

No. 1-10-0945

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 6983
)	
DANIEL RODRIGUEZ,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBride delivered the judgment of the court.
Justices J. Gordon and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to provide support for his claim of ineffective assistance of trial counsel.

¶ 2 Defendant Daniel Rodriguez 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 summarily dismissing his petition because he set forth a claim of ineffective assistance of trial counsel which had an arguable basis in law and in fact.

¶ 3 The record shows that defendant was convicted of first degree murder on evidence showing that co-defendant Carlos Estrada¹ confessed in a videotaped statement that in the early morning hours of July 26, 2003, he hit the victim, Alberto Martinez, in the head with a club, and defendant fatally stabbed him. Defendant was subsequently sentenced to 45 years' imprisonment on his conviction, and this court affirmed that judgment on direct appeal. *People v. Rodriguez*, No. 1-06-3525 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 In January 2010, defendant filed the instant *pro se* post-conviction petition alleging, *inter alia*, that his trial counsel was ineffective for failing to investigate and present his alibi witnesses. Defendant claimed that prior to trial he identified over 10 alibi witnesses to his attorney, who failed to investigate and contact them. He also claimed that the alibi witnesses would verify that he was in Mexico for two and a half months prior to the incident, and did not leave there until late August 2003. He maintained that Alberto Gomez Garcia, Alberto Gomez Miranda, Abacu Abarca Abarca, his step-mother Sonia Roza Uribe, and his brothers Juan Carlos Rodriguez and Alejandro Rodriguez, would have testified that he was living in Mexico at the home of his father and step-mother from May 2003 through late August 2003, and that they were in his presence on July 26, 2003.

¶ 5 In support of his petition, defendant attached, in relevant part, unsigned, typed "affidavits" of the six named witnesses. The unsigned statements of Uribe, Juan Carlos Rodriguez, Alejandro Rodriguez reflect that on July 26, 2003, defendant was living with them in Mexico, and that they told defendant's family in Illinois to have his representative contact them. According to Uribe's statement, the representative never did. Alejandro Rodriguez further stated that defendant arrived in Mexico in May 2003, and did not leave until late August 2003, and that all their neighbors can verify that defendant was in Mexico on July 26, 2003. Garcia stated that

¹Prior to defendant's trial, co-defendant Estrada pleaded guilty to second degree murder.

he saw defendant in Mexico on a daily basis between May and August 2003, and Garcia, Miranda and Abarca stated that they saw defendant on the date in question at his father's house in Mexico.

¶ 6 Defendant also attached his own "affidavit" to his petition alleging therein that it was made pursuant to section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2008)). Defendant stated that he told his attorney that on July 26, 2003, he was residing in Mexico with his step-mother, brothers, and father, and had been there since May 2003. He also stated that his attorney told him he would contact his alibi witnesses, but never did, and there were at least eight names that his attorney was provided along with addresses. Defendant further stated that his attorney claimed that the State's case was "so weak" that he did not need to present an alibi, and that his attorney told him not to testify to his whereabouts because he would have been impeached with a prior conviction. Defendant further stated that he tried to contact the alibi witnesses, but did not have access to a phone for three months which was his only way to communicate with the person who was helping him contact the people in Mexico. He also stated that he was unable to communicate with that person due to a swine-flu outbreak at the prison which resulted in a quarantine, that since then he was able to contact that person, and they prepared affidavits, and recently mailed them to his witnesses. However, the prison was then placed on lock down due to a hostage situation, and, once again, he had no means to contact the Mexico witnesses and tell them where to mail their affidavits.

¶ 7 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found that defendant attached purported statements from witnesses but none are affidavits or complied with the Act.

¶ 8 On appeal, defendant asserts that he presented a claim of ineffective assistance of trial counsel which had an arguable basis in law and in fact, *i.e.*, that his counsel was ineffective for

failing to investigate and call his alleged alibi witnesses. He thus contends that the summary dismissal should be reversed and his cause remanded for second stage proceedings.

¶ 9 We initially observe that defendant has raised no issues 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). We disagree with the State's claim, however, that defendant has also waived the issue he is raising on appeal because he failed to include it in his post-trial motion. Although the record shows that defendant hired new counsel after his trial, who conceivably could have raised this claim with the other claims of ineffective assistance of trial counsel presented in the post-trial motion, the issue is not waived because the facts relating to the claim at bar do not appear on the face of the original appellate record (*People v. Eddmonds*, 143 Ill. 2d 501, 528 (1991)), and we will consider the claim on the merits.

¶ 10 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). 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).

¶ 11 In determining whether defendant set forth a meritorious claim of ineffective assistance of counsel, 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).

¶ 12 In this case, defendant claims that his trial counsel was ineffective for failing to investigate and call his alibi witnesses. Although defendant named these witnesses, he failed to provide valid affidavits showing what their testimony would be. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998). The proposed "affidavits" defendant attached to his petition were not signed and notarized as required for their validity (*People v. Harris*, 224 Ill. 2d 115, 142 (2007)), and also failed to identify the witnesses' availability (*Johnson*, 183 Ill. 2d at 190), *i.e.*, whether they would have testified on defendant's behalf (*People v. Brown*, 371 Ill. App. 3d 972, 982 (2007)). As such, the proposed "affidavits" are merely what defendant wished the witnesses would say, and did not supply the necessary evidentiary support for defendant's claim of ineffective assistance of counsel making further review unnecessary. *Harris*, 224 Ill. 2d at 142, citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000).

¶ 13 Defendant maintains, however, that he supported his petition with his own affidavit. Defendant's "affidavit" also had no legal effect. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). The record shows that defendant's "affidavit" was made pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2008)), *i.e.*, a verification affidavit. Under the Act, however, an affidavit must be notarized in order to be valid (*People v. Carr*, 407 Ill. App. 3d 513, 516 (2011)), and defendant's invocation of section 1-109 of the Code is not an acceptable substitute (*People v. Tlatenchi*, 391 Ill. App. 3d 705, 715-16 (2009)). Accordingly, defendant failed to support his claim as required (725 ILCS 5/122-2 (West 2008)), and the circuit court properly dismissed his petition at the first stage of proceedings.

¶ 14 Defendant disputes that conclusion, citing the Second District case of *People v. Rivera*, 342 Ill. App. 3d 547, 550 (2003), where a certification filed under section 1-109 of the Code was found the equivalent of an affidavit for post-conviction purposes. The Second District, however, has since acknowledged that its holding regarding the affidavit "was foreclosed" by the supreme

court's decision in *Collins* (*People v. Rogers*, 372 Ill. App. 3d 859, 863 n.1 (2007)), and therefore provides no support for defendant's present claim.

¶ 15 Defendant, nonetheless, claims that he was not required to support his claim with affidavits from the alleged alibi witnesses because he provided an explanation of why it was not feasible for him to obtain affidavits from these witnesses, namely, that he was in prison and could not use a phone for three months to contact the person who was helping him communicate with the witnesses in Mexico, that there was a lockdown due to a hostage situation and a quarantine due to swine flu. We observe that defendant was arrested in 2005, and filed his post-conviction petition in 2010. Clearly, defendant had sufficient time during that period to obtain affidavits from these alibi witnesses who were known to him and several of them were relatives. We thus find that defendant has failed to provide a reasonable explanation as to why he could not obtain the necessary affidavits to support his petition.

¶ 16 In light of the foregoing, we affirm the order of the circuit court of Cook County.

¶ 17 Affirmed.