

NOTICE

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2014 IL App (4th) 120527-U

NO. 4-12-0527

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 20, 2014

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
PERRY E. HAMPTON,)	No. 09CF1903
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal of defendant's postconviction petition was proper where defendant failed to attach to his petition an affidavit or other sufficient documentation in support of his claim.

¶ 2 Following a February 2010 trial, the jury convicted defendant, Perry E. Hampton, of residential burglary. In March 2010, the trial court sentenced defendant to 29 years' imprisonment. In February 2012, defendant filed a *pro se* postconviction petition, in which he asserted, *inter alia*, his trial counsel rendered ineffective assistance by failing to subpoena and call a witness who could have provided exculpatory and corroborative evidence. In May 2012, the trial court summarily dismissed defendant's petition, finding it failed to present the "gist" of a constitutional claim. On appeal, defendant contends he presented the "gist" of a constitutional claim he did not receive effective assistance of trial counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2009, the State charged defendant with residential burglary, a Class 1 felony (count I) (720 ILCS 5/19-3 (West 2008)), and armed violence, a Class X felony (count II) (720 ILCS 5/33A-2(a) (West 2008)). In February 2010, the cause proceeded to jury trial.

¶ 5 A. Defendant's Trial and Sentencing Hearing

¶ 6 At trial, the victim in this case, Robert Brown, testified he is "totally blind" and lives with his four-year-old granddaughter. Just before midnight on November 3, 2009, Brown put his sleeping granddaughter to bed and was getting himself ready for bed. Brown heard a knock at the back door and decided not to answer because it was late. Brown heard a second knock and then heard some voices outside his house. Moments later Brown heard the back door open, which sounded "like somebody burst a door open." When the intruders entered the house, Brown heard one person run upstairs and another person go into the television (TV) room and start unhooking the cables from his TV.

¶ 7 Brown grabbed a handgun for protection, dialed 9-1-1, and closed and locked his bedroom door. At no point did the intruders call out to Brown to ask if he was okay. The intruders eventually came to his bedroom door and tried to open it. Brown then heard a voice say "Mr. B.," which is what defendant's codefendant, Vishan Johnson, called Brown. The voice identified himself as "Leon," a friend of Brown's son, and told Brown he and "one of [his] guys" had entered the house to get away from the police," who were after them. Brown knew, however, the voice outside his door was Johnson, because only Johnson called him "Mr. B." At some point, police officers entered the house and escorted Brown and his granddaughter out of the residence.

¶ 8 Officer Zachary Mikalik of the Urbana police department testified he responded to Brown's 9-1-1 call. When Officer Mikalik arrived on the scene, he parked about a block away

and approached the residence on foot. As Officer Mikalik walked around to the south side of the residence, he saw an individual, later identified as Johnson, carrying a TV out the back door. Johnson ran back into the house with the TV when he saw Officer Mikalik. Officer Mikalik did not pursue Johnson into the house for safety reasons and instead went around the corner to radio what he saw. Officer Mikalik and another officer watched the house to ensure nobody entered or left the residence until more officers arrived on scene. When more officers arrived, they entered through the front door and escorted Brown and his granddaughter out of the house.

¶ 9 Once Brown and his granddaughter were safe outside, officers apprehended defendant and Johnson in an upstairs bedroom. Officer Mikalik made sure the basement was clear and then participated in a "secondary sweep" of the house. Brown's TV was found in the kitchen. A .25-caliber handgun was found behind the couch in the TV room.

¶ 10 Sergeant Harley Rutledge of the Urbana police department testified he responded to the burglary call at Brown's residence. After Brown and his granddaughter were removed from the house, Sergeant Rutledge and three other officers went upstairs while Mikalik and another officer stood watch in front of the basement stairs. Sergeant Rutledge testified he and the other officers in the house were repeatedly and loudly announcing their presence but received no answer. While upstairs, Sergeant Rutledge and another officer found Johnson and defendant hiding underneath a bed. Sergeant Rutledge placed both men under arrest. Sergeant Rutledge questioned Brown about the presence of the weapon found under the couch. Brown told Sergeant Rutledge he had only one gun, a 9-millimeter handgun, and no other weapons should be inside the house.

