No. 1-10-0472

FIRST DIVISION
DATE 5/16/11

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 8312
	)	
STEVE CUNNINGHAM,	)	The Honorable
	)	Mary M. Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and LAMPKIN concurred in the judgment.

O R D E R

HELD: Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to present an arguable basis in law and in fact for his claim of ineffective assistance of trial counsel.

Defendant Steve Cunningham appeals from an order of the circuit court of Cook County summarily dismissing 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 court erred in dismissing his petition because he set forth a claim of ineffective assistance of trial counsel that had an arguable basis in law and in fact.

This court previously affirmed defendant's 2007 jury conviction for first degree murder and sentence of 26 years' imprisonment. People v. Cunningham, No. 1-07-1550 (2009) (unpublished order under Supreme Court Rule 23). On October 5, 2009, defendant filed the instant pro se post-conviction petition alleging, in relevant part, that his trial counsel was ineffective for failing to investigate and call three witnesses, Diane Cunningham, Jacqueline Moffett, and Berthella Forrest. He claimed that these witnesses would have testified that he was present at the scene of the crime, but that he did not possess a firearm or shoot at the victim, and that he fled from the scene once the shooting began, as did everyone else. He also alleged that due to his incarceration, indigence, and inability to secure a qualified investigator, he would support his claims with his own affidavit.

The record shows, however, that he attached a verification affidavit to his petition (725 ILCS 122-1(b) (West 2008)), in which he attested that the three witnesses were at the scene of the crime, engaged in a card game, and had been socializing with him. He further attested that trial counsel knew or should have known that Diane was present at the crime scene, and could have testified that she saw defendant at the time in question, that he was not armed, and that he did not shoot a gun at anyone. Defendant also attested that "[l]ikewise," Moffett and Forrest were present, and if called, would have testified that defendant did not have a gun or shoot the victim. Forrest would have further testified that defendant fled the scene as everyone else did once the shooting began. Defendant also included the mailing addresses for the three named witnesses.

On December 8, 2009, the circuit court summarily dismissed defendant's petition. In doing so, the court noted that defendant failed to show that his counsel was ineffective for failing to investigate in that he did not point to any specific information that was overlooked by counsel, provided only a general complaint with no supporting documentation, and did not demonstrate that any further investigation would have affected the outcome of his trial. The court also noted that defendant

did not provide any affidavits from the three witnesses, and therefore, his claim that counsel was ineffective for failing to contact them fails. The court finally concluded that the issues raised by defendant were frivolous and patently without merit.

On appeal, defendant claims that the court erred in summarily dismissing his petition because he set forth a claim of ineffective assistance of trial counsel that had an arguable basis in law and in fact. He maintains that counsel was ineffective for failing to investigate and call the three exculpatory witnesses. Defendant presents no issue regarding the other allegations set forth in his petition, and has thus waived them for review. People v. Pendleton, 223 Ill. 2d 458, 476 (2006).

At the first stage of post-conviction proceedings, a pro se defendant need only present the gist of a meritorious constitutional claim. People v. Edwards, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an arguable constitutional claim. People v. Brown, 236 Ill. 2d 175, 184 (2010). However, the petition must be both verified by affidavit (725 ILCS 122-1(b) (West 2008)), and supported by affidavits, records, or other evidence (People v. Collins, 202 Ill. 2d 59, 65

(2002)). If such affidavits, records, or other evidence are unavailable, petitioner must explain why they are absent. Collins, 202 Ill. 2d at 65.

If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. People v. Hodges, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is de novo. People v. Coleman, 183 Ill. 2d 366, 388-89 (1998).

Here, defendant maintains that he set forth a cognizable claim of ineffective assistance of trial counsel which required further proceedings under the Act. In determining whether defendant set forth such a meritorious claim, we are guided by the standard set forth in Strickland. People v. Morris, 335 Ill. App. 3d 70, 78 (2002), citing Strickland v. Washington, 466 U.S. 668 (1984). To demonstrate ineffective assistance of trial counsel, defendant must allege facts showing that counsel's performance was objectively unreasonable and resulted in prejudice to defendant. Strickland, 466 U.S. at 687, 694; People v. Chatman, 357 Ill. App. 3d 695, 700 (2005).

