendant's phone conversations, and that he said "an old man is shooting at me, and stuff, bring some guns." As defendant made the phone calls, he was picking up bottles that were on the ground and throwing them at the victim's house. The victim, who had previously gone back inside his house, came outside again and told defendant to leave and that he would call the police.

¶ 12 A few minutes later, two individuals arrived in a small cream colored GMC or Ford car. Wayne testified that defendant walked over to the car, pointed at the victim's house, and said "there they are right there, folks, handle that business." Karl testified that defendant pointed at him and his father, said, "There is the old man and the dude there on the porch right there," and told them to "handle they [*sic*] business." Karl ran inside the house, as the two individuals

stepped out of the car carrying guns. One of the individuals shot three to five times, and the second shot hit the victim, who collapsed on the front porch. The two individuals got back into the cream colored car and drove north, while defendant got into his green Bonneville and drove south.

¶ 13 Wayne ran across the street to help the victim, "but it was too late." Wayne called 911, then ran to the police station at 79th and Halsted, and spoke to police officers. Around 4 a.m., Wayne viewed a "photo spread line-up" and identified defendant.

¶ 14 Karl testified that he met with the police on October 17, 2005, viewed a photo array, and also identified defendant as the person who ordered the shooting. Karl acknowledged at trial that he was currently incarcerated in Cook County jail, and that he used to use crack cocaine. Karl testified that he smoked crack cocaine sometime in the morning of October 14, 2005, and again at night after Sharon gave him a portion of the purchase.

¶ 15 The parties then entered a stipulation regarding telephone calls made between cell phones on October 14 and 15, 2005. Specifically, the parties stipulated that the phone number 773-633-7334 belonged to Wayne, and that phone numbers 773-934-0980 and 773-517-1938 belonged to defendant. On October 14, 2005 at 10:24 p.m., phone number 227-934-0980, belonging to defendant, received an incoming call from the phone number belonging to Wayne. Thereafter, at 11:39 p.m. and 11:42 p.m. on October 14, and at 12:20 p.m. on October 15, 2005, the phone number 773-934-0980, belonging to defendant, made three calls to the phone number 773-517-1938, also belonging to defendant. All of the phone calls lasted one minute or less. The stipulation was signed by the parties, including defendant's counsel and defendant.

¶ 16 Dr. Eupil Choi testified as an expert witness in forensic pathology. Dr Choi testified that he was the former deputy chief medical examiner at the Cook County Medical Examiners'

Office, and that he performed an autopsy on the victim. Dr. Choi observed two gunshot wounds on the victim's body, one on the back of the neck and one on the right calf. He concluded that the victim died from multiple gunshot wounds and that the manner of death was a homicide.

¶ 17 Hubert Rounds testified that he is a forensic investigator for the Chicago Police Department. Officer Rounds testified about receiving and inventorying the bullets recovered from the victim's body after the autopsy.

¶ 18 Forensic Investigator James Shader from the Chicago Police Department testified that he was assigned to investigate the scene at 7221 South Morgan after the murder with his partner, Forensic Investigator Arthur Oswald. When they arrived, the victim's body was still lying on the front porch. Investigator Shader also noticed that the back basement door "had been kicked in" and the "door was actually ripped off the hinges." Investigator Shader and his partner collected and inventoried evidence at the scene, including a fired bullet that was found imbedded in the porch, the television set, glass bottles and bottle pieces. They also processed the scene for fingerprints.

¶ 19 Deborah McGarry testified that she is employed by the Illinois State Police Forensic Science Center as a forensic scientist specializing in latent prints. She examined fingerprints lifted from the victim's television, an intact bottle and broken bottles found at the scene. McGarry did not identify defendant's fingerprints on any of the items. None of the fingerprints on the intact bottle or broken bottles were "suitable for comparison," and the fingerprints lifted from the television did not match defendant.

¶ 20 Illinois State Police forensic scientist Marc Pomerance testified as an expert witness "specializing in firearms tool mark identification." Pomerance testified that he examined the

bullet and bullet fragments recovered in this case, and determined that they were all fired from the same gun.