¶ 11 The defense's theory was defendant (1) only entered Brown's home because

Johnson asked him to help check on Brown and (2) did not know Johnson intended to commit a theft once inside. In support of this theory, defendant presented three witnesses.

¶ 12 Lawanda Upshaw testified she was friends with defendant. Defendant was at her home visiting on the evening of November 3, 2009. At around 10 or 11 p.m., Johnson came over to her home. Upshaw answered the door and let Johnson inside. Defendant immediately left the home with Johnson.

¶ 13 Defendant next called Vishan Johnson. Johnson testified he pleaded guilty to armed violence for his involvement in this matter. Johnson was friends with defendant and had known him for four or five years. After Johnson pleaded guilty, he came forward with the following information regarding defendant's involvement with this incident.

¶ 14 On November 3, 2009, Johnson went to Brown's residence to retrieve a gun he knew was inside the home. Johnson was by himself and knocked on the back door. When Brown did not answer, Johnson went to Brown's bedroom window and called out, "Pops, Pops, Pops *** come to the back door, Pops." Johnson returned to the back door and waited for a few minutes for Brown to let him in. After waiting a few minutes and knocking again, Johnson "kicked the door to go in there and retrieve what I was trying to get." When he kicked the door open, he saw a light turn on at a neighbor's house, so he left the residence and proceeded to Upshaw's home, where he knew defendant was staying. Johnson testified he knocked on Upshaw's door and defendant came to the door. Johnson told defendant to grab his stuff and come with him because something had happened to "Pops."

¶ 15 Johnson and defendant arrived back at Brown's house. As Johnson tried to enter the residence, defendant requested they call the police and let them handle the matter. Johnson

convinced defendant to enter the house to make sure no ambulance would be needed. Once the men entered the residence, Johnson immediately told defendant to go upstairs to check if Brown was there. Defendant went upstairs, and Johnson could hear defendant calling out to Brown. Johnson, however, knew Brown was not upstairs. Johnson "was trying to sidetrack [defendant] and get [defendant] out of the way so [he] could retrieve what [he] was trying to get [be]cause [he] didn't want [defendant] to think [he] was [at Brown's home] for that."

¶ 16 Once defendant was upstairs, Johnson went to the living room and retrieved the gun he originally sought. Even though Johnson came for the gun, he decided to grab the TV from the living room because he became "greedy." At no time did Johnson tell defendant he was going to retrieve a weapon or steal a TV. Johnson needed defendant to come back to Brown's house with him so he could use defendant as "bait" and an extra set of eyes.

¶ 17 As Johnson began walking out of the house with the TV, defendant saw him and asked what he was doing. Defendant tried to stop Johnson from taking the TV, because defendant was there only to check on Brown's welfare. Johnson exited the house and was confronted by an Urbana police officer, prompting him to run back inside. Johnson told defendant to run upstairs with him and be quiet. Defendant complied with Johnson's request but asked what was going on. After waiting a "little while" to see if the police had followed them in, Johnson and defendant returned to the first floor to look for defendant's cell phone, which had fallen out before they ran upstairs. While looking around, defendant and Johnson heard a noise. Thinking the noise came from Brown, Johnson went to Brown's bedroom door and identified himself and said he and his friend were there to help. Brown, for some reason, kept referring to Johnson as "Leon." At some point, defendant and Johnson returned upstairs, where they "shielded" themselves from the police

under a bed. According to Johnson, defendant's fear caused him not to respond to the police when they announced their presence, even though defendant was totally innocent of any wrongdoing. Johnson never told defendant the real reason he entered the home.

