

FIRST DIVISION
MAY 16, 2016

No. 1-13-3642

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. 04 CR 18747
)	
EMANUEL RIVERA-MARTINEZ,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed. Defendant failed to state an arguable claim of ineffective assistance of counsel for not investigating and calling a certain witness where he provided neither a supporting affidavit or other evidence nor a sufficient explanation for their absence.

¶ 2 Defendant Emanuel Rivera-Martinez 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 2012)). On appeal, defendant contends that his

petition stated the arguable basis of a claim that trial counsel was ineffective for failing to investigate and call a witness. We affirm.

¶ 3 Defendant and codefendants Alejandro Vega and Eugenio Lasso were charged with the November 2003 shooting deaths of Freddy Hurtado and Mario Montanez. Following a bench trial, defendant was convicted of the first degree murders of the two victims (720 ILCS 5/9-1(a)(1) (West 2002)) and sentenced to natural life imprisonment (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2002)). This court affirmed the convictions and sentence. *People v. Rivera-Martinez*, No. 1-08-3583 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 The evidence at trial showed that Ricardo Gomez was walking with the two victims and Renee Delgado when they noticed two men wearing hoods. The men said something to Gomez's group, but the group did not answer and kept walking. Gomez heard gunshots and saw Hurtado run. Montanez fell on top of Gomez. Gomez saw defendant, to his left, put a gun in his pocket and flee. Gomez saw a police officer and pointed defendant out to her. The officer chased after defendant. Gomez later identified defendant in a photo array and physical lineup as the shooter.

¶ 5 Amy Gonzales testified that she was standing outside the Last Chance bar at the corner of Lawndale and Fullerton Avenues on the night in question at 10 p.m. She saw a man, walking in the street with two other men, shoot a gun three times in the direction of two men on the corner. She identified defendant as the shooter in a photograph, a lineup and in court. She did not see anyone other than defendant with a gun that night.

¶ 6 Chicago police detective Cathleen Iser was riding in a police car when she heard gunfire. She exited the police car, jumped over a man who had fallen down, saw a muzzle flash and a

man firing a gun. She chased the shooter. Detective Iser saw the shooter throw the gun into the air by a garage. The shooter was eventually apprehended, and the gun was recovered. Detective Iser identified defendant as the shooter in court. She did not see anyone other than defendant discharge a weapon. Detective Iser acknowledged she failed to mention that she saw the muzzle flash come from defendant's gun in the police report she signed.

¶ 7 Codefendant Vega testified that he had an agreement with the state's attorney office that, in exchange for his truthful testimony at defendant's trial, the State would recommend 20 years' imprisonment for one of the two murders with which he was charged, and the other murder charge would be dropped. Vega testified that he was member of the YLO Cobras gang for 11 years and defendant was a fellow gang member.

¶ 8 Vega testified that he was with codefendant Lasso and "Georgie," whose last name he did not know, when, at 10 p.m., defendant approached them and requested a gun. Defendant told them there were some members of a rival gang, the Imperial Gangsters, on the corner of Fullerton and Lawndale Avenues and he wanted to get "rid" of them. Defendant asked Vega to watch his back.

¶ 9 Vega testified that Lasso went to his vehicle, retrieved a gun, and gave it to defendant. The four of them then started walking to Fullerton and Lawndale Avenues. Vega and Lasso looked out for police on the east side of Lawndale Avenue walking north while defendant was on the west side of Lawndale Avenue by the Last Chance bar. As Vega was walking, he saw several men exit a car and signal the YLO Cobra gang sign at him. Vega believed they were falsely signing because he did not recognize them. Vega then heard three gunshots, and saw defendant

firing the gun at these men. As Vega was running away, he heard a lot of gunshots. When he looked back, he saw a man in all black, someone he could not identify, also shooting a gun. Vega felt bullets passing him. In the recorded statement he gave in jail to an assistant state's attorney (ASA), he did not state that bullets went by his head or that someone was shooting at him.

¶ 10 Vega admitted that he was going to plead guilty to possession of a controlled substance with intent to deliver and would receive a six-year sentence of imprisonment concurrent with his murder sentence. He was also convicted in the past of a possession of a stolen motor vehicle and aggravated discharge of a firearm.

¶ 11 The parties stipulated that defendant's gun could hold 13 bullets and contained 7 bullets when found. There were 11 shell casings found in the area on the night in question. A bullet recovered from victim Montanez's body was tested and found to have been fired by the weapon discarded by defendant. Only a calcified bullet was recovered from the body of Hurtado from a previous wound, but there was evidence of an entrance and exit bullet which caused his death.