¶ 21 The court entered a vehicle record showing defendant as owning a green 1992 Pontiac Bonneville, and the State rested.

¶ 22 The defense called Detective Brian Lutzow, who testified that he interviewed Wayne on October 15, 2005. Detective Lutzow did not remember Wayne telling him that he had heard defendant say "folks, I need some assistance" or "get over here right now and bring those things" when he was on the phone.

¶ 23 The defense rested, and after deliberations, the jury returned a verdict finding defendant guilty of first degree murder and residential burglary. Defendant was later sentenced to respective consecutive terms of 38 and 6 years' imprisonment. That judgment was affirmed on direct appeal over defendant's claim that the trial court did not comply with Illinois Supreme Court Rule 431(b) when questioning the prospective jurors. *People v. Thomas*, 1-09-0282 (May 5, 2011) (unpublished order under Illinois Supreme Court Rule 23).

¶ 24 Thereafter, on October 25, 2012, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), alleging claims of ineffective assistance of trial and appellate counsel. Specifically, defendant alleged that trial counsel was ineffective for failing to offer evidence that supported his theory in opening statements that "at the time of the shooting [defendant] was not on the scene." Defendant also contended that trial counsel was ineffective for failing to call a number of witnesses, including

Brian Elliot, Reganald Elliot,[2] Allen Blake and Marianne Shingles. Defendant maintained that the first three witnesses would have testified that he was not present at the time of the murder, and that Marianne would have testified that a phone number, which had been attributed to him at trial, "belonged to" her. Defendant attached affidavits from Brian Elliot and Reganald Elliot, but did not provide affidavits for Allen or Marianne. Defendant claimed to be unable to do so because he is "incarcerated and indigent, and unable to locate these witnesses['] current address[es] without assistance from the court."

¶ 25 On January 11, 2013, the circuit court summarily dismissed defendant's petition, finding the issues raised to be frivolous and patently without merit. The court concluded that defendant could not show that trial counsel's performance was deficient or prejudice resulting therefrom, because defendant had been convicted under an accountability theory, and the proposed testimony that he left the scene prior to the murder "is not relevant to his innocence in this matter." The court also concluded that defendant's failure to provide affidavits for Allen or Marianne was fatal to his claim regarding trial counsel's failure to call them as witnesses. The court also rejected defendant's claim that appellate counsel was ineffective, concluding that he had not made the requisite showing of either deficient performance or prejudice.

¶ 26 In this appeal, defendant appeals the summary dismissal of his petition. He contends that his petition should be remanded for second stage proceedings because he presented an arguable claim that his trial and appellate counsels provided ineffective assistance. Specifically, defendant maintains that his trial counsel was ineffective for failing to follow through on a

[2] The names of Brian and Reganald Elliot are spelled in a variety of ways in the record. For consistency, we will refer to these witnesses using the spelling defendant used in his *pro se* petition.

"promise" made to the jury during opening statements "that he would call witnesses to establish that [defendant] was not present at the time of the murder," and for failing to call four specific witnesses: Brian Elliot, Reganald Elliot, Marianne Shingles, and Allen Blake. Defendant further claims that appellate counsel was ineffective for failing to raise a challenge to trial counsel's effectiveness on direct appeal. We initially note that, while defendant raised other issues in his *pro se* post-conviction petition regarding a number of other witnesses, he has concentrated his arguments solely on the above claims in this appeal, and he has thus abandoned the remaining claims set forth in his petition, forfeiting them for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 27 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Defendant need only set forth the "gist" of a constitutional claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122–2.1(a)(2) (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). A petition is frivolous or patently without merit if it has no arguable basis in law or in fact. *Id.* at 16. We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 28 Here, defendant first claims that he presented an arguable claim of ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). More specifically, 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. Cathey*, 2012 IL 111746, ¶ 23. At the first stage of post-conviction proceedings under the Act, a petition alleging ineffective assistance 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 thereby. *People v. Tate*, 2012 IL 112214, ¶ 19 (2012) (emphasis in original).