¶ 18 Defendant testified on his own behalf. Defendant testified on November 3, 2009, he was at Upshaw's home. Defendant and Upshaw heard a loud knock at the front door. When defendant opened the door, Johnson was standing outside. Johnson told defendant to grab his "stuff" and "come on." Defendant asked what was going on and Johnson said something had happened to Brown. Defendant immediately left with Johnson and ran to Brown's house.

¶ 19 When defendant and Johnson arrived at Brown's home, defendant noticed the door had been forced open. Defendant asked Johnson whether he should call the police, but Johnson told him they had to go inside to check on Brown first. The two men entered the house. No lights were on inside the residence and neither Johnson nor defendant turned them on. Johnson began calling out to Brown, but received no response. Johnson sent defendant upstairs to check on Brown.

¶ 20 Defendant quietly climbed the stairs and called out to Brown. Defendant heard Johnson downstairs "playing the role" by calling out to Brown. Defendant did not go all the way upstairs at this time. Defendant returned to the first floor and saw Johnson walking into the kitchen carrying a TV. Defendant asked Johnson why he was taking Brown's TV, to which Johnson replied, "come on, come on, bro." Johnson walked out of the house and was confronted by an Urbana police officer. Johnson "bust[ed] back in" to the house and dropped the TV. Defendant closed the door behind Johnson because he heard somebody outside say, "Hands up or I'm going to shoot." Johnson told defendant to go upstairs. Defendant and Johnson climbed the

stairs and entered one of the rooms. At this point, defendant realized he dropped his cell phone when Johnson came back inside.

¶ 21 Defendant and Johnson went back downstairs to look for defendant's cell phone. The two men heard a noise, which Johnson thought was Brown. Johnson quietly went to Brown's bedroom door and began calling out his name. Johnson identified himself but, for some reason, Brown started saying the name "Leon."

¶ 22 Defendant testified when Brown announced he had a gun, Johnson returned to defendant and stated the two men should surrender to the police. Defendant did not want to surrender to the police because the police would not believe their story and he was scared the police would harm them. Defendant and Johnson went back upstairs and entered a bedroom. Defendant told Johnson to "go under the bed and shield [them]selves." Defendant denied he and Johnson were hiding—he and Johnson both made sure their legs were protruding from underneath the bed. Defendant could not explain why he and Johnson did not answer the police officers when they announced their presence.

¶ 23 Defendant testified he never saw Johnson in possession of a gun. Defendant did not see a gun in the home. Defendant was not wearing gloves and did not bring a bag to place stolen items in when he left Upshaw's home. Defendant never intended to steal anything from Brown's home and did not know Johnson was planning on doing so. Defendant related his version of events to Officer Wolfe after his arrest.

¶ 24 On this evidence, the jury found defendant not guilty of armed violence but guilty of the predicate felony of residential burglary. In March 2010, following a hearing, the trial court sentenced defendant to 29 years' imprisonment, with credit for 128 days served. Following the

court's denial of his motion to reconsider sentence, defendant appealed. On direct appeal, this court denied the office of the State Appellate Defender's (OSAD's) motion for summary remand (*People v. Hampton*, 2011 IL App (4th) 100219, ¶ 17, 959 N.E.2d 1158), and, on the merits, affirmed in part as modified, vacated in part, and remanded with directions. *People v. Hampton*, 2012 IL App (4th) 100219-U, ¶ 49.

¶ 25

B. Postjudgment Proceedings

¶ 26

In March 2011, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2010)). In May 2011, the State filed a motion to dismiss defendant's petition. In June 2011, the trial court entered a memorandum of opinion and order denying defendant's petition. Defendant appealed. Pursuant to an agreed motion for summary remand, this court remanded the case for further proceedings. *People v. Hampton*, No. 4-11-0580 (Aug. 6, 2012) (order for summary remand).

