2011 IL App (1st) 092804-U
No. 1-09-2804

SIXTH DIVISION
August 5, 2011

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 30309
	)	
WILLIE McGEE,	)	The Honorable,
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and R. E. Gordon concurred in the judgment.

O R D E R

HELD: Summary dismissal of *pro se* post-conviction petition affirmed where defendant's allegation of ineffective assistance of trial counsel was conclusory, and defendant failed to explain the absence of affidavits or supporting materials to corroborate his allegation.

¶ 1 Defendant Willie McGee 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

2008)). He contends that the circuit court erred in summarily dismissing his petition where he presented the gist of a non-frivolous claim that trial counsel was ineffective for failing to present evidence that the State's key witness, Taisha Garmon, threatened to lie to detectives and at trial if he did not claim to be the father of her baby.

¶ 2 Defendant's conviction arose from the fatal shooting of Steven Riley in the early morning hours of April 6, 2004. In a videotaped statement that defendant gave to an assistant State's Attorney on November 11, 2004, he explained that he was arguing with his girlfriend, Taisha Garmon, outside her aunt's house in rival gang territory, when he shot a hooded man who emerged from a gangway. He later learned that the man he shot was Riley, and when asked whether Riley was armed at the time of the shooting, defendant answered that he was not. At the conclusion of his statement, defendant apologized for the shooting.

¶ 3 At trial, defendant claimed self-defense, but the jury rejected his claim and found him guilty of first degree murder. Before the court's pronouncement of sentence, defendant expressed his remorse and stated, in pertinent part:

> "I am not trying to sugarcoat what I did, I did it, I did do it. But the way they got up there and explained it *** when it gets close to *** trial time she want me to claim a baby that's not mine now me and her we have an argument now she, the whole day -- I mean the whole visiting day she's telling me I'm going to pay for it since I don't want to take care of her baby and be a father to her baby I'm going to

pay for it."

Following this statement, the trial court sentenced defendant to 60 years' imprisonment.

¶ 4 On direct appeal, this court affirmed defendant's conviction and sentence, rejecting, in relevant part, various allegations of ineffective assistance of trial counsel, *e.g.,* failing to object to testimony and references regarding defendant's presence at Graham Correctional Center when he gave his videotaped statement. *People v. McGee,* No. 1-06-0625 (2008) (unpublished order under Supreme Court Rule 23). The supreme court subsequently denied his petition for leave to appeal. *People v. McGee,* 229 Ill. 2d 684 (2008).

¶ 5 Defendant then filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In his petition, defendant alleged prosecutorial misconduct, ineffective assistance of trial counsel, reasonable doubt, and excessive sentence. Among the exhibits attached to his petition were the handwritten statements of Taisha Garmon and Johntile Alexander, who saw defendant shoot the victim once, and the handwritten statements of Anthony Tyson and Alphonzo Jones stating that they fabricated their initial statements to police regarding the shooting. The circuit court denied defendant's section 2-1401 petition as untimely on May 14, 2009.

¶ 6 Thereafter, defendant filed the subject *pro se* post-conviction petition in which he raised the same allegations that he did in his section 2-1401 petition. The allegation of ineffective assistance of trial counsel at issue before this court reads completely as follows

"Defendant's attorney were ineffective when he fail to present the affidavits from defendant and other county jail inmates whom heard witness Taisha Garmon tell defendant that she would lie to

> the Detectives and lie on the stand and do all she can to get defendant locked up for the rest of his life. If the defendant don't claim her child as his. If he don't say he's the father of her child. She would not tell the truth that defendant acted in self defence [*sic*]. See attached exhibits #2."

¶ 7 In support of his petition, defendant attached his own affidavit claiming that he shot Riley in self-defense, that he "believe[d]" numerous State's witnesses lied because they were coerced to do so, and his videotaped statement was also coerced by the detectives on the case. He also attached a document from the Cook County Sheriff's Police Department, which stated that Johntile Alexander showed a significant emotional disturbance in response to three questions during his polygraph examination.

¶ 8 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. In its written order, the court found that defendant's allegations were waived, barred by *res judicata,* or otherwise without merit. As to his ineffective assistance of trial counsel claim, the court specifically observed that defendant's testimony that he was high on drugs when he shot Riley in self-defense contradicted his allegation that trial counsel was ineffective for failing to bring forth such evidence. The court also observed that his allegations regarding trial counsel's failure to investigate Johntile Alexander and Alphonzo Jones, who were offered deals and failed their polygraphs, or whether Riley's cousin was a gang member, and to file a motion to suppress his confession as coerced, were conclusory and devoid of any supporting facts.