¶ 12 Defendant testified that, as he was walking south on Lawndale Avenue, he saw two men, one of whom he knew from the streets by the nickname Puppet G. Defendant stated that Puppet G., an Imperial Gang member, yelled, "[s]ecurity, bust out that bitch ass nigger G. He a Cobra." Defendant took this statement to mean that Puppet G. had asked someone to shoot him. Defendant saw several men exit a vehicle and start shooting at him. He took cover behind a parked car, took out his gun and returned fire. Defendant testified that he had not seen Vega or Lasso at all that day.

¶ 13 After he noticed a female police officer exit her car, he fled and threw the gun. He was eventually apprehended by police. Defendant testified that he had no intention of killing anyone, but, rather, was defending himself.

¶ 14 During closing arguments, defense counsel argued that the ballistics at the scene showed that there must have been another weapon fired that night because there were 11 shell casings found and defendant's gun only held 13 bullets, 7 of which were found in the gun. Counsel urged the court to find defendant not guilty by reason of self-defense, or, in the alternative, guilty of second degree murder.

¶ 15 At the close of evidence, the court found defendant guilty of two counts of first degree murder. It found credible the testimony of Amy Gonzales, Gomez and Detective Iser which suggested that defendant had fired first. The court commented that Vega was not the most credible witness because of his background, but was credible when he testified that he, defendant, and Lasso were looking for rival gang members to seek retaliation. The court admitted there were some questions raised regarding the number of shell casings found at the scene, but found the State proved defendant guilty beyond a reasonable doubt.

¶ 16 Defendant appealed, and raised two issues: (1) whether the State proved beyond a reasonable doubt that he was not justified in shooting the victims in self-defense, and (2) whether this court should reduce his conviction to second degree murder based on his belief that he needed to use deadly force in self-defense. In *Rivera-Martinez*, order at 10-11, this court found that the evidence at trial supported a finding by the trial court that defendant was not justified in shooting the victims in self-defense. This court found eyewitnesses Gomez, Amy Gonzales,

Detective Iser and Vega all testified that they did not hear any shots fired prior to the ones fired by defendant and the fact that there might have been two shooters did not absolve defendant of guilt in the light of these witnesses' credible testimony. *Rivera-Martinez*, order at pages 10-11. This court further found that defendant's first degree murder convictions should not be reduced to second degree murder because the mitigating factors to warrant a reduction of defendant's convictions did not exist. *Rivera-Martinez*, order at 11.

¶ 17 On June 18, 2013, defendant filed the instant *pro se* post-conviction petition, alleging, in relevant part, that he was denied effective assistance of trial counsel where counsel failed to interview and call as a witness, Jorge Gonzalez, to refute "co-defendants" testimony, which was used by the State to convict him.¹ Defendant alleged that "[p]rior to trial," he advised his counsel that he had talked to Gonzalez over the phone some time in 2004. Defendant alleged that, on September 1, 2004, Detective Raymond Schalk had requested an investigative alert on Gonzalez because he had been "identified by two co-defendants" as participating in the murder of Hurtado and Montanez. Defendant claimed Gonzalez told him that, once Gonzalez was aware that he was being pursued by police for questioning, he turned himself in sometime in September 2004. Defendant alleged that Gonzalez denied to the police all allegations that were made against him by codefendants Vega and Lasso and was not charged in the case. Defendant asserted that on September 15, 2004, Detective Schalk requested that the investigative alert on Gonzalez "be expired."

¹ Defendant alleges in his petition that "co-defendants" testified against him but only codefendant Vega testified at trial. Codefendant Lasso gave a recorded statement to police but did not testify.

¶ 18 Defendant claimed that Detective Schalk would not have requested the investigative alert to "be expired" unless he had thoroughly interrogated Gonzalez. He argued that his counsel should have thoroughly investigated what was said to Detective Schalk by Gonzalez. Defendant maintained that, had counsel conducted a thorough investigation prior to trial and called Gonzalez as a witness, the outcome of the trial would have been different. He asserted Gonzalez would have refuted codefendants' testimony against defendant that he had walked up to them and Gonzalez asking for a gun and their help as lookouts. He alleged that Gonzalez would have helped prove that defendant "did not have any type of involvement" with the shootings, and would have established that codefendants Vega and Lasso falsely implicated defendant. Defendant further alleged that he wrote the Chicago Police Department (CPD) under the Freedom of Information Act (FOIA) requesting all investigative reports in regards to Gonzalez, but the office responded that they did not have any such records. Defendant maintained that this was disturbing as Detective Schalk must have interrogated Gonzalez. He requested that Gonzalez and Detective Schalk be subpoenaed to address this issue.