¶ 29 Defendant claims that trial counsel was ineffective for making an opening statement "promising the jury that he would call witnesses to establish that [defendant] was not present at the time of the murder" and then not following through on that promise. Relatedly, defendant contends that defense counsel was ineffective for failing to call witnesses Reganald and Brian Elliot, who would have testified that defendant was not present. Defendant cites *People v. Chandler*, 129 Ill. 2d 233, 249 (1989), and *People v. Briones*, 352 Ill. App. 3d 913, 918 (2004), for the proposition that an "attorney's failure to present promised testimony constitutes ineffective assistance of counsel when the broken promise is not a result of unforeseeable events."

¶ 30 Initially, we observe that defendant misconstrues counsel's opening statement. Nowhere in that statement did counsel "promise" to call any witnesses or present any testimony. Instead, our review of the opening statement indicates that counsel was commenting on what he believed the evidence would and would not show, and arguing that the State would not be able to prove its case beyond a reasonable doubt.

¶ 31 Moreover, we find the cases defendant relies on to be distinguishable from the case at bar. In *Briones*, the defendant's counsel promised during opening statements that, although

defendant was not obligated to testify, he was going to take the stand and "tell you the truth." *Briones*, 352 Ill. App. 3d at 915. Counsel, however, inexplicably did not call defendant, and there was nothing in the record to show that defendant had changed his mind about testifying or that there were any other unexpected events that made the decision not to call him reasonable. *Id*. at 919. The court also found a number of other errors on the part of defense counsel, and found that the defendant was prejudiced based on those "aggregate errors." *Id*. at 921. The reviewing court further found that the evidence was not overwhelming, and the crux of the State's case involved the victims' identification of the defendant in low light. *Id*. In those circumstances, the court found that counsel's performance, in failing to present the defendant's testimony that she had promised in opening statements, was deficient. *Id*.

¶ 32 In *Chandler*, our supreme court concluded that defendant's counsel failed to subject the State's case to any meaningful adversarial testing; counsel did not cross-examine several of the State's witnesses, failed to understand the law of accountability and felony murder when he admitted the defendant's guilt to burglary, and did not present the defendant's testimony after a promise in opening statements. *Chandler*, 129 Ill. 2d at 248–49. The supreme court noted that as a result of the defense counsel's ineffectiveness, the jury "was forced to convict defendant of the offenses charged." *Id.* at 250.

¶ 33 Unlike in *Briones* or *Chandler*, defense counsel in this case did not make any explicit promises, or reference any specific witnesses who were going to testify but who later did not do so. There was also no similar "aggregate errors" (*Briones*, 352 Ill. App. 3d at 921) in this case from which we could find that defendant has been prejudiced, or that the jury "was forced to convict defendant of the offenses charged" (*Chandler*, 129 Ill. 2d at 250).

¶ 34 Moreover, the evidence presented in this case is far different from the evidence in *Briones*, which we noted was not overwhelming and was based primarily on a questionable identification. Here, defendant was identified by two witnesses, Karl and Wayne, as being the man who ordered the shooting. Wayne, specifically, testified that he knew defendant prior to the offense, because defendant was Sharon's cousin. Both witnesses testified that they heard defendant making phone calls during which he ordered someone to "get over here right now" and bring "those things" or "guns." The witnesses also later observed defendant pointing out the victim's house to the individuals who arrived, and telling them to "handle that business." Defendant's theory did not challenge the identification of him, and indeed, as defendant contends in this post-conviction petition, his theory was not that he was never there, but that he had left prior to the shooting. At trial, defense counsel acknowledged during opening statements and closing arguments that defendant "was a drug dealer" and that "if [defendant] is guilty of anything with respect to that evening, it is *** selling drugs." Counsel's defense theory attempted to undermine the credibility of the State's witnesses as "a crack cocaine addict and a convicted felon" regarding whether defendant was responsible for the later shooting. In these circumstances, we find *Briones* and *Chandler* to be distinguishable from this case.