¶ 27

In February 2012, defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In his petition, defendant asserted 13 grounds for relief. As one of his purported grounds for relief, defendant contended he "was denied effective assistance of counsel when counsel failed to subpoena Officer Shannon Wolfe," in violation of his sixth and fourteenth amendment rights under the United States Constitution. Defendant explained he asked his trial attorney to call Officer Wolfe as a witness so that Wolfe could testify to defendant's statements following his and Johnson's arrests. Defendant contended Officer Wolfe's testimony regarding his postarrest statements could have changed the result of his trial because Wolfe's testimony (1) would have shown his postarrest statements were true, and (2)

could have easily convinced the jury defendant had nothing to do with the offense.

¶ 28 Defendant attached to his petition the second page of a three-page incident report written by Officer Wolfe on the night of the offense. (The first and third pages of the report were not attached and do not otherwise appear in the record.) According to this page of the report, Officer Wolfe read defendant his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) shortly after his arrest. Officer Wolfe then asked defendant whether he would like to speak with her about the incident. Defendant replied, "nope, I have nothing to say to you because I did not do anything wrong." When Officer Wolfe asked defendant why he was found hiding under a bed despite the fact he did not do anything wrong, defendant stated, "I don't know anything that is going on, I came here with [codefendant Johnson] because he knows old dude and when we got here the door was kicked in." Defendant explained when he and Johnson saw the door was kicked in, they entered the house to investigate. Johnson yelled repeatedly to Brown, but Brown did not answer.

¶ 29 Officer Wolfe then asked defendant, "at what point did he or [Johnson] pick up the TV?" to which defendant replied, "F*** you lady, I didn't touch no f***[ing] TV." Officer Wolfe also asked defendant why he was hiding from the police when the officers announced their presence in Brown's home, even though he had not done anything wrong. Defendant replied, "cause you mother f***[ers] scare me, you mother f***[ers] go around shooting young boys and s***." Defendant went further, "f*** you lady, I am not saying s*** to you. I have money, I don't need to go robbing people." Officer Wolfe asked defendant whether he was employed, to which he replied, "no, I got peoples." Defendant then stopped speaking to Officer Wolfe.

¶ 30 In May 2012, the trial court entered a memorandum of opinion summarily

dismissing defendant's postconviction petition. The court found defendant's petition failed to present the "gist" of a constitutional claim. With regard to defendant's claim of ineffective assistance of counsel for failing to call Officer Wolfe, the court noted defendant failed to attach an affidavit from Officer Wolfe stating what her testimony would have been had counsel called her to testify. Further, any testimony from Officer Wolfe regarding defendant's postarrest statements would have been barred as inadmissible hearsay evidence. Thus, the court found, counsel's performance was not deficient. Finally, the court found defendant did not demonstrate how the failure to introduce this evidence prejudiced him, "particularly in light of overwhelming [evidence] of guilt."

¶ 31

II. ANALYSIS

¶ 32 On appeal, defendant argues the trial court erred by summarily dismissing his postconviction claim of ineffective assistance of counsel. Specifically, defendant contends trial counsel rendered ineffective assistance by "failing to present the testimony of Officer Shannon Wolfe regarding [defendant's] post-arrest statements to her that supported his defense." Defendant argues the statements he made to Officer Wolfe following his arrest, memorialized in Wolfe's incident report, corroborated both defendant's and Johnson's testimony defendant had no knowledge Johnson intended to commit a crime when the two men entered Brown's home. Presumably, Officer Wolfe would have testified, if called at trial, defendant made the statements contained in her police report.

