

No. 1-14-0016

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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. 04 CR 1489
)	
EDWARD TRAYWICK,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of defendant's postconviction petition was proper where defendant did not attach an affidavit or other documentation supporting his claim of ineffective assistance of trial counsel for failure to call an expert witness.
- ¶ 2 Following a jury trial, defendant Edward Traywick was found guilty of first-degree murder and sentenced to 40 years' incarceration. Through private counsel, he filed a 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 an expert witness to testify about false confessions. We affirm the judgment of the trial court.

¶ 3 The evidence at trial established that Bryan Ricks died after being shot in the chest. One bystander was coming home from work on December 4, 2003, when he heard two or three gunshots. He turned towards the shots and saw two men running away from a green car. Ricks exited the car and crossed the street before falling down. After the shooting, Ricks's stepmother arrived and found a large group of people, including defendant, standing near Ricks. She heard defendant twice state, "It wasn't supposed to go down like that."

¶ 4 The State's theory of the case was that defendant, codefendant Jessie Wilkes, and Brian Jett had formed a plan to rob Ricks during a drug deal arranged by defendant. During the robbery, one of the other men shot Ricks. The State's case relied primarily on multiple statements defendant made to investigators on December 4, December 14, December 17, and December 18, 2003.

¶ 5 According to Chicago police detective Mark Pacelli, police officers brought defendant to the police station for an interview on December 4, 2003, shortly after the shooting. Defendant stated that he was in Ricks's car prior to the shooting when Ricks indicated that he needed to deliver some marijuana and asked defendant to accompany him. Defendant agreed, but first left the car to lock his apartment door. He noticed two men named "Fudd" and "Black" walking past the car. Before entering his apartment building, defendant heard four gunshots. When defendant left the building, Ricks walked towards him stating he had been shot. Defendant saw Fudd and Black running from the area.

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¶ 6 Defendant again spoke with police officers on December 14, 2003. According to Chicago police detective Derail Easter, defendant repeated the statements he had made to officers on the day of the shooting. He stated, however, that he had been mistaken and a man named "Block," not "Black," had been involved. Defendant was able to identify Block in a photo array.

¶ 7 Police officers interviewed defendant again on December 17, 2003. According to Easter, when officers told defendant that they were unable to find Block or Fudd, he confessed that "there is no Block or Fudd." Defendant then indicated that Jett and Wilkes were the men involved. Later that day, defendant spoke with Chicago detective Dion Boyd. According to Boyd, defendant stated that he had met with Jett on the afternoon of the shooting. Jett asked if defendant knew anyone with marijuana and defendant indicated that Ricks had marijuana. Jett asked if Ricks was a "victim" and if defendant cared if Jett "got him." Defendant told Jett "[d]on't you all do that," but he proceeded to call and arrange a meeting between Jett, Wilkes, and Ricks. Defendant further stated that he met in Ricks' car that night. When Jett and Wilkes arrived he introduced them to Ricks and left. As he reached his apartment building, he looked back and witnessed a struggle in the car. He heard gunshots and saw Wilkes and Jett flee.

¶ 8 Defendant made a video-recorded statement to assistant state's attorney Ted Lagerwall on December 18, 2003. Defendant told Lagerwall that he had been treated "fine" by the police officers, and Lagerwall did not notice any injuries on defendant. In his statement, defendant admitted that he, Jett, and Wilkes had formed a plan to rob Ricks of his marijuana on December 4, 2003. He stated that he called Ricks to meet with him under the pretense of purchasing marijuana, and that he was aware Wilkes and Jett had a firearm in their possession when they met with Ricks.

¶ 9 At trial, defendant denied forming a plan to rob Ricks; rather, he testified that the three men only discussed purchasing marijuana from Ricks. According to defendant's testimony, when Ricks arrived at the meeting location, defendant entered the car and observed Jett approach the driver's side door and aim a gun at Ricks. At that point, defendant, who wanted nothing to do with Jett's conduct, exited the vehicle and walked across the street to his home. Hearing gunshots, defendant turned around and observed Jett shoot at Ricks and flee. Defendant also testified that during his time at the police station from December 17, 2003 to December 19, 2003, the police officers denied his repeated requests to leave, to use the telephone, and to have the presence of an attorney. He further testified that he was never advised of his *Miranda* rights, that he was denied the opportunity to sleep, and that he was only given minimal food and drink at the police station. According to the defendant, Detective Boyd punched him several times in the ribs and lower back area until he agreed to make a videotaped statement from a script provided by Detective Boyd. The parties stipulated that in February 2004 defendant went to a hospital and a doctor diagnosed him with "chest wall contusions consistent with being punched in the ribs."

¶ 10 The jury found the defendant guilty of first-degree murder under a theory of accountability, but not guilty of armed robbery. This court affirmed defendant's conviction on direct appeal. *People v. Traywick*, 2012 IL App (1st) 100670-U.

