

No. 1-13-0122

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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 02 CR 15262
)	
ALEXANDER VALENCIA,)	Honorable
)	Rosemary Higgins-Clark,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

¶ 1 *HELD:* Summary dismissal of postconviction petition affirmed where defendant failed to attach adequate documentation in support of his claim of ineffective assistance of trial counsel and allegations did not support arguable claim that trial counsel was ineffective.

¶ 2 Petitioner Alexander Valencia (defendant) appeals from 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 circuit court erred in dismissing his petition because he set

forth an arguable claim of ineffective assistance of trial counsel based on his counsel's failure to investigate and call certain witnesses. We affirm the dismissal of the petition.

¶ 3

BACKGROUND

¶ 4 Defendant's conviction stems from a shootout over a drug debt, which resulted in the shooting death of Jeffrey Smith (Jeffrey). Defendant and Carlos Santos sold a kilo of heroin, worth \$70,000, to the victim's father, James Smith (James) on consignment. Defendant made repeated attempts to contact James Smith about repayment. When defendant finally located him, James told defendant that he did not have the money and would kill defendant if he ever returned to his house. Defendant and Santos then hired two Cook County Sheriff's Deputies, John Lavelle and Estaban Perkins, to help them collect the debt.

¶ 5 On May 3, 2002, defendant, Santos, Lavelle, and Perkins drove two cars to James' house. Defendant remained in one car while Santos, Lavelle, and Perkins went to the door. James' son, Jeffrey, answered the door with a gun. Perkins ran back to defendant's car and drove away, with defendant in the passenger seat and others in the back seat. A shootout then ensued at the house, and Jeffrey was fatally wounded from the gunfire.

¶ 6 Defendant eventually was arrested. On the day of his arrest, he gave multiple statements to officers and ultimately made a videotaped statement.

¶ 7

A. Defendant's first interview

¶ 8 During trial, Detective Michael Barz testified that he and Detective John Trahanas first interviewed defendant at around 7:00 a.m. on the morning of defendant's arrest. According to Detective Barz, after he read defendant his *Miranda* rights, defendant acknowledged that he understood those rights and began to discuss the events leading up to Jeffrey's death. During this initial interview with Detective Barz, which lasted about an hour, defendant admitted that the

men had gone to James' house to collect the drug debt. Defendant told the detectives that if James refused to pay, they planned to kidnap him until someone either paid the debt or returned the drugs. If James was not home, defendant explained, they planned to force their way into the home to search for money and drugs.

¶ 9 B. Defendant's second interview

¶ 10 Detective Barz further testified that he next spoke with defendant later that morning at around 10:00 a.m., and that this second interview with defendant lasted between an hour and an hour and a half. Sergeant Ricky Maher was also present at this interview. Detective Barz stated that, prior to this conversation, he once again informed defendant of his *Miranda* rights, and defendant agreed to speak with them. In this second interview, defendant elaborated on the events leading up to the shooting. Defendant informed the officers that after the failed attempts to collect the debt from James, he contacted Lavelle and had a meeting with him. During that meeting, defendant told Lavelle that the debt was \$75,000 and that he would pay Lavelle \$5,000 to help collect it. Detective Barz additionally testified that defendant recounted that, during this meeting, Lavelle informed defendant that if James had a gun, Lavelle would shoot him.

¶ 11 According to Detective Barz, defendant then proceeded to detail the events that occurred when the men arrived at Smith's house. Defendant told the officers that he met with Lavelle another time—this time with Santos—on the evening of the shooting. At this point, the men had agreed to either kidnap James or break into his home if he refused to pay the debt. After reaching agreement on this plan, the men went to pick up Perkins. The group then drove in two separate cars to 26th Street and California Avenue in Chicago, because Lavelle wanted to get some equipment, and eventually headed to Smith's residence. Lavelle was with Perkins, and Santos was with defendant.

¶ 12 C. Defendant's third interview

¶ 13 At around 1:45 p.m. that same day, defendant participated in a third interview, this time with Detective Barz and Assistant State's Attorney (ASA) Arunas Buntinas. ASA Buntinas testified at trial that he informed defendant that he was a prosecutor and not defendant's lawyer, and defendant indicated to ASA Buntinas that he understood. Next, ASA Buntinas read defendant his *Miranda* rights, and defendant informed ASA Buntinas that he understood his rights and was willing to answer questions. This interview with ASA Buntinas lasted approximately 45 minutes to an hour.