¶ 33 The Act provides a three-stage process through which a defendant may obtain a remedy for the substantial denial of his constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). Proceedings under the Act are initiated by the filing

of a petition. 725 ILCS 5/122-2 (West 2012). "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." *Id.* In *People v. Johnson*, 183 Ill. 2d 176, 191, 700 N.E.2d 996, 1003 (1998), the supreme court recognized the failure to include an affidavit or other evidence supporting a postconviction claim does not defeat the petition where "the petitioner's allegation stands uncontradicted and is clearly supported by the record." The supreme court held, however, where, as here, a defendant claims his trial counsel was ineffective for failing to call a witness, he or she must attach to his or her petition an affidavit from the proposed witness. *Id.* at 192, 700 N.E.2d at 1004; *People v. Enis*, 194 Ill. 2d 361, 382-83, 743 N.E.2d 1, 14 (2000). The failure to attach an affidavit from the proposed witness precludes the court from considering the claim any further. *Johnson*, 183 Ill. 2d at 192, 700 N.E.2d at 1004; see also *People v. Guest*, 166 Ill. 2d 381, 402, 655 N.E.2d 873, 883 (1995).

¶ 34 In this case, defendant did not attach to his petition an affidavit from Officer Wolfe. He offers no explanation for why his petition failed to include this required documentation. Thus, his claim he received ineffective assistance of counsel must fail. *Johnson*, 183 Ill. 2d at 192, 700 N.E.2d at 1004. Defendant argues the single page of Officer Wolfe's three-page incident report sufficiently supports his claim counsel should have called Officer Wolfe to testify, but he fails to cite any authority in support of this assertion. We disagree. In *Enis*, *Johnson*, and *Guest*, the supreme court was clear: claims of ineffective assistance of counsel involving the failure to investigate and call a witness must be supported by the affidavit of the proposed witness. Further, defendant's argument requires this court to assume Officer Wolfe's testimony would have been wholly consistent with the small excerpt of Wolfe's report that defendant chose to highlight in his

petition. We decline to make this assumption. Before we can determine whether counsel was ineffective for failing to call a proposed witness, we must know what the proposed testimony would have been had counsel called the witness.

¶ 35 Even if the single page of Officer Wolfe's three-page report was sufficient to support his claim of ineffective assistance, defendant's petition failed to present the "gist" of a claim counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). At the first stage of postconviction proceedings, the trial court examines the petition *only* to determine whether it is frivolous and patently without merit. *People v. Bowens*, 2013 IL App (4th) 120860, ¶ 11, 1 N.E.3d 638. A postconviction petition is frivolous or patently without merit only where "the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.'" *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). In other words, the petition must have an arguable basis either in law or in fact. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1202 (2010). To have an arguable basis in law, the petition must not be premised on an "indisputably meritless legal theory, such as one that is completely contradicted by the record." *Id.* To have an arguable basis in fact, the petition may not be based "upon a fanciful factual allegation, such as one that is clearly baseless, fantastic[,] or delusional." *Id.* We review *de novo* the summary dismissal of a postconviction petition. *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 447.

¶ 36 A claim of ineffective assistance of counsel typically requires a defendant to meet the two-part test delineated in *Strickland*. *People v. Nieves*, 192 Ill. 2d 487, 494, 737 N.E.2d 150, 154 (2000). A defendant must show (1) his counsel's performance was deficient as measured

against an objective standard of reasonableness under prevailing professional norms, and (2) defense counsel's deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687-88. Failure to establish either prong of the *Strickland* analysis will defeat a defendant's ineffective-assistance claim. *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. Thus, to survive first-stage dismissal, defendant's petition had to establish it was *arguable* (1) counsel's performance was deficient; *and* (2) the deficient performance prejudiced defendant.

¶ 37 In this case, counsel's performance was not arguably deficient. Defendant's statements to Officer Wolfe following his arrest would be inadmissible hearsay if offered by defendant. See *People v. Grayson*, 321 Ill. App. 3d 397, 403, 747 N.E.2d 460, 466 (2001) (a party cannot introduce his or her own prior statements). Counsel's failure to elicit inadmissible testimony does not render his or her performance deficient. Defendant cannot establish counsel's performance was deficient and, thus, his claim of ineffective assistance of counsel must fail. *Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192.

¶ 38 III. CONCLUSION

¶ 39 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012)

¶ 40 Affirmed.