¶ 11 Defendant filed a postconviction petition on June 26, 2013, with the assistance of counsel. Counsel amended that petition on August 19, 2013. In the amended petition, defendant alleges, *inter alia*, that he was denied due process because police officers coerced his confession and that trial counsel was ineffective for not presenting expert testimony on the subject of false

confessions. As to the coercion claim, defendant's petition noted that he had raised the claim on direct appeal, but argued that appellate counsel was ineffective for not addressing the additional points regarding coercion contained within the petition. Defendant attached several news articles and documents regarding lawsuits involving alleged misconduct by Detective Boyd to his petition. The trial court summarily dismissed the petition. Defendant appeals.

¶ 12 Defendant contends that trial counsel was constitutionally ineffective for failing to call an expert witness to testify regarding false confessions in support of his claims that his statements were the products of police coercion. He has abandoned the remaining claims in his petition on appeal. He asserts that most jurors are unable to understand why an individual would falsely confess, and cites numerous studies laying out risk factors that indicate a false confession. He argues that had jurors heard about such risk factors, they likely would have found that defendant's statements were false confessions, and consequently found him not guilty. The State responds that defendant's petition must fail because it is not supported by an attached affidavit from a potential expert witness and does not contain an explanation for why such an affidavit is missing. It argues alternatively that defendant's claim has no merit because defendant has not shown that such false confession testimony would be admissible at trial and he has not shown that the absence of expert testimony arguably prejudiced him.

¶ 13 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).

¶ 14 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 postconviction 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 of its claims, or otherwise "state why the same are not attached." 725 ILCS 5/122-2 (West 2012). We review the first stage dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 15 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). Our supreme court recently explained that while a defendant is not necessarily required to present a notarized affidavit at the first stage, some form of corroborative evidence must be attached to his or her petition. See *People v. Allen*, 2015 IL 113135, ¶¶ 25-38. 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.

¶ 16 Defendant did not attach the required supporting affidavit to his petition or explain why it is not present. The trial court's dismissal of his petition was therefore proper. *Collins*, 202 Ill. 2d at 66. While defendant concedes that he has not attached an affidavit, he asserts that there are numerous experts and a "plethora of studies" which could have been used to support his claims. Even accepting, *arguendo*, these assertions as true, our holding would remain the same. Section 122-2 of the Act specifically requires that a petitioner attach supporting documentation to his or her petition or explain its absence. 725 ILCS 5/122-2 (West 2012). Defendant's petition fails to set forth with any specificity or certainty whom trial counsel should have called as a witness, whether that witness would have agreed to testify, or what specifically that person's testimony

would have been. Because defendant has not identified an actual witness or any definite testimony, his claims remain highly speculative and lack the corroboration required by the statute. Furthermore, defendant provides no explanation for his failure to corroborate his claim. His petition does not allege that he has contacted any potential witnesses nor explain why he was unable to do so. As such, he has failed to meet the pleading requirements of section 122-2 and the dismissal of his petition was proper. *Collins*, 202 Ill. 2d at 68.

¶ 17 We note that even if we were to look past defendant's failure to attach supporting documentation to his petition, his petition would still fail because it does not set forth an arguable claim of ineffective assistance of trial counsel. At the first stage of proceedings, defendant was required to show that "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185. As previously discussed, defendant's petition does not indicate a particular witness or provide specific testimony that counsel should have presented during trial. His broad claim that multiple experts exist does not inform us whether such witnesses were known or available to trial counsel. See *People v. Bell*, 152 Ill. App. 3d 1007, 1012 (1987) (Failure to investigate and call witnesses "may indicate incompetence when trial counsel knows of the witnesses and their testimony may be exonerating.") His failure to provide definite testimony from a potential expert prevents a determination of whether such testimony was relevant or helpful to the jury. See *People v. Allen*, 376 Ill. App. 3d 511, 522 (2007) (holding that a court must consider the "necessity and relevance of the expert testimony" when determining its admissibility); see also *People v. Bennett*, 376 Ill. App. 3d 554, 571 (2007) ("Expert testimony is proper where such testimony is needed to explain matters beyond the common knowledge of

ordinary citizens, and where such testimony will aid the fact finder.") Without this information, we cannot find that counsel's decision not to call such a witness was arguably unreasonable or determine whether defendant was arguably prejudiced. Consequently, defendant's petition does not set forth an arguable claim of ineffective assistance of counsel.

¶ 18 Defendant also contends that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal because this issue "was apparent from the record." The question of whether appellate counsel was ineffective for failing to raise an issue on direct appeal is analyzed under the same rubric as a claim of ineffective assistance of trial counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Appellate counsel is not required to brief meritless issues on appeal, and therefore a claim of ineffective assistance of appellate counsel must fail where the underlying claim is meritless. *Id.* at 163-64. Because we have already determined that defendant's underlying claim of ineffective assistance of trial counsel is meritless, his claim of ineffective assistance of appellate counsel for failing to raise that issue must also fail.

¶ 19 For the foregoing reasons, we find that defendant failed to adequately support his postconviction petition claiming ineffective assistance of counsel, and thus the trial court's dismissal of the petition was proper. Because his underlying claim of ineffective trial counsel is without merit, we also find that appellate counsel was not ineffective for failing to raise the issue on direct appeal. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.