¶ 35 Additionally, even if defense counsel's statements in this case could somehow be construed as a "promise" to call the witnesses that defendant contends should have been called, we would still find no arguable claim of ineffective assistance. Defendant's claim relates specifically to the proposed testimony of two witnesses: Brian and Reganald Elliot, defendant's cousins, who were respectively 12 and 11 years old at the time of the murder.

¶ 36 Brian Elliot's affidavit, which defendant attached to his *pro se* petition, states the following:

> "On the night of Oct 14, 2005 around 11:00 p.m. I heard two gun shots and my mother shouting. When I went to the front of the house to see what was going on, I witnessed my neighbor Earl Duke shouting and waving a gun. I asked my mom what happened and she told me Earl just shot at Dasmen. I asked where was Dasmen and she pointed to the side of the house. I went to the lot next to our home to see if Dasmen was o.k. He told me he was o.k. Dasmen shouted at Earl just let me leave, just let me leave. Earl stood in the street and shouted you gon [*sic*] pay for my door. Dasmen started throwing bottles and Earl went back to his house. Dasmen ran to his car and left. About ten minutes later a small gray car pulled up in front of Earl's houes [*sic*]. It was three people in the car, I had never seen any of them before. The front and back passenger got out of the car and the guy that was in the front passenger seat started shooting at Earl and his son Karl who were standing on there [*sic*] front porch. Then the two men got back in the car and sped off."

¶ 37 Reganald Elliot's affidavit states the following:

> "On October 14, 2005 I was on the back porch of my house when I heard some gun shots and saw my cousin Dasmen running through the lot next to my house. I asked him what happened but he didn't respond. I heard somebody screaming you gon [*sic*] pay for my door. Then Dasmen said let me leave, I'm just trying to leave. I

> found out the person screaming was Earl from across the street. Earl said you leaving nowhere, you going to jail. Dasmen started throwing bottles at Earl. Karl Duke throw some back. Then Dasmen ran and got in his car and left. Me and my brother Brian went to the front of the house with my mother to see what happened and a little while later a gray four door car pulled up and two dudes got out and one of them started shooting. We all ran in the houes [*sic*] and we heard the car pull off. It was three guys in the car. I saw them all, and none of them was Dasmen."

¶ 38 In his post-conviction petition, defendant maintained that he asked his counsel why he did not interview or call these witnesses, and his counsel said that it was because they were too young. Given the record and defendant's statements in his petition, it appears that counsel made a strategic choice not to call Brian and Reganald because of their ages and relationship to defendant. See *People v. Enis*, 194 Ill. 2d 361, 378 (2000) ("decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel. Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence, and are, therefore, generally immune from claims of ineffective assistance of counsel." (citations omitted)).

¶ 39 Even more importantly, however, the proposed testimonies of Brian and Reganald actually corroborate the version of events testified to by the State's witnesses. Brian and Reganald both describe an escalating conflict involving defendant that took place at the victim's home on the night of October 14, 2005. Like the State's witnesses, Brian and Reganald describe the victim coming outside with a gun and yelling at defendant about his door. They also describe

defendant throwing bottles at the victim's home. Brian and Reganald both aver that a short while later, a small gray car arrived on the scene, two men got out of the car, and one started shooting at the victim and his son.

¶ 40 The only substantial way that Brian and Reganald's proposed testimony differs from that already presented at trial is that they claim defendant ran back to his car and left prior to the gray car's arrival. However, as the circuit court explained, this testimony would be of little relevance to defendant, because he was convicted under an accountability theory, and his presence at the scene during the murder was not required to find him guilty. Brian and Reganald's proposed testimony does not negate the testimony from Wayne and Kurt that they overheard defendant's two phone calls during which he stated "Folks, I need some assistance," "Folks, get over here right now and bring those things" and "an old man is shooting at me, and stuff, bring some guns." Whether or not defendant remained on the scene to confirm that his instructions were followed would not absolve him of accountability for the offense. Under these circumstances, defendant cannot show either arguable prejudice or deficient performance arising from trial counsel's alleged failure to call theses witnesses. It is not arguable that counsel's decision not to call these witnesses was unreasonable, where their testimony would have been of questionable value, and there is no reasonable probability that, had counsel called these witnesses, the result of the proceeding would have been different. See *People v. Guest*, 166 Ill. 2d 381, 400-01 (1995); *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 48. We thus find no arguable claim of ineffective assistance of counsel based on the failure to call Brian and Reganald.

