

NOTICE
Decision filed 09/26/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 150310-U

NO. 5-15-0310

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 09-CF-1130
)	
DORIAN E. BOYD,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in dismissing defendant’s postconviction petition at the first stage of the proceedings where the petition set forth the gist of a constitutional claim of ineffective assistance of trial counsel. We reverse and remand for further proceedings.

¶ 2 Following a jury trial, defendant, Dorian Boyd, was convicted of first-degree murder and was sentenced to 40 years in prison. Defendant’s conviction and sentence were affirmed on direct appeal. *People v. Boyd*, 2014 IL App (5th) 110481-U. Defendant filed a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)), raising numerous claims of ineffective assistance of counsel.

¶ 3 After reviewing the petition and record, the circuit court entered an order summarily dismissing defendant's petition, finding his claims were frivolous and without merit, and that the petition did not raise the gist of a constitutional claim. Defendant appealed. For the reasons that follow, we reverse and remand for further proceedings.

¶ 4 On September 22, 2009, Dion Hardin was shot while he stood on the front porch of a nightclub in Brooklyn, Illinois. Hardin had just stepped outside of the club, when a man approached him and shot him once in the chest. Several other men, including defendant's cousin Justin Harper, were standing outside the entrance to the club when Hardin was shot and they ran off after the shooting.

¶ 5 Shortly after the shooting, police made contact with three men inside of a vehicle parked near the club. Justin Harper was sitting in the front passenger seat of the vehicle. Police seized a .45-caliber handgun found beneath Harper's seat, and Harper was subsequently charged with aggravated unlawful use of a weapon. Testing revealed that a bullet fragment removed from Hardin's body and a spent shell casing recovered from the scene of the shooting were both fired from the handgun seized from the vehicle.

¶ 6 At trial, the State admitted evidence from the club's surveillance system which had recorded the shooting. Several witnesses who were not present during the shooting testified, and identified defendant as the man in the surveillance video seen confronting Hardin immediately before he was shot. The State also called Christopher Adams, who was on the porch at the time of the shooting, and witnessed the shooting. At trial, Adams identified defendant as the shooter, stating he saw defendant draw a pistol from his waistband and shoot Hardin. Adams acknowledged he initially told police he was unsure

who shot Hardin and that he had agreed to testify at trial pursuant to a deal he had made with the State. The jury found defendant guilty of first-degree murder. Defendant appealed, and we affirmed defendant's conviction and sentence.

¶ 7 In June 2015, defendant filed a petition for postconviction relief, alleging ineffective assistance of trial and appellate counsel. Although defendant raised numerous claims of ineffective assistance of counsel, only one of his claims is at issue in this appeal. In the petition, defendant alleged trial counsel was ineffective for failing to conduct a reasonable investigation by interviewing three eyewitnesses to the shooting, who could have corroborated defendant's theory of defense. The petition alleged trial counsel should have interviewed Deontri Wiley, Andre Murray, and Travon Wiley, three of the men outside of the club at the time of the shooting. Defendant alleged the three men gave detailed videotaped statements to police shortly after the shooting, in which they all stated they did not see defendant with a gun. In support of his claim, defendant attached to the petition the investigative reports produced by police, summarizing the interviews of these three eyewitnesses.

¶ 8 The attached reports indicated Deontri Wiley told police he was at the club when Hardin was shot and knew most of the individuals present that evening. Deontri saw "D" move toward Hardin and then he heard a gunshot. Deontri told police he did not see anyone with a gun before the shooting. Andre Murray told police he was on the club's porch steps when the fight occurred. Murray saw Hardin exit the club, "get smacked" by someone identified as "Big D," and then get shot. Murray stated he did not see the gun when the fight occurred. Travon Wiley told police he was at the club when he heard a

gunshot. Travon stated he did not see anyone with a gun and did not know who shot Hardin.

¶ 9 In dismissing defendant's petition, the circuit court found, generally, that defendant's allegations were "unsupported conclusions" and noted that defendant did not provide affidavits as to what the potential witnesses' testimony would be. The court dismissed defendant's petition, finding defendant's claims to be frivolous and without merit, and that the petition did not raise the gist of a constitutional claim. The circuit court did not specifically address defendant's contention that his trial counsel was ineffective for failing to investigate the Wileys and Murray as potential witnesses.

¶ 10 The Post-Conviction Hearing Act provides a three-stage procedure through which a defendant can challenge his conviction based on allegations of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage, the postconviction court reviews the defendant's petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The petition is considered frivolous or patently without merit only if the petition's allegations, taken as true, fail to present the gist of a meritorious constitutional claim. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The court may summarily dismiss a petition as frivolous and patently without merit when it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16; 725 ILCS 5/122-2.1(a)(2) (West 2014). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. The petition must

allege sufficient facts to demonstrate an arguable constitutional claim, but need only contain a limited amount of detail. *Hodges*, 234 Ill. 2d at 9. This court reviews the circuit court’s dismissal of the defendant’s petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 11 The petition must be supported by “affidavits, records, or other evidence *** or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2014); *Collins*, 202 Ill. 2d at 65. The purpose of section 122-2 is to establish that the allegations in the petition are capable of “objective or independent corroboration.” *Collins*, 202 Ill. 2d at 67; *People v. Allen*, 2015 IL 113135, ¶ 34. The documents attached to the petition must “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); *Allen*, 2015 IL 113135, ¶ 34. Failing to provide supporting affidavits or other documents, or to explain their absence, is a sufficient basis on which to summarily dismiss a postconviction petition at the first stage. *Collins*, 202 Ill. 2d at 66.

¶ 12 Claims of ineffective assistance of counsel are evaluated under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel’s performance fell below an objective standard of reasonableness and that he suffered prejudice as a result of counsel’s deficient performance. *Hodges*, 234 Ill. 2d at 17. To survive dismissal during the first stage, a defendant alleging ineffective assistance of counsel must demonstrate that it is arguable that counsel’s performance fell below an objective standard of reasonableness and that he was prejudiced by counsel’s deficiency. *Hodges*, 234 Ill. 2d at 17.

¶ 13 On appeal, defendant argues the circuit court erred in dismissing his petition at the first stage of postconviction proceedings because the petition set forth the gist of a constitutional claim with respect to his allegation that his trial counsel was ineffective for failing to interview potential defense witnesses identified in the police reports. The petition alleged Deontri Wiley, Andre Murray, and Travon Wiley were present at the scene of the crime and gave statements to police that they did not see defendant with a gun. At trial, defendant's defense was that he was not armed during the incident and that the actual shooter was Justin Harper, who was present at the scene and was subsequently charged with unlawful use of the murder weapon. The potential witnesses' statements given to police were consistent with the defense theory employed during trial.

¶ 14 Defendant supported his allegations by attaching copies of the investigative reports produced by police summarizing the potential witnesses' statements. These reports constituted "other evidence" which demonstrated that defendant's allegations were capable of corroboration, and identified the sources, character, and availability of evidence supporting the petition's allegations. See 725 ILCS 5/122-2 (West 2014); *Allen*, 2015 IL 113135, ¶ 34.

¶ 15 It is arguable that trial counsel's failure to investigate the potential witnesses fell below an objective standard of reasonableness and that the alleged deficiency prejudiced the defense. Defendant's allegations that trial counsel was ineffective for failing to investigate these witnesses stated the gist of a constitutional claim. The circuit court erred in summarily dismissing defendant's petition at the first stage.

¶ 16 For the reasons stated, we reverse the circuit court's order dismissing defendant's postconviction petition and remand for further proceedings.

¶ 17 Reversed and remanded.