2018 IL App (1st) 153590-U
Order filed: May 18, 2018

FIRST DISTRICT
FIFTH DIVISION

Nos. 1-15-3590 and 1-16-0222 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 27938
	)	
EDGAR FERNANDEZ,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: First-stage dismissal of postconviction petition is affirmed, where: (1) specific assertions of ineffective assistance of counsel with respect to petitioner's direct appeal were not raised in *pro se* postconviction petition; and (2) documents allegedly supporting a claim of ineffective assistance of trial counsel were first presented to trial court in motion to reconsider the dismissal of the postconviction petition.

¶ 2 In these consolidated appeals, petitioner-appellant, Edgar Fernandez, appeals from the first-stage dismissal of his *pro se* postconviction petition. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Petitioner was charged by indictment with—*inter alia*—multiple counts of first-degree murder, each of which generally alleged that he shot and killed Luis Jimenez on or about

October 23, 2004. Following extensive pretrial proceedings—involving petitioner's unsuccessful motions to suppress statements, quash arrest and suppress evidence, and the withdrawal of petitioner's initial plea of guilty—this matter proceeded to a jury trial in October of 2012.

¶ 5 The trial proceedings and the evidence presented at trial were set out in our prior order, entered upon petitioner's direct appeal, and need not be fully restated here. See *People v. Fernandez*, No. 1-13-0363 (2014) (unpublished order under Supreme Court Rule 23). It is sufficient to note that at trial, the State presented evidence that the victim died as a result of a single gunshot wound to the back of his head. It was undisputed at trial that, shortly before 11 p.m. on October 23, 2004, petitioner fired the gunshot that killed the victim. Rather, the primary issue at trial was whether or not petitioner should be convicted of first-degree murder, with the petitioner arguing that he should be convicted of—at most—second-degree murder because he reasonably acted in defense of another.

¶ 6 After the State rested its case, petitioner's motion for a directed verdict was denied, and petitioner thereafter introduced no further evidence at trial. At a jury instruction conference, it was determined that the jury would be instructed on both first and second-degree murder, over the State's objection. Following the parties' subsequent closing arguments, the jury found petitioner guilty of first-degree murder. Petitioner's motion for a new trial was denied, and petitioner was ultimately sentenced to a term of 45 years' imprisonment. A timely notice of direct appeal was thereafter filed.

¶ 7 On direct appeal, petitioner contended that he was denied a fair trial where, during its closing and rebuttal arguments, the State improperly misstated the law, argued facts not in evidence, and made comments designed solely to inflame the passions of the jury. We rejected each of petitioner's arguments, and affirmed his conviction. *Id.*

¶ 8 Pursuant to the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq*. (West 2014)), petitioner thereafter filed a *pro s*e postconviction petition contending that—for a host of reasons—his trial and appellate counsel provided ineffective assistance. Petitioner's postconviction petition was summarily dismissed at the first stage of proceedings, and petitioner filed a notice of appeal (appeal No. 1-15-3590). Petitioner thereafter filed a motion to reconsider the denial of his postconviction petition. After that motion was denied, petitioner filed a second notice of appeal (appeal No. 1-16-0222). By order of this court, these appeals have been consolidated.

¶ 9 II. ANALYSIS

¶ 10 As noted above, in these consolidated appeals petitioner challenges the summary dismissal of his postconviction petition.

¶ 11 The Act provides a procedural mechanism through which a petitioner may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2014). At the first stage of a postconviction proceeding, the circuit court independently reviews the petitioner's petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it "has no arguable basis in either fact or law." *Id*. at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). A petition lacks an arguable basis in fact or law when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an indisputably meritless legal theory is one that is "completely contradicted by the record." *Id*. at 16-17.

¶ 12 To state a claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong, deficiency and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner alleging ineffective assistance of counsel at the first stage of postconviction proceedings must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that petitioner was prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (citing *Hodges*, 234 Ill. 2d at 17).

¶ 13 We review the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10. Thus, we review the circuit court's judgment rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 14 On appeal, petitioner first contends that his petition was improperly dismissed at the first stage because he sufficiently stated a claim that the counsel representing him on his direct appeal was arguably ineffective only for failing to challenge the orders denying his pretrial motions to suppress evidence and quash arrest. As the State correctly notes, however, and as petitioner essentially concedes, while the petition included other claims of appellate counsel's ineffectiveness, this argument was not *specifically* raised below in the *pro se* postconviction petition.

¶ 15 The Act specifically provides that a postconviction petition "shall * * * clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2014). The Act also provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014). As such, it is well-recognized that "claims not raised in a petition cannot be argued for the first time on appeal," and this court may not overlook the language contained in section 122-3 of the Act

and address claims raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505-06 (2004).

¶ 16 While petitioner essentially concedes that he did not specifically raise this claim below, he does note that his petition did assert a claim of ineffective assistance for his appellate counsel's purported "failure to raise any viable claim[s] which were preserved." On appeal, petitioner contends that this language alone, when "liberally construed," encompasses his current argument regarding the purported ineffectiveness of appellate counsel. In making this argument, petitioner relies upon both his *pro se* status below and on the "low threshold" applicable to the first stage of postconviction proceedings.

¶ 17 We disagree. A petitioner's *pro se* status is not an excuse for the failure to comply with the requirements of the Act. *Jones*, 213 Ill. 2d at 505–06; *People v. Vilces*, 321 Ill. App. 3d 937, 939-40 (2001). In addition, and even in light of the low threshold and liberal construction applicable at the first stage, claims that were at best *implicitly* raised below may not be raised on appeal. *People v. Cole*, 2012 IL App (1st) 102499, ¶¶ 11-16; *People v. Reed*, 2014 IL App (1st) 122610, ¶ 63 (appellate court should not recognize "a nonspecific claim of ineffective assistance of appellate counsel that is not clearly set forth in the petition"); *Jones*, 213 Ill. 2d at 508 (appellate court is not free to excuse an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition).

