

No. 1-11-0071

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 455
	)	
REMEL RUTLEDGE,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Quinn and Connors concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed where defendant failed to establish an arguable basis in fact or in law for claim of ineffective assistance of trial counsel.
- ¶ 2 Defendant Remel Rutledge 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 2010). He contends that the circuit court erred in dismissing his petition where he set forth a cognizable claim of ineffective assistance of trial counsel based on counsel's failure to communicate with him and adequately prepare for trial.

¶ 3 The record shows, in relevant part, that on January 9, 2007, defendant was charged in the instant case (No. 07 CR 455) with multiple counts arising from the 2005 shooting of Ashraf Samad and the robbery of his cell phone store "The Connection," at 63rd Street and South Fairfield Avenue, in Chicago. At the time these charges were filed, defendant was represented by private counsel in two cases from 2005 and 2006, and on January 24, 2007, counsel filed an appearance on defendant's behalf in the instant case and in case number 07 CR 843. He also filed a motion for discovery in the two new cases. Thereafter, at a hearing on February 22, 2007, counsel acknowledged receipt of discovery for "the 3 cases" pending against defendant, and on May 8, 2007, he filed an answer to the State's motion for discovery in the instant case which stated that "[i]nvestigation [c]ontinues."

¶ 4 On May 24, 2007, the State informed the court that it was electing to proceed against defendant in case number 07 CR 843, and a jury trial was set for July 24. The report of proceedings for that date does not indicate any trial activity; however, at the next hearing, on August 8, 2007, the State informed the court: "if you recall, the defendant had three cases. We elected on the one case. I wasn't present, but I believe that was a finding of not guilty. He has two cases left. It was up today for us to elect. We are going to elect." The State then elected to proceed on case number 07 CR 453.

¶ 5 On September 5, 2007, counsel acknowledged receipt of an answer to discovery in the elected case, and the matter was set for a jury trial on October 16. When that date arrived, counsel was not present, and the following colloquy was had between the State, the court, and defendant:

"MR. MURPHY [assistant State's Attorney]: Judge, this is Mr. Rutledge, he is represented by Anthony Burch, who is present in court. The matter was set, 07-453 was set today for jury trial.

Mr. Burch contacted our office last week sometime and indicated that he would not be answering ready. We did call off our victims. The State would have been ready. I did speak to Mr. Burch today, and after talking with him we are going to change our election on the cases, we are going to change our election to 07-455, which is a case with the co-defendant of Kenyan Slater, and we will set it for bench trial on November 28th. I talked to Mr. Burch and he wanted a bench trial for that date.

THE COURT: All right. We will see you on that date. Do you understand?

THE DEFENDANT: Yes."

¶ 6 On November 28, 2007, defendant's bench trial in case number 07 CR 455 commenced. He was ultimately found guilty of attempted murder, aggravated battery with a firearm, two counts of armed robbery, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon, then sentenced to concurrent terms of 15 years' imprisonment for attempted murder, 40 years for armed robbery, and 7 years for aggravated unlawful use of a weapon. This court affirmed that judgment on direct appeal. *People v. Rutledge*, No. 1-08-1231 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 On September 10, 2010, defendant filed the instant *pro se* petition for post-conviction relief alleging, as pertinent to this appeal, that trial counsel was ineffective for failing to communicate with him in order to develop sound trial strategy. He claimed that counsel "spoke to him only between courtroom appearances" in visits of about five minutes in length, that he only spent a total of 30 minutes with him prior to trial, and that his "performance was unreasonable where counsel failed to communicate with [him] and to prepare him for the

testimony he would or should eventually have given during his trial." He also claimed that if counsel had communicated with him, "there is a good probability that the outcome of this case would have been different."

¶ 8 Defendant further alleged that trial counsel was ineffective for advising him not to testify and for failing to impeach one of the State's witnesses, call Kenyon Slater as a witness, point out inconsistencies between the physical evidence and trial testimony, file a motion *in limine* regarding other crimes evidence and a motion for change of venue, and consult a ballistics expert. He also alleged that appellate counsel was ineffective for failing to raise the issues contained in his petition on direct appeal.

¶ 9 In support of his petition, defendant attached, *inter alia*, an affidavit from his appellate counsel in which she averred that after defendant's direct appeal was denied, she volunteered to assist defendant in gathering evidence for his post-conviction petition. In this respect, she contacted trial counsel "to seek his assistance with documents he had in his possession, including but not limited to, police reports and medical records for Ashraf Samaad." She also asked counsel "if he would be willing to write an affidavit attesting to his representation of [defendant] prior to a lineup and the police denying him access to [defendant] during lineups," but counsel did not respond to her e-mails. Defendant also attached his own affidavit in which he criticized the strategic decisions of trial counsel and alleged improper conduct by the State, the police, and the trial court, but did not address trial counsel's alleged failure to communicate with him or prepare for trial.