¶ 9 The court did not specifically address defendant's allegation that trial counsel was

ineffective for failing to present affidavits from "defendant and other county jail inmates" who heard Taisha say that she would not tell the truth, that the shooting was in self-defense, if defendant did not acknowledge he was the father of her child. This allegation of ineffective assistance, however, is the only one that defendant has argued on appeal.

¶ 10 To survive summary dismissal at the first stage of proceedings, a *pro se* defendant need only allege enough facts, with supporting affidavits, records or other evidence, to support the gist of a constitutional claim. *People v. Munoz*, 406 Ill. App. 3d 844, 850 (2010). A *pro se* petition may be dismissed as frivolous and patently without merit only if it has no arguable basis in law or in fact. *People v. Hodges,* 234 Ill. 2d 1, 16 (2009). We review *de novo* the summary dismissal of defendant's *pro se* post-conviction petition. *People v. Delton,* 227 Ill. 2d 247, 254 (2008).

¶ 11 Here, defendant's underlying contention of ineffective assistance of trial counsel is that "the State's key witness, Taisha Garmon, planned to lie and had a motive to lie on the witness stand," and therefore her entire testimony is questionable, casting doubt on whether he acted in self-defense when he shot Riley. The State responds that defendant has failed to support his allegation as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)), rendering his petition legally insufficient to withstand summary dismissal (*People v. Collins,* 202 Ill. 2d 59, 69 (2002)). The State also notes that defendant did not explain the absence of affidavits to corroborate the allegation in his petition (725 ILCS 5/122-2 (West 2008)), nor identify the inmates who allegedly heard Garmon threaten him, and that his ineffectiveness claim is rebutted by the record.

¶ 12 Defendant replies that the allegation in his petition about trial counsel's failure to

use "the affidavits from Defendant and other County Jail Inmates," "implies that counsel was indeed aware of Garmon's threat." He also states that it would be unfair to expect him to present an affidavit from his trial counsel, whose competency he calls into question, or from fellow inmates given the strict regulations regarding correspondence between inmates without prior approval.

¶ 13 We recognize that the failure to attach independent corroborating documentation or explain its absence may be excused where the petition contains sufficient facts to infer that the only affidavit defendant could have furnished, aside from his own, was that of his attorney. *Collins,* 202 Ill. 2d at 67-68. However, in our view, defendant's allegation that trial counsel failed to use "the affidavits from Defendant and Other Jail Inmates," by itself, is insufficient to support an inference that counsel knew of Garmon's threat before trial. *Delton,* 227 Ill. 2d at 256-57. Likewise, defendant's reference to Garmon's "strange testimony" regarding her pregnancy and his statement at sentencing where he apprised the court of Garmon's motive and threat to lie at trial, does not support an inference that counsel had been told about this before trial. *Delton,* 227 Ill. 2d at 256-57.

¶ 14 Moreover, since defendant alleged that Garmon's motive and threat to lie were known to him before trial, it is neither unreasonable or unjust to expect his petition to contain sufficient facts accompanied by affidavits which identify with reasonable certainty the inmates who allegedly overheard Garmon's threat. *Delton,* 227 Ill. 2d at 254, 258. Defendant, however, has not even named them.

¶ 15 The only supporting documentation that he offered on the issue of trial counsel's representation is his own affidavit, wherein he states that he "believe[d]" numerous State's

witnesses lied because they were coerced to do so, and his videotaped statement was also coerced by the detectives on the case. This statement is equivocal and insufficient to support his claim that trial counsel was "indeed aware of Garmon's threat." *Schaff,* 281 Ill. App. 3d at 296. Allegations amounting to nothing more than broad conclusory assertions of ineffective assistance of counsel are not permitted under the Act. *People v. Miller,* 393 Ill. App. 3d 629, 640 (2009).

¶ 16 We also observe that defendant's claim is belied by the record. *People v. Rogers,* 197 Ill. 2d 216, 222 (2001). As the State points out, the statements that Garmon gave to police before trial, are consistent with her testimony that the defendant pulled out a gun, the victim immediately put his hands in the air, and she then heard a gunshot. Defendant's own videotaped statement defeated his self-defense theory, as did medical evidence indicating that Riley was shot in the back.

¶ 17 For the reasons stated, we conclude that the circuit court properly dismissed defendant's *pro se* post-conviction petition at the first stage of proceedings, and we affirm the court's order to that effect.

¶ 18 Affirmed.