SIXTH DIVISION
November 30, 2012

No. 1-10-3646

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 15688
	)	
CHRISTOPHER MCATEE,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice GARCIA concurred in the judgment.
Justice GORDON concurred in part and dissented in part.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's *pro se* post-conviction petition reversed and remanded for second-stage proceedings where defendant raised an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Christopher McAtee 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 he presented the gist of a meritorious claim of ineffective assistance of counsel for failing to investigate, subpoena and call two witnesses.

¶ 3 The record shows that defendant was charged with first degree murder in the June 24, 2003, gang-related shooting of Racquel Torres on the northwest side of Chicago. Following a jury trial, defendant was found guilty of that charge, then sentenced to an aggregate term of 70 years in prison. Defendant filed a direct appeal, in which he claimed that the trial court erred in: (1) denying his pre-trial request for a continuance in order to procure his brother Frederick's presence in court; and (2) denying his motion *in limine* to admit a statement Frederick gave to defense counsel in December 2003, as a statement against penal interest. This court affirmed the trial court's rulings, finding no abuse of discretion by the court in denying defendant's motion for a continuance where, *inter alia*, counsel failed to exercise reasonable diligence in subpoenaing Frederick prior to trial, or show that there was a reasonable expectation of procuring his attendance at trial. This court further found no abuse of discretion in denying defendant's motion *in limine* to admit Frederick's hearsay confession because the statement lacked sufficient indicia of reliability. *People v. McAtee*, No. 1-07-1921 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On August 31, 2010, defendant filed an 88-page *pro se* "Petition for Post-Conviction Relief" replete with exhibits and attachments. In his petition, defendant set forth numerous allegations including, in pertinent part, (1) actual innocence; and (2) ineffective assistance of counsel based on counsel's conduct in entering into a stipulation regarding DNA evidence. In support of his actual innocence claim, defendant relied on affidavits from Anthony Lorenzi, who testified at trial, as well as that of Frederick McAtee and his sister, Nicole McAtee (Nicole).

¶ 5 In his affidavit, Frederick averred that he committed the murder of which defendant was convicted, that his handwritten statement and grand jury testimony implicating defendant were untrue, and that he would have testified accordingly had he been called as a witness at trial. In her affidavit, Nicole averred that she witnessed Frederick shoot at the victim's car and that, two months after the incident, she informed defense counsel of her observations, but was told not to worry about it. She further averred that defense counsel did not call her as a witness at trial, in spite of knowing that she was willing to testify to what she had witnessed. Defendant maintained that Lorenzi gave a detailed account of what led up to the shooting in his affidavit; however, as the trial court noted, the affidavit was not attached to the petition.

¶ 6 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the trial court found, in pertinent part, that the substance of the three affidavits was not newly discovered evidence, in that it was available at the time of trial, and thus defendant had no basis upon which to claim actual innocence. The court found that

defendant's claim of ineffective assistance of counsel had no arguable basis in law in that he had failed to show that it was objectively unreasonable for counsel to enter into the DNA stipulations, and that the stipulations prejudiced the defense, as required by *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 7 On appeal, defendant challenges the propriety of the dismissal order, and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). 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). 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. *Hodges*, 234 Ill. 2d at 11-12, 16.

¶ 8 In his challenge to the court's summary dismissal based on such a finding, defendant has solely raised a claim of ineffective assistance of trial counsel. In doing so, he has abandoned the other claims in his petition and thereby forfeited them on appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 9 That said, we observe that the ineffectiveness claim raised by defendant in his petition was based solely on counsel's stipulation to DNA evidence which, he maintained, foreclosed his right to confrontation. In this court, defendant claims that he set forth the gist of a constitutional claim of ineffective assistance of trial counsel based on counsel's failure to subpoena and call Frederick and Nicole as witnesses. Acknowledging the obvious, and relying on *Hodges*, 234 Ill.

2d at 21, defendant maintains that, although he "did not state the precise legal argument now raised in this appeal" in his petition, his claim is not defeated because the affidavits of Frederick and Nicole, which were attached to his petition, "clearly contained enough facts to make out an ineffective assistance of counsel claim." The State disagrees and asserts that defendant has forfeited this claim because he failed to raise it in his post-conviction petition.