¶ 14 At around 6:15 p.m., ASA Buntinas asked defendant how he would like his statement memorialized. Defendant agreed to provide a videotaped statement, which he made at 9:11 p.m. that night. In general, this videotaped statement was consistent with defendant's prior statements to police. See *People v. Valencia*, No. 1-08-1871, slip op. at 6 (unpublished order under Supreme Court Rule 23). In the taped statement, defendant stated that he, Santos, Lavelle, and Perkins went to James' house to collect the drug debt. They planned to take the drugs or kidnap James until he paid, if James refused to pay. *Id.* at 7. Defendant further stated that they were prepared to shoot to defend themselves if anyone in the house had guns. *Id.*

¶ 15 D. Defendant's trial testimony

¶ 16 Defendant's trial testimony largely comported with his prior statements, and he again acknowledged that he met with Lavelle twice before Perkins joined the group. But in contrast to his statements to the officers and the ASA during his prior interviews, during his trial testimony, defendant denied that there was a plan to kidnap James or to break into his home. *Id.* at 8. Instead, defendant maintained that the officers had tricked him into giving the videotaped

statement by telling him that he would be released from custody if he helped get Lavelle and Perkins off the street. *Id.*

¶ 17 During the trial, the jury heard testimony from several witnesses for the State, including Ortancia Smith, the victim's sister, and Tanya Jeffries, his girlfriend. Both women were inside the Smith residence on the night of the shooting. After the close of the prosecution's case, Tremayne Davis, a neighbor, testified for the defense as a witness to the shooting, and defendant testified about the events surrounding the shooting and his statements to officers. Detective Barz and ASA Buntinas then testified for the State in rebuttal concerning defendant's prior statements.

¶ 18 E. Felony murder conviction and appeal

¶ 19 Defendant ultimately was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2002)) predicated on attempted aggravated kidnapping, attempted residential burglary, and attempted aggravated unlawful restraint. He also was found to have been armed with a firearm during the commission of the offense and was sentenced to 45 years' imprisonment.

¶ 20 On direct appeal, defendant argued that (1) the State failed to prove that he was guilty of felony murder beyond a reasonable doubt; and (2) his counsel was ineffective for failing to request the "Initial Aggressor's Use of Force" pattern jury instruction. *People v. Valencia*, No.1-08-1871. This court affirmed the conviction on June 30, 2011. *Id.* Defendant then sought leave to appeal to the Illinois Supreme Court, which was denied on September 28, 2011. *People v. Valencia*, 955 N.E.2d 479 (2011).

¶ 21 Defendant filed a *pro se* motion for an extension of time to file his postconviction petition, file-stamped July 11, 2012, which the circuit court denied on July 18, 2012. Defendant then filed his petition for postconviction relief, file-stamped August 23, 2014, in which he alleged, *inter alia*, that his trial counsel was ineffective for failing to interview and call Alvaro

Escobar, Jr. (defendant's younger brother), Mauricio Llanos, and Perkins as witnesses at the trial.¹ According to defendant, these witnesses would have corroborated his defense theory—that he was not guilty of felony first degree murder because there was no plan to commit a burglary, kidnapping, or unlawful restraint of James if he refused to pay the debt. Specifically, in the petition, defendant alleged that Escobar, Llanos, and Perkins would have testified that during the May 3, 2002 meeting between defendant, Santos, Lavelle, and Perkins at 26th Street and California Avenue—which took place right before the men headed to James' house—there was no discussion of a plan to kidnap James or to break into his house.

¶ 22 On November 20, 2012, the circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. Defendant now appeals.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant contends that the circuit court erred in summarily dismissing his postconviction petition because he stated an arguable claim that his trial counsel was ineffective for failing to investigate and call Escobar, Llanos, and Perkins as witnesses at his trial. According to defendant, the circuit court erred by improperly relying on Santos' confession; making factual and credibility findings; and concluding that trial counsel's decisions were a matter of trial strategy. As explained below, we disagree that defendant has satisfied his burden at the first stage of the postconviction proceedings.

¶ 25 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). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim. *Delton*, 227 Ill. 2d at 254. The circuit court, however, must

¹ Defendant's postconviction petition raised several issues, but we address only those claims that he continues to pursue on appeal.

dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2012)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). Our review of the dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). We may affirm on any basis appearing in the record. *People v. Quigley*, 365 Ill. App. 3d 617, 619 (2006).

¶ 26 Section 122-2 of the Act requires a defendant who files a postconviction petition to provide "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). These materials are necessary to ensure that the allegations in the petition "are capable of 'objective or independent corroboration.'" *Delton*, 227 Ill. 2d at 254 (quoting *Hall*, 217 Ill. 2d at 333).

¶ 27 Our supreme court has repeatedly addressed the issue of whether certain deficiencies—as well as which specific ones—in a postconviction petition can be grounds for summary dismissal at the first stage of the postconviction proceedings. In *People v. Bocclair*, 202 Ill. 2d 89 (2002), for example, the court held that the untimeliness of a petition is not a proper basis for a dismissal at the first stage, but rather "should be left for the State to assert during the second stage of the post-conviction proceedings." *Id.* at 102.

¶ 28 Then, in *People v. Collins*, 202 Ill. 2d 59 (2002), which is particularly relevant to this appeal, the court held that the failure to comply with section 122-2's mandate for supporting "affidavits, records or other evidence," or to explain the absence of the requisite documentation, "by itself justifies the summary dismissal of defendant's petition." *People v. Collins*, 202 Ill. 2d at 66 (emphasis added). Although *Collins* was not a unanimous decision, the supreme court has continued to apply its holding. *See Delton*, 227 Ill. 2d at 255. Previous decisions of the supreme court have also recognized that under section 122-2, the defendant must "adequately" or

"sufficiently" explain the absence of the required documentation. *People v. Titone*, 151 Ill. 2d 19, 24-25 (1992) (absence of affidavits must be " 'sufficiently explained' " (quoting *People v. Curtis*, 48 Ill. 2d 25, 27-29 (1971))); *People v. Smith*, 40 Ill. 2d 562, 564 (1968) (defendant must "adequately explain" absence of "supporting affidavits").