¶ 19 Defendant alleged that he had tried to obtain affidavits from all the individuals listed on the petition and police reports, but he had been unable to do so because he was incarcerated, indigent and unable to locate the witnesses without the assistance of the court.

¶ 20 In support of his petition, defendant attached, *inter alia*, his own affidavit averring that, due to constant lockdowns at prison and six months of segregation, he was unable to file his petition on time. He also averred that his trial counsel was ineffective for failing to conduct any type of investigation in his case or call important witnesses to testify on his behalf.

¶ 21 Defendant also attached a copy of an investigative alert stating that Gonzalez had been identified by "two co-defendants" as participating in the double homicide, and copies of forms showing the investigative alert was "expired." He further attached various police reports related to the incident, and a letter from the CPD Freedom of Information Office. The letter informed him that the CPD data base had no records responsive to defendant's FOIA request for "all investigative reports in regards to *** Gonzalez, conducted by [Detective Schalk] that took place September 1, 2004, through September 15, 2004."

¶ 22 The circuit court dismissed defendant's petition, finding it frivolous and patently without merit. The court concluded, in relevant part, that defendant failed to demonstrate that defense counsel's performance was arguably deficient for failing to investigate and call Jorge Gonzalez as defendant failed to attach an affidavit from Gonzalez and his claim was, therefore, conclusory.

¶ 23 On appeal, defendant contends that he presented an arguable claim of ineffective assistance of trial counsel where counsel failed to investigate the substance of Gonzalez's statement to police and call him as a witness. Defendant asserts that, since Gonzalez was implicated by Vega and Lasso but not arrested, he must have given police a different version of events than Vega. Defendant claims Gonzalez's version of the shooting would have corroborated defendant's self-defense theory or supported a finding that defendant unreasonably believed he was justified in using deadly force.

¶ 24 At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead enough facts to assert an

arguably constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *Id.* at 16. Our review of a first-stage dismissal is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 25 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. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 26 A *pro se* petitioner is not excused from providing any factual detail whatsoever surrounding the alleged constitutional violation. *Hodges*, 234 Ill. 2d at 10. Section 122-2 of the Act requires: "the petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." *Id.* (quoting 725 ILCS 5/122-2 (West 2006)). The purpose of this requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *Id.* at 10 (citing *People v. Delton*, 227 Ill. 2d 247, 254 (2008)). "Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *Id.* (quoting *Delton*, 227 Ill. 2d at 254-55).

¶ 27 Where, as here, defendant alleges ineffective assistance of counsel for failure to investigate and present a witness, defendant must set forth sufficient facts to establish a constitutional violation for purposes of invoking the Act. *Hodges*, 234 Ill. 2d at 17-18. Besides a summary of the witness's testimony and an allegation that the defendant told counsel regarding the witness, the defendant must also attach affidavits or some other factual documentation that allows independent corroboration of the allegation. *Id.* at 18-19. The affidavit and exhibits must identify with reasonable certainty the sources, character and availability of the alleged evidence supporting the petition's allegations. *Delton*, 227 Ill. 2d at 254 (citing *People v. Johnson*, 154 Ill. 2d 227 (1993)). If the petitioner does not set forth some facts which can be corroborated and are objective in nature, he must explain why this corroboration is absent. *Delton*, 227 Ill. 2d at 254-55. Failure to attach the necessary affidavits, records or other evidence or explain their absence is fatal to a petition and justifies its summary dismissal. *Id.* at 255. If a defendant fails to properly support a petition under section 122-2, the court need not reach the question of whether the petition set forth the gist of a constitutional claim. *Id.*

¶ 28 Defendant claims trial counsel was ineffective for failing to investigate and call Gonzalez, whose testimony would have refuted that of Vega implicating defendant. His claim, therefore, must be supported by an affidavit from Gonzalez (*People v. Enis*, 194 Ill. 2d 361, 380 (2000)), but defendant did not provide one. In the absence of such an affidavit, we cannot determine whether Gonzalez would have provided testimony or information favorable to defendant, and further review of his claim is unnecessary. *Id.* None of defendant's allegations regarding Gonzalez's testimony are corroborated. They are entirely speculative. Unless defendant

provides a satisfactory explanation regarding the absence of the affidavit, this absence is fatal to his petition. *Delton*, 227 Ill. 2d at 255.