¶ 10 The Act provides that "any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3. Accordingly, the supreme court has held that any issue to be reviewed must be presented in the petition filed in the circuit court. *People v. Jones*, 211 Ill. 2d 146, 148-49 (2004).

¶ 11 Here, defendant raised a single claim of ineffective assistance of counsel in his petition, which was based solely on counsel's conduct in entering into a DNA stipulation. In fact, defendant devoted seven pages of his petition to argue this claim and it was specifically addressed and found wanting by the circuit court. Nowhere in the petition did defendant allege that trial counsel was ineffective for failing to subpoena and call Frederick or Nicole as witnesses. In addition, the affidavits of these witnesses were specifically offered in support of his actual innocence claim and were considered as such by the circuit court.

¶ 12 In this respect, we find it noteworthy that in stating his claim of actual innocence, defendant did not allege that counsel's decision not to call Frederick or Nicole as witnesses was the result of deficient performance or that he suffered prejudice as a result. Rather, he alleged

that Nicole has "recently come forward," and that Frederick "recently signed an affidavit confessing to the murder." It is therefore clear that defendant's present claim was not included in his post-conviction petition, as such, and we address whether forfeiture is indicated as a result. *Jones*, 211 Ill. 2d at 148-50.

¶ 13 The supreme court has repeatedly reminded the appellate court that it is not free to ignore the clear language of the Act requiring that any issue to be reviewed must be presented in the petition filed in the circuit court. *People v. Coleman*, 2011 IL 091005, ¶¶ 16-17, citing *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993), *People v. Jones*, 213 Ill. 2d 498, 508 (2004), and *Jones*, 211 Ill. 2d at 145. Unlike the supreme court, we do not possess the supervisory authority to address claims that were not included in an initial post-conviction petition. *Coleman*, 2011 IL 091005, ¶ 17.

¶ 14 Further, although defendant's appellate counsel, upon reviewing defendant's case, may have discerned a potential claim that escaped defendant's untrained eye (see *Jones*, 213 Ill. 2d at 504-05), appellate counsel does not have the authority to raise a claim on appeal from the summary dismissal of a post-conviction petition that was not raised in the petition itself. *Coleman*, 2011 IL 091005, ¶ 18.

¶ 15 Nevertheless, defendant, relying on *Hodges*, 234 Ill. 2d at 21, maintains that his claim is not defeated because the affidavits attached to his petition contained sufficient facts to make out an ineffective assistance of counsel claim. The State responds that although *Hodges* counsels

that courts should review *pro se* post-conviction petitions with a lenient eye and allow borderline cases to proceed (234 Ill. 2d at 21), defendant failed to allege sufficient facts to constitute such a borderline claim.

¶ 16 In his petition, defendant stated that Nicole "had been willing to testify at trial, but defendant's lawyers would not call her in although they knew she was an eyewitness to the murder." With regard to Frederick, defendant stated that, in his affidavit, Frederick confessed to the murder of which defendant was convicted, as he had previously done on December 17, 2003, in a statement he provided to defendant's attorney and a private investigator. In his affidavit, Frederick also stated that he was willing to testify accordingly at defendant's trial.

¶ 17 Although defendant attached these affidavits in support of his claim of actual innocence rather than ineffective assistance of counsel, it appears that the misidentified legal basis for his allegations should not preclude the cause from proceeding to the second stage of proceedings. *Hodges*, 234 Ill. 2d at 21. In reaching that conclusion, we observe that a claim of ineffective assistance of counsel is examined under the two-prong *Strickland* test, under which a defendant must show that he suffered prejudice that was caused by counsel's deficient performance. *Strickland*, 466 U.S. at 687. At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel survives summary dismissal if it is arguable that counsel's performance fell below an objectively reasonable standard and it is arguable that defendant suffered prejudice as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 18 Defendant contends that he was deprived of his right to effective assistance of counsel due to counsel's failure to contact, interview and subpoena Frederick and Nicole, who would have supported his claim of innocence.[1] The record refutes defendant's contention with respect to Frederick, who was not only known to defendant and his counsel, but was the subject of several pretrial motions. Defendant's motion *in limine* to submit Frederick's December 2003 statement into evidence was denied and that denial was affirmed on direct appeal. In addition, the transcript of the pretrial motion reflects that upon denying the motion, the circuit court asked defense counsel if he wished to have Frederick's statement "placed into the file," and marked it as "Court's Exhibit No. 1," after counsel stated that he did.