¶ 18 We, therefore, find petitioner's specific claim of ineffective assistance of appellate counsel, raised for the first time on appeal, to be barred by section 122-3 of the Act.

¶ 19 Petitioner's remaining argument is that his petition was improperly dismissed at the first stage because he sufficiently stated a claim that his trial counsel was arguably ineffective for

failing to call his two brothers as witnesses at trial, where they would have testified that someone else shot the victim. We reject this argument for a number of reasons.

¶ 20 First, and as petitioner admits on appeal, his "petition did not explain how his brothers would have testified had they been called as a witness." As such, his petition once again failed to meet the Act's requirement that a postconviction conviction "shall * * * clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2014).

¶ 21 Indeed, the petition itself only obliquely asserts that petitioner told his trial counsel to speak with his two brothers, "and they would testify who killed Luis Jimenez." While this statement might arguably support a claim of actual innocence or that petitioner would not have been found guilty at all, the petition itself only faults trial counsel for failing to call witnesses in support of the pretrial motions and petitioner's claim he reasonably acted to protect another. It was not until petitioner filed the motion to reconsider the dismissal of his petition that he affirmatively indicated that his two brothers would testify that someone else shot the victim and that he was prejudiced by trial counsel's failure to present that testimony in support of a claim that defendant did not shoot the victim at all. As such, petitioner arguably violated the well-recognized principle that a petitioner is not allowed to wait until after his petition has been summarily dismissed to file a motion to reconsider raising new arguments in support of a dismissed petition. *Vilces*, 321 Ill. App. 3d at 939; *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 31, appeal allowed, 2017 WL 4391797 (Ill. Sept. 27, 2017).

¶ 22 Even if petitioner's assertion that trial counsel was ineffective for failing to call his two brothers as witnesses in support of a claim he did not shoot the victim was properly raised in the initial petition, it was not properly supported. It is well recognized that, where a petitioner alleges

in his petition that trial counsel was ineffective for failing to present evidence at trial, the petition must include affidavits and exhibits identifying, with reasonable certainty, the sources, character, and availability of the alleged evidence supporting the petitioner's allegations. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Although a petitioner is not required to present a notarized affidavit at the first stage, some form of evidence demonstrating that the petitioner's allegations are capable of corroboration must be attached to the petition. *People v. Allen*, 2015 IL 113135, ¶ 34. The "failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 23 Petitioner again concedes on appeal that he did not attach to his petition affidavits from his two brothers specifying how they would have testified at trial. Moreover, the explanation he provided for their absence—the simple fact that he was incarcerated—was insufficient. Although attaching the required documentation will, in some cases, place an unreasonable burden on post-conviction petitioners, this fact 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*. Because relief under the Act is available only to persons "imprisoned in the penitentiary" (725 ILCS 5/122-1(a) (West 2014)), defendant's mere status as a prisoner does not excuse his failure to provide the required affidavits; to say otherwise would improperly render the requirements of section 122-2 of the Act superfluous.

¶ 24 It was only when petitioner filed his motion to reconsider the summary dismissal of his petition that he provided the court with unsigned, unnotarized "affidavits" from his two brothers. However, while there is some support for allowing a petitioner to provide new evidence in the

form of signed, notarized affidavits in support of a motion to reconsider the summary dismissal of a postconviction petition (*People v. Coleman*, 2012 IL App (4th) 110463, ¶ 62), the unsigned and unnotarized affidavits submitted here in connection with petitioner's motion to reconsider do not meet that standard. Moreover, petitioner's explanation as to why the affidavits attached to the motion to reconsider were unsigned and unnotarized—that petitioner was "in segregation"—is also insufficient. See, *e.g.*, *People v. Scullark*, 325 Ill. App. 3d 876, 887-88 (2001) (recognizing that for a petitioner to rely upon the fact that he was in segregation as an excuse for failing to comply with the Act, he must also allege that he was in segregation through no fault of his own).

¶ 25 And finally, we note that petitioner had never explained how the content of his brothers' affidavits—which he specifically asserts was information known to them, petitioner, and trial counsel before trial—was newly discovered evidence that he could not have presented with his initial petition. The summary dismissal of a postconviction petition is a final judgment in a civil proceeding, with respect to which a petitioner may file a motion to reconsider as in any other civil proceeding. *People v. Dominguez,* 366 Ill. App. 3d 468, 472 (2006). The "purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law." *Pence v. Northeast Illinois Regional Commuter R.R. Corp*., 398 Ill. App. 3d 13, 16 (2010). The absence of such a reasonable explanation is itself a sufficient basis to reject a motion to reconsider, regardless of the contents of the newly proffered evidence. *Gardner v. Navistar International Transportation Corp*., 213 Ill. App. 3d 242, 248 (1991).

¶ 26 In light of petitioner's failure to allege the nature of his brothers' purported testimony in the petition, his failure to attach the necessary, signed affidavits or other evidentiary support to his petition, and considering the above authority, we reject petitioner's challenge to the dismissal

of this specific claim of ineffective assistance of trial counsel. Moreover, because petitioner has raised no argument on appeal that any of the other claims in his postconviction petition were improperly dismissed, those claims have been waived. *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010); Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017).

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the summary dismissal of petitioner's postconviction petition.

¶ 29 Affirmed.