¶ 41 As to defendant's claim regarding Allen and Marianne, the State contends that the trial court's summary dismissal should be affirmed because defendant failed to provide any affidavits from those witnesses. Defendant contends that the lack of affidavits from these witnesses should

not be fatal to his claim because "he explained their absence," namely, that he had been "unable to locate these witnesses from prison and needs the assistance *of* counsel." (emphasis in original). Defendant recognizes that this explanation "might ordinarily not be sufficient," but he contends that his claim is "strengthened by the fact that counsel listed these witnesses, promised their testimony, and then reneged."

¶ 42 Under the Act, defendant must clearly set forth in his petition the respects in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting those allegations or explain their absence. 725 ILCS 5/122-2 (West 2010). The purpose of requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration. *Delton*, 227 Ill. 2d at 254; *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 43 The supreme court has specifically held that "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380 (2000). It further noted that "[i]n the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.*

¶ 44 Here, defendant claims that trial counsel was ineffective for failing to call Allen and Marianne, but he did not attach their affidavits. Our supreme court has found that the failure to attach necessary documentation or explain its absence is "fatal" to a post-conviction petition and justifies its summary dismissal. *Delton*, 227 Ill. 2d at 255; see also *Collins*, 202 Ill. 2d at 66. Defendant attempted to explain the absence of these affidavits by stating that he was unable to locate the witnesses from prison and needed the assistance of counsel.

¶ 45 While we question whether defendant's explanation is sufficient under section 5/122-2 of the Act, we need not reach this issue because, notwithstanding defendant's failure to provide these affidavits, the proposed testimonies of Allen and Marianne do not support an arguable claim of ineffective assistance of trial counsel. Defendant claimed that Allen would testify that he was not present at the time of the murder. However, for the reasons previously discussed, the failure to elicit such testimony would not support an arguable claim of ineffective assistance of counsel.

¶ 46 Regarding Marianne, defendant claimed that she would have testified that the phone number 773-517-1938 "belonged to her." Defendant claimed that this would have contradicted the State's theory that the phone number belonged to the "unknown shooter of [the victim]." However, this claim is belied by the record, which indicates that at trial, defendant stipulated that the phone number "belonged to [him]." That stipulation was not only signed by defendant's counsel but also by defendant himself. Defendant cannot stipulate to something at trial, and then claim otherwise in a post-conviction petition. We thus conclude that defendant's petition lacked an arguable basis in fact. See *People v. Morris*, 236 Ill. 2d 345, 354 (2010) ("A petition lacks an arguable basis in fact when it is based on a “fanciful factual allegation,” which includes allegations that are “fantastic or delusional” or belied by the record").

¶ 47 We also reject defendant's related claim that appellate counsel was ineffective for failing to raise, on direct appeal, a challenge to trial counsel's ineffectiveness based on the foregoing issues. A defendant who argues that his appellate counsel was ineffective for failing to raise a particular issue on appeal must show that the failure to raise that issue was objectively unreasonable and that the decision prejudiced defendant. *People v. Childress*, 191 Ill. 2d 168, 175 (2000); *People v. Olinger*, 176 Ill. 2d 326, 365 (1997). Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from

raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Harris*, 206 Ill. 2d 1, 34 (2002). Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal. *Id*. As discussed above, we have found that defendant's underlying ineffective assistance of trial counsel issues have no merit, and accordingly, defendant cannot establish that he suffered prejudice from appellate counsel's failure to raise them on appeal. See *Childress*, 191 Ill. 2d at 175.

¶ 48 In sum, defendant failed to present an arguable basis in fact or in law that his trial or appellate counsels were ineffective. We thus affirm the trial court's summary dismissal of defendant's *pro se* post-conviction petition.

¶ 49 Affirmed.