¶ 19 The record also reflects that both defense counsel and the State's Attorney's office attempted to locate Frederick prior to trial, but had difficulty doing so. This difficulty was likely due to the fact that, as noted by defense counsel at a pretrial hearing held on October 23, 2006, a warrant against Frederick had been issued in July 2003 in relation to a separate incident, and counsel speculated that as a result, Frederick was "currently a fugitive." Although defense counsel was able to locate Frederick in Texas shortly before trial, his motion for a continuance in order to procure Frederick as a witness at trial, was denied by the trial court.

[1] Defendant does not allege any deficiency on the part of counsel with regard to Lorenzi in this appeal.

¶ 20 The record further reflects that Frederick, who was aware that defendant's trial was set to begin in a matter of days, told defense counsel that he would not appear in court on the day trial was set to begin. Notably, although Frederick claims in his affidavit that he would have confessed to the murder had he been called as a witness, when actually given the opportunity to do so, he refused to appear at trial on its scheduled start date, thereby undermining his credibility as a potential witness. Under these circumstances, it is clear that defendant could have raised this claim of ineffective assistance of counsel on direct appeal, and has waived the issue by failing to do so. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). It is also clear that defendant failed to set forth facts to establish that defense counsel's performance in relation to Frederick arguably fell below an objectively reasonable standard to warrant further proceedings. *Hodges*, 234 Ill. 2d at 17.

¶ 21 The same, however, cannot be said of defendant's allegations with respect to Nicole. In her affidavit, Nicole attested that she saw the incident and that Frederick, not defendant, was the one who shot the victim in this case. She further attested that although she spoke with defense counsel prior to trial and informed him of her observations, he did not call her as a witness at trial in spite of knowing that she was willing to testify to what she had witnessed. This claim rests on facts that are outside of the record, and thus defendant could not have raised this claim on direct appeal. Although we make no determination as to whether this claim will ultimately succeed, the facts and allegations contained in the petition and Nicole's affidavit, when taken as true and

viewed under *Hodges*, 234 Ill. 2d at 21, are sufficient to raise an arguable claim of ineffective assistance of counsel, thereby allowing the cause to proceed to the second stage of post-conviction proceedings.

¶ 22 Accordingly, we reverse the order of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition and remand the cause for second-stage proceedings.

¶ 23 Reversed and remanded.

¶ 24 JUSTICE GARCIA, concurring:

¶ 25 I agree that the defendant has made an arguable claim of ineffective assistance of counsel based on the affidavit from Nicole to warrant a remand to the circuit court for appointment of counsel and second-stage postconviction proceedings. I write separately to make clear that on remand, the duty of appointed postconviction counsel under Supreme Court Rule 651(c) (eff. Dec. 1, 1984) is to amend the *pro se* petition to adequately present the defendant's constitutional claims, which may lead to the re-emergence of the affidavit from Frederick. See People v. Johnson, 154 Ill. 2d 227, 237-38 (1993) (appointed postconviction counsel has the duty to make any amendments to the pro se petition necessary to adequately present the defendant's constitutional contentions). Postconviction counsel may also add new claims in the course of amending the *pro se* petition in carrying out his duty to provide reasonable assistance under Rule 651(c), though he is under no obligation raise new claims. See *People v. Pendleton*, 223 Ill. 2d

458, 476 (2006) (appointed postconviction counsel may raise other issues than those raised in the pro se petition, though counsel is under no duty to do so).