Defendant maintains that his counsel was ineffective for failing to investigate and call Diane, Moffett, and Forrest, who

would have allegedly testified that he did not possess a firearm or shoot the victim. To support his claim, defendant was required to provide affidavits from these witnesses. People v. Johnson, 183 Ill. 2d 176, 192 (1998). Defendant, however, did not attach any affidavits from these witnesses identifying the source and character of their alleged testimony, and their availability (Johnson, 183 Ill. 2d at 190), i.e., whether they would have testified on his behalf (People v. Brown, 371 Ill. App. 3d 972, 982 (2007)).

Instead, defendant filed an "affidavit of verity" to which he signed his name and declared, "under penalty of perjury," that it was in accordance with section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2008)). Section 1-109 of the Code does not indicate that the verification affidavit is an acceptable substitute when a statute other than the Code requires a document to be sworn to or verified under oath. People v. Tlatenchi, 391 Ill. App. 3d 705, 715-16 (2009). Here, defendant was required to provide a supporting affidavit pursuant to section 122-2 of the Act, and his verification affidavit under section 1-109 of the Code is not an acceptable substitute for that requisite affidavit. Tlatenchi, 391 Ill. App. 3d at 716. Furthermore, and contrary to the contention set forth in

defendant's appellate brief, the affidavit he attached to his petition is the verification affidavit under section 122-1(b) of the Act (725 ILCS 122-1(b) (West 2008)) (People v. Delton, 227 Ill. 2d 247, 252 n.1 (2008)), which does not satisfy the supporting affidavit requirement of section 122-2 of the Act (725 ILCS 122-2 (West 2008)) (Collins, 202 Ill. 2d at 65). Accordingly, we conclude that defendant failed to provide any supporting documentation for his claim regarding these witnesses, and thus failed to set forth a cognizable claim of ineffective assistance of trial counsel.

Defendant, however, claims that his failure to provide the affidavits was excused because his allegations are uncontradicted and supported by the record, and that he did not have the means to hire an investigator and track down the witnesses to obtain their affidavits. We disagree. The record shows that two of the three witnesses were named in defendant's answer to the State's pretrial discovery request. It is thus apparent that counsel was aware of them and chose not to call them, rather than failed to investigate them. People v. Deloney, 341 Ill. App. 3d 621, 635 (2003). Moreover, the police reports indicate that Diane was defendant's mother, and given this familial relationship, counsel could reasonably determine that her credibility may have carried

little weight. Deloney, 341 Ill. App. 3d at 635.

In addition, defendant's claim that he could not track down the three witnesses is rebutted by his verification in which he lists the mailing addresses of these witnesses. It thus appears that he could have contacted them via mail, or had one of his family members, who he claimed periodically provided him with money, contact them. Finally, we discern no reason why defendant could not have obtained an affidavit from his mother. Delton, 227 Ill. 2d at 257.

In sum, defendant failed to satisfy the documentation requirement of section 122-2 of the Act (Delton, 227 Ill. 2d at 257), and could not meet the prejudice prong given the overwhelming evidence of his guilt (Johnson, 183 Ill. 2d at 192). The record shows that the victim's 14-year-old stepson, Jerome Johnson, witnessed defendant shoot the victim inside an apartment building lobby. Although Johnson was going to receive sentencing consideration on a pending 2006 federal narcotics charge for his trial testimony in 2007, he had previously given statements in 1999, 2003, and 2004, implicating defendant. In addition, another witness observed defendant fleeing from the building where the victim had been shot. Accordingly, we conclude that the circuit court did not err in summarily dismissing defendant's

post-conviction petition.

In light of the foregoing, we affirm the summary dismissal of defendant’s petition entered by the circuit court of Cook County.

Affirmed.