

No. 1-10-1605

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. 03 CR 15223
)	
EDDIE MOSLEY,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE Salone delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

Held: Where defendant presented in support of his post-conviction claim the affidavit of a witness who would testify defendant was not present at the attack on the victim, petition did not state an arguable claim of trial counsel's ineffectiveness in failing to present that testimony where the same witness identified defendant to police as the assailant; the circuit court's summary dismissal of defendant's post-conviction petition was affirmed.

¶ 1 Defendant Eddie Mosley appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends his petition stated an arguable claim that his

trial counsel was ineffective for failing to call a witness who would have testified defendant was not present when the victim was killed. We affirm.

¶ 2 Following a jury trial, defendant was convicted of first degree murder for killing Kevin Gavin by striking him on the head with a bat. The incident occurred at about 6 p.m. on May 31, 2003, when a group of teenagers gathered outside a home at 3528 West 85th Place in Chicago. Two boys in the group were preparing to fight, and several other youths were gathered around to watch. Gavin was trying to stop the two boys from fighting when, according to several witnesses who testified at trial, defendant approached Gavin from behind and struck him on the head with a baseball bat. After Gavin fell to the ground, several other people converged upon Gavin, and he died as a result of his head injuries.

¶ 3 Before trial, a hearing was held on defendant's motion to suppress identification testimony, which was denied. At the hearing, Chicago police detective Brian Forberg testified that four people at the scene of the melee, including Pablo Cruz, viewed a photo array or a police lineup, or both, and identified defendant as the person who struck Gavin on the head.

¶ 4 At trial, Harrison King testified he was mowing his lawn next door to the house where Gavin was attacked. According to King, between 15 and 20 teenagers congregated in the yard next to his. After several more teenagers arrived, the group began talking loudly and arguing. King approached them and asked Gavin, who stood among the group, if they could quiet down.

¶ 5 As King returned to his yard, he was about 15 or 20 feet away from Gavin when he saw defendant strike Gavin on the back of the head with a bat. King testified he called out to defendant and "met eyes" with him, and King shouted to defendant that he should stop hitting the victim. King said he had a clear view of defendant and saw his full face and that nothing was blocking his view. On June 7 or June 8, King met with police and viewed a police photo book,

identifying defendant as the attacker. Several days later, King identified defendant in a police lineup. King testified defendant was the only person hitting Gavin with a bat.

¶ 6 Emmanuel Poe, one of the youths present in the group, testified that a person named Pablo was present when the victim was attacked, though he did not know Pablo's last name. Poe testified defendant struck Gavin four or five times. Poe identified defendant in a photo array and a police lineup, as did Anthony Green and DeAngelo Taylor. Keon Smith testified he was three feet away from Gavin when Gavin was struck. Smith identified defendant in a lineup as the assailant.

¶ 7 Defendant presented an alibi theory of defense. One defense witness was a family friend who testified defendant was with her on the day of the altercation until he drove her home at about 6 p.m.

¶ 8 Upon his conviction, defendant was sentenced to 50 years in prison. On direct appeal, defendant raised two claims regarding jury instructions, and this court rejected those claims and affirmed defendant's conviction and sentence. *People v. Mosley*, No. 1-06-1479 (2008) (unpublished order under Supreme Court Rule 23).

¶ 9 On February 24, 2010, defendant filed a *pro se* post-conviction petition claiming, *inter alia*, that his trial counsel was ineffective in failing to call Pablo Cruz as a witness. In an affidavit in support of his petition, defendant stated that counsel refused to call Cruz as a witness despite his repeated requests. Defendant attested Cruz "would have vindicated me from the scene of the crime." The circuit court summarily dismissed defendant's petition, finding it to be frivolous and patently without merit because defendant had not attached to the petition an affidavit from Cruz.

¶ 10 On April 6, 2010, defendant filed a *pro se* motion asking the court to reconsider his petition. Defendant attached to his motion an affidavit of Cruz dated December 21, 2009, that stated, in its entirety, as follows:

"I was present during the incident which led to the death of [Kevin] Gavin. I will testified that at no time was Eddie Mosely [sic] there at the scene of the crime. I believe a mistake in identity has taken place and the true assaliant [sic] of Kevin Gavin has not been brought to justice for this crime. I am certain that out of the many people who were beating and assaulting Kevin Gavin that Eddie Mosely [sic] was not there at that time."

¶ 11 On May 13, 2010, the circuit court considered the content of Cruz's affidavit and found defendant's claim of counsel's ineffectiveness to be without merit. The court denied defendant's motion to reconsider. Defendant now appeals.

¶ 12 Defendant contends on appeal that his petition set forth an arguable claim of the ineffectiveness of trial counsel for failing to call Cruz as a witness. At the first stage of a post-conviction proceeding, the circuit court is concerned with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The court considers the substantive merit of a petition and may dismiss the petition if the allegations there, taken as true, render the petition "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008).

¶ 13 A petition is frivolous and patently without merit if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation,"

which encompasses assertions that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a post-conviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 14 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the two-prong test of *Strickland*, a defendant must show counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness and, secondly, that such deficient performance substantially prejudiced defendant, meaning the result of the proceeding would have been different but for counsel's errors. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*). At the first stage of post-conviction proceedings, a petition that alleges ineffective assistance may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 15 Defendant asserts his trial counsel was ineffective for failing to call Cruz to testify consistent with the contents of his affidavit, *i.e.*, that he was present at the offense and defendant was not the offender. Counsel's decisions on what evidence to present and what witnesses to call are routinely considered matters of trial strategy immune from ineffective assistance claims. *People v. Munson*, 206 Ill. 2d 104, 139 (2002); *People v. Enis*, 194 Ill. 2d 361, 402-03 (2000). According to defendant's own affidavit in support of his petition, defendant repeatedly asked his counsel to present Cruz as a witness. Therefore, counsel made a strategic decision not to use Cruz as a witness, likely because Cruz would have been impeached with his identification of defendant as the assailant in a police photo array and lineup, as revealed in Detective Forberg's testimony in the suppression hearing.

¶ 16 As we have noted, a post-conviction petition can be summarily dismissed if its allegations are based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. Defendant asserts in his post-conviction petition that Cruz could have offered testimony to vindicate him. However, the record contradicts that theory by way of testimony that Cruz identified defendant as the attacker, as did several other witnesses.

¶ 17 Defendant nevertheless argues the decision of his trial counsel not to present Cruz as a witness was objectively unreasonable. Even presuming, for the sake of argument only, that defendant could be considered to have met this first prong of *Strickland*, defendant cannot claim it is arguable that he was prejudiced by the absence of Cruz's testimony. Cruz's claim that defendant was not at the scene would have been countered by several witnesses who testified at trial that defendant was the assailant.

¶ 18 In conclusion, defendant has not set forth an arguable claim that his trial counsel was ineffective for failing to call Cruz as a witness, where Cruz's potential testimony would have been impeached by his identification of defendant as the attacker, and where the State presented the accounts of various other witnesses at the scene who also identified defendant as the person who struck the victim with a bat.

¶ 19 Accordingly, we affirm the circuit court's dismissal of defendant's post-conviction petition at the first stage of review.

¶ 20 Affirmed.