¶ 29 Then, in *Delton*, the court reaffirmed the *Collins* holding, reiterating that the failure to provide the requisite supporting documentation or explain its absence as required by section 122-2 " 'by itself justifies the petition's summary dismissal.' " *Delton*, 227 Ill. 2d at 255 (quoting *Collins*, 202 Ill. 2d at 66).

¶ 30 Under this line of cases, most recently, in *People v. Hommerson*, 2014 IL 115638, the court addressed the verification affidavit requirement under 725 ILCS 5/122-1(a) (West 2010), holding that "the circuit court may not dismiss a petition at the first stage of proceedings solely on the basis that it lacked a verification affidavit." *Hommerson*, 2014 IL 115638, ¶ 11.

¶ 31 We also note that this court has concluded that the failure to notarize a supporting affidavit under section 122-2 is not a basis for a summary dismissal at the first stage of postconviction proceedings. *See, e.g., People v. Parker*, 2012 IL App (1st) 101809; *People v. Wilborn*, 2011 IL App (1st) 092802. But we agree with the State that these cases do not stand for the proposition that the failure to comply with section 122-2's supporting documentation requirements cannot warrant a first stage dismissal. To the contrary, such a conclusion would be inconsistent with the rationale and directive espoused in *Collins*.

¶ 32 Turning to defendant's allegations in this case, defendant maintains that his counsel was ineffective for failing to investigate and call Escobar, Llanos, and Perkins as witnesses. Our supreme court squarely addressed the requirements for pleading such a claim in *People v. Enis*, 194 Ill. 2d 361 (2000), holding that "[a] claim that trial counsel failed to investigate and call a

witness *must* be supported by an affidavit from the proposed witness." (Emphasis added.) 194 Ill. 2d at 380. "In 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.* Thus, under *Enis*, defendant was required to provide affidavits from those witnesses or adequately explain their absence. Defendant did neither.

¶ 33 Defendant does not dispute that he failed to provide an affidavit from Escobar, Llanos, or Perkins. To explain the absence of these affidavits, on appeal defendant relies on his own affidavit attached to the postconviction petition in which he attested that he "obtained affidavits from" Escobar, Llanos, "and others" but they were "destroyed or [thrown] away" during a prison "shakedown" on July 16, 2012. Notably, defendant's affidavit does not address why he failed to attach an affidavit from Perkins. Nor does it explain why he was prevented from obtaining replacement affidavits from Escobar and Llanos prior to filing his petition. If these alleged witnesses had indeed already provided him with affidavits, defendant presumably had a means to both communicate with them and receive the necessary documents. In the absence of an adequate explanation, defendant has not complied with section 122-2. And "[t]his fact alone justifies the summary dismissal of defendant's petition." *Collins*, 202 Ill. 2d at 66.

¶ 34 But even if we were to consider defendant's allegations, notwithstanding his failure to comply with section 122-2, we agree with the circuit court that defendant's ineffective assistance of counsel claim was frivolous or patently without merit.

¶ 35 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Shatner*, 174 Ill. 2d 133, 144 (1996) (applying *Strickland*). Namely, defendant must establish (1) "that

counsel's performance was deficient"; and (2) that this "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. In performing this inquiry, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Indeed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" *Id.* Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. In general, "[d]ecisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf" are "matters of trial strategy" which are "generally immune from claims of ineffective assistance of counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997).

¶ 36 Here, defendant alleges that his counsel was ineffective for failing to investigate his defense properly by interviewing Escobar, Llanos, and Perkins and then calling them as witnesses at his trial. In his petition, he alleged that these men would have testified that, during the meeting at 26th Street and California Avenue, defendant, Santos, Lavelle, and Perkins did not discuss a plan to kidnap Smith or burglarize his home; they only discussed collecting the debt. But as defendant does not dispute, the meeting at 26th and California was not the initial meeting with Lavelle. Based on testimony elicited at trial, including defendant's own testimony, defendant met with Lavelle earlier in the evening. In his statements to the officers, defendant acknowledged the plan to kidnap James or break into his home, which the perpetrators devised during this meeting. After this meeting with Lavelle, Lavelle picked up Perkins, and defendant and Santos, both in defendant's car, met Lavelle and Perkins at 26th and California before heading to James' house. Thus, accepting the alleged testimony as true, evidence that a

kidnapping or burglary was not discussed during this meeting at 26th and California does not contradict defendant's prior inculpatory statements that the kidnapping and burglary plan was made earlier in the day, nor does it support defendant's trial testimony that they never made such a plan. As a result, his trial counsel's decision not to offer such testimony was not objectively unreasonable or prejudicial to defendant's defense. Defendant, therefore, has failed to state an arguable claim that his counsel was ineffective.

¶ 37 For these reasons, the circuit court's summary dismissal of the postconviction petition is affirmed.

¶ 38 Affirmed.