¶ 29 In defendant's *pro se* petition, he asserts he could not obtain an affidavit from Gonzalez because he was incarcerated and indigent and unable to locate the witnesses without the assistance of the court. This explanation is insufficient to excuse the absence of affidavits. Relief under the Act is available only to persons "imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2012). Consequently, the vast majority of post-conviction petitions are filed by defendants who are incarcerated and indigent. Although attaching the required documentation will, in some cases, place an unreasonable burden on post-conviction petitioners that does not mean that petitioners are relieved of bearing any burden whatsoever. *Collins*, 202 Ill. 2d at 68. On the contrary, section 122-2 of the Act makes it clear that a petitioner who is unable to provide the required corroborating documentation must at least explain why such evidence is unobtainable. *Id.* Defendant's status as a prisoner does not excuse his failure to provide the required affidavit or an adequate explanation for its absence.

¶ 30 Defendant's failure to attach an affidavit supporting his claims regarding Gonzalez's testimony and properly explaining its absence is fatal to his claim of ineffective assistance of counsel for counsel's failure to investigate and call Gonzalez. *Id.* at 66. Accordingly, we need not reach the question of whether defendant's petition stated the gist of a constitutional claim to survive summary dismissal. *Delton*, 227 Ill. 2d at 254-55; *People v. Brown*, 2014 IL App (1st) 122549, ¶¶ 46, 49.

¶ 31 Defendant argues the lack of a supporting affidavit is not determinative of whether he has failed to state "the gist" of a meritorious constitutional claim as required in *Hodges*, 234 Ill. 2d 1. He argues courts have eschewed the "affidavit-centric notion" set forth in *Delton*, following *Collins*, 202 Ill. 2d 59, "which supposedly made affidavits a requirement for every successful petition."

¶ 32 As explained by our supreme court in *Delton*, a post-conviction case "presents two questions: (i) Did [the defendant] properly support his petition under section 122-2? And if so (ii) did his petition set forth the gist of a constitutional claim so as to survive the first-stage postconviction scrutiny? If this court answers the first question in the negative, it need not reach the second." *Delton*, 227 Ill. 2d at 255.

Thus, a defendant may state the gist of a constitutional claim in a petition but, unless that claim is supported by independent, corroborating evidence of the variety set forth in section 122-2, the petitions fails notwithstanding the "gist" presented.

¶ 33 As defendant points out, in *People v. Hanks*, 335 Ill. App. 3d 894, 899 (2002), we held: "We do not construe the ruling in *Collins* [relied on in *Delton*] to require an affidavit in every post-conviction petition." Instead, in *Hanks*, 335 Ill. App. 3d at 898-99, "the record, the contents of the court file and the exhibits allow for objective and independent corroboration of the allegations." *Id.* In *Hanks*, 335 Ill. App. 3d at 898-99, no affidavit from defendant's brother

regarding his recollection of a certain juror was necessary where the juror's prior acquaintance with defendant and his brother was reflected in the record.

¶ 34 Similarly, in *People v. Morris*, 335 Ill. App. 3d 70, 74, 85-86 (2002), the defendant's failure to attach affidavits from alleged alibi witnesses was not fatal to his post-conviction petition where the record contained the trial court's *voir dire* of these witnesses and the defendant had attached affidavits from himself, his mother, and trial counsel. In *People v. Hernandez*, 351 Ill. App. 3d 28, 35 (2004), the defendant was not required to provide evidence other than his own sworn statement where any further verification of his allegations of ineffective assistance would have had to come from his trial counsel.

¶ 35 Here, unlike in *Hanks* and *Morris*, there is no corroborating evidence of any kind in the record as to the contents of Jorge Gonzalez's testimony. In fact, defendant's claim that Gonzalez gave a statement to police is positively rebutted by the record where the FOIA response from the CPD indicated that there was no such statement for the time period provided by defendant. See *Coleman*, 183 Ill. 2d at 381-82 (the trial court may summarily dismiss a post-conviction petition if the allegations in the petition are positively rebutted in the record)). Further, unlike in *Hernandez*, the only evidence supporting defendants' claim would not come from defense counsel. Therefore, an affidavit from Gonzalez was required to support defendant's ineffective assistance claim. *Enis*, 194 Ill. 2d at 380. Without independent corroboration of defendant's allegations regarding the value or content of Gonzalez's testimony, those allegations are purely speculative. A successful post-conviction petition is not based on speculation. *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997); *People v. Williams*, 2015 IL App (1st) 131359, ¶¶ 32-34.

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We, therefore, conclude that the trial court did not err in summarily dismissing defendant's post-conviction petition as frivolous and patently without merit.

¶ 36 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition.

¶ 37 Affirmed.