¶ 10 On November 30, 2010, the circuit court summarily dismissed defendant's petition. In its written order, the court found that many of defendant's ineffective assistance of trial counsel claims were premised on the trial record and thus waived, and that his claims nonetheless failed on the merits because they were either contradicted by the record or lacked adequate factual

support. The court also noted that defendant did, in fact, testify at trial, but did not specifically address trial counsel's alleged failure to communicate with defendant and adequately prepare for trial. This appeal follows.

¶ 11 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 12 Defendant maintains that he set forth a claim of ineffective assistance of trial counsel warranting further proceedings under the Act. To establish such a claim, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 13 Defendant maintains that he set forth an "arguably meritorious" claim of ineffective assistance of trial counsel where, because his bench trial commenced six weeks after the State elected on the case, "it is arguable that [counsel] lacked sufficient time to adequately prepare for trial in the instant case and to communicated with [him]."

¶ 14 The State responds that defendant has forfeited his ineffective assistance of trial counsel claim by failing to raise it on direct appeal. The State also responds that defendant has failed to provide adequate documentary support for his claim, and that his petition has no arguable basis in law because he failed to establish an arguable claim of prejudice.

¶ 15 Anticipating this response, defendant correctly noted in his post-conviction petition that the rules of procedural default are relaxed where the facts pertaining to a post-conviction claim do not appear in the trial record. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). Since defendant's claim that trial counsel did not communicate with him or adequately prepare for trial is based on information outside the trial record, and therefore could not have been considered on direct appeal, we are not precluded from addressing his claim here. *Taylor*, 237 Ill. 2d at 373.

¶ 16 Notwithstanding, we agree with the State that defendant has failed to provide adequate documentary support for his claim. Under the Act, defendant is required to provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). The purpose for requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 17 Here, defendant claimed that trial counsel failed to communicate with him and to adequately prepare for trial where he only met with him for about 30 minutes prior to trial. However, defendant has failed to include an affidavit from counsel regarding the amount of representation that was provided, or any other evidence in support of his claim. In fact, defendant did not even allude to this issue in his own affidavit.

¶ 18 Rather, defendant points out that the failure to attach independent corroborating documentation or explain its absence may be excused where the petition allows an inference that the only affidavit defendant could have furnished, other than his own, was that of his attorney.

*People v. Hall*, 217 Ill. 2d 324, 333 (2005). Contrary to defendant's claim, however, we find that no such inference obtains here. As the State correctly notes, defendant could have supported his post-conviction claim by providing billing statements showing the amount of time counsel spent on his case, in lieu of obtaining an affidavit from counsel. Although defendant balks at this suggestion, claiming that the reason for his failure to attach billing statements is "self-evident from the circumstances under which he filed his *pro se* petition," we note that his ability to obtain an affidavit from appellate counsel suggests that he would be equally able to obtain his own billing records. In any event, he has failed to provide any explanation for the absence of documentation to corroborate his claim that counsel failed to communicate with him or adequately prepare for trial, and has thus failed to comply with the evidentiary requirements of the Act. 725 ILCS 5/122-2 (West 2010).

¶ 19 That said, it is clear that defendant has failed to establish an arguable claim of prejudice based on counsel's alleged inattention to his case. Although defendant alleged in his petition that if counsel had communicated with him, "there is a good probability that the outcome of this case would have been different," *Strickland* requires a showing of actual prejudice, not just mere speculation as to prejudice. *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 20 In his opening brief, defendant argues that counsel had only six weeks "to begin or complete his investigation of a case involving extensive ballistics evidence," criticizes his decisions on matters of trial strategy, then summarily concludes that he was "arguably prejudiced." Similarly, in his reply brief, defendant responds to the State's argument that the allegation of prejudice contained in his petition was conclusory by noting the "low threshold" standard at the first-stage of post-conviction proceedings, and asserting that "[i]t is arguable that counsel would not have been adequately prepared to present a defense in a case involving extensive ballistics evidence with only six weeks between the State's election and trial, and

because he did not speak to his client once following the election before putting him on the stand to testify."

¶ 21 Defendant's claim that he was prejudiced because counsel only had six weeks "to begin or complete his investigation" is not contained in his petition, nor is his claim that counsel did not speak with him after the State's election and before he testified at trial. He is therefore precluded from raising these claims here. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Furthermore, these arguments on the issue of prejudice completely fail to address the salient question, *i.e.*, whether there was a reasonable probability that, but for counsel's allegedly deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694.

¶ 22 Moreover, his claim finds no support in the record. As noted above, the trial record shows that counsel filed an appearance and a motion for discovery in this case on January 24, 2007, and was in receipt of discovery a month later. Counsel continued to represent defendant through the State's election to pursue the case in October 2007, and through the ensuing trial where counsel vigorously cross-examined the State's witnesses, called defendant to testify on his own behalf, and made a thoughtful closing argument. In these respects, defendant's assertion of ineffectiveness is belied by the record (*People v. Rogers*, 197 Ill. 2d 216, 222 (2001)), speculative, and insufficient to satisfy either prong of the *Strickland* test (*Strickland*, 466 U.S. at 687-88, 694).

¶ 23 For the reasons stated, we affirm the summary dismissal of defendant's *pro se* post-conviction petition by the circuit court of Cook County.

¶ 24 Affirmed.