¶ 26 Our mandate in this case is limited: we remand for second stage postconviction proceedings in which postconviction counsel will be appointed to represent the defendant. Appointed postconviction counsel must then render reasonable assistance by amending the *pro se* petition to adequately present the defendant's constitutional contentions and may add additional claims as supported by available evidence, should he so choose. There is no authority for any suggestion by the State that the defendant is bound to proceed with only those claims raised in his original petition at the second stage. See *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 71 (affidavits may serve different purposes at first and second stage proceedings). *People v. Coleman*, 2011 IL App (1st) 091005, and other similar cases involving an affirmance of a *pro se* petition as frivolous and patently without merit, have no application here where we find the petition to present an arguable claim of a constitutional violation and remand for second stage proceedings.

¶ 27 JUSTICE R. GORDON, concurring in part, and dissenting in part:

¶ 28 I concur in part, and dissent in part. First, I concur with the majority that we should review defendant's claim, but for different reasons as I explain below. Second, I also concur with the majority's decision to reverse and remand for further proceedings. However, I dissent from

the majority's decision to limit the trial court's review to only one of the affidavits presented by defendant.

¶ 29 First, although the majority finds that defendant is raising a new claim on appeal (*supra* ¶12), it proceeds to review it in the interest of leniency (*supra* ¶ 15). I must write separately because I believe that we should generally not review new claims on appeal. As the majority observes, unlike the supreme court, we do not possess the supervisory authority to address new claims that were not previously included in an initial post-conviction petition. *Supra* ¶ 15 (citing *Coleman*, 2011 IL 091005, ¶ 13). However, for the reasons I explain below, I find that defendant's claim is not new, and thus we have the authority to review it on appeal. Thus, I concur on this issue but for different reasons.

¶ 30 Second, although the majority reverses and remands to the trial court for further proceedings, it limits the trial court's review to only one of the two affidavits. Since I believe, as I explain below, that the trial court should be allowed to consider both affidavits on remand, I must dissent from this part of the majority's holding.

¶ 31 I. Not a New Claim

¶ 32 Factually, defendant makes the same claim in his *pro se* postconviction petition as he does on this appeal: that he is actually innocent and that the information in the attached affidavits proves his innocence.

¶ 33 Before the trial court, defendant believed – quite reasonably for a lay person – that, since the affidavits were new, his claim met the legal standard for an actual innocence claim based on new evidence. However, the trial court dismissed his petition as frivolous and patently without merit because the affiants – as opposed to the affidavits themselves – were previously known to defendant and thus not new for purposes of the rule.

¶ 34 Before this court, the *pro se* defendant had what he did not have in the trial court – an attorney. And this attorney took the same exact facts and placed them into the correct legal container, namely, ineffectiveness assistance of trial counsel. Thus, before us, defendant now argues that his trial counsel was ineffective for not having raised these facts before.

¶ 35 However, the majority finds that defendant is raising a new claim – a new legal claim, yes; a new factual claim, no. This case shows exactly why a *pro se* petition should not be dismissed before an attorney reviews it, *unless* it is frivolous and patently without merit – in other words, *unless* even an attorney could not phrase the factual claim into correct legal terms.

¶ 36 As we all agree, a *pro se* petition must be liberally construed. A *pro se* petitioner is not an attorney, and we do not expect him to know what precise legal terms to use or to be educated in legal concepts such as what does "new" mean to a lawyer, as opposed to a lay person. What defendant does believe is that he is innocent and that these witnesses will prove his innocence; and that if they had been presented before, he would not have to raise them now in his own *pro se* petition.

¶ 37 Nonetheless the majority finds that defendant is raising a new claim. However, we cannot expect legal draftsmanship of a *pro se* petitioner. To do so is contrary to the law set forth by our supreme court in *People v. Hodges*, 254 Ill. 2d 1 (2009). In *Hodges*, our supreme court cautioned that, "[b]ecause most petitions are drafted at this stage by defendants with little legal knowledge or training this court views the threshold for survival as low." *Hodges*, 254 Ill. 2d at 9.

¶ 38 In *Hodges*, our supreme court expressly rejected the type of "strict construction[ist]" thinking that is being applied to find a new claim here. *Hodges*, 234 Ill. 2d at 21. In *Hodges*, the State asked our supreme court to affirm the appellate court which had considered only whether certain testimony would support a self-defense theory but not whether it would also support a theory of second degree murder. The State argued that "the reason that the appellate court had addressed only self-defense and not second degree murder is that, in his petition, defendant focused only on the impact the witnesses' testimony would have had on self-defense." *Hodges*, 234 Ill. 2d at 21. The State argued that defendant had failed to "expressly allege that this same testimony would have supported 'unreasonable belief' second degree murder." *Hodges*, 234 Ill. 2d at 21. Rejecting this argument, our supreme court observed that second degree murder "has been referred to as 'imperfect self-defense.' " *Hodges*, 234 Ill. 2d at 21. The court observed that "[i]n the State's view, defendant, who was acting *pro se*, 'chose' to focus only on self-defense and not on second-degree murder, and he should be held to that choice." *Hodges*, 234 Ill. 2d at 21.

Our supreme court flat out "reject[ed] this argument," finding "the State's strict construction of defendant's petition is inconsistent with the requirement that a *pro se* petition be given a liberal construction." *Hodges*, 234 Ill. 2d at 21.

¶ 39 In other words, our supreme court did not expect a *pro se* defendant to understand the legalistic differences between "new" as used by a lay person and "new" as used by a lawyer; or to understand that the information contained in the "new" affidavits could serve as the basis of an ineffectiveness claim but not as the basis of an actual innocence claim – even though what he is claiming is that he is actually innocent. Without a law degree, these distinctions are pretty difficult to understand; and our supreme court in *Hodges* made clear that we would not place such a demand on a *pro se* defendant.

¶ 40 The majority holds, in effect, that, if defendant intended to challenge the effectiveness of counsel on this ground, he would have expressly stated so. Undoubtedly, if he had an attorney to tell him that his claim of innocence would otherwise go unreviewed, he certainly would have stated it that way if he knew how. However, this is at the first stage, before a defendant has the benefit of an attorney.

¶ 41 Since an attorney could – and, in fact, did on appeal– shape the precise same factual claim by defendant into a viable legal claim, I would find that it is not a new claim, and I would not dismiss the appeal on this ground.

¶ 42 II. Review of Both Affidavits.

¶ 43 Defendant claims that his trial counsel was ineffective for failing to subpoena Frederick and Nicole, who would have supported his claim of innocence. The majority concludes that defendant raised an arguable claim with respect to Nicole, but not Frederick, and so remands based on Nicole's affidavit alone. I concur with remanding; however, I must dissent because I would allow the trial court to consider both affidavits, not just one.

¶ 44 The majority concludes that defendant's trial counsel made some attempts to contact and locate Frederick but, in the end, trial counsel failed to produce him. The majority finds that these unsuccessful attempts negate an arguable claim of ineffectiveness. *Supra* ¶ 18-19. I do not agree. There is no dispute that counsel never subpoenaed Frederick, and no dispute that he never appeared. I cannot find that unsuccessful attempts to produce a witness negate an ineffectiveness claim, at this first stage of the proceedings. The trial court needs to hear more and, upon remand, an attorney will be appointed who will hopefully look into the matter.

¶ 45 The majority also finds that defendant could have raised this claim of ineffective assistance of counsel on direct appeal. However, the claim relies on material that would have been outside of the trial record, namely, Frederick's affidavit which details what he would have testified to if he had been called as a witness and which also avers that defendant's trial counsel never called him as a witness. As a result, this claim could not have been raised on direct appeal and is not forfeited now.

¶ 46 Conclusion

¶ 47 In sum, although I concur with the majority's decision to review defendant's claim on appeal, I must write separately about this issue because I conclude that defendant's claim is not new and this is why we have the authority to consider it on appeal. In addition, although I concur with the majority's decision to reverse and remand for further proceedings, I must dissent from this part of the order because I would allow the trial court to consider both affidavits on remand and not just one.