

FIFTH DIVISION
JUNE 30, 2014

No. 1-12-1207

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 10771
)	
RAFAEL GUERRERO,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's summary dismissal of defendant's *pro se* post-conviction petition where defendant failed to state an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Rafael Guerrero 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 2012). On appeal, defendant contends that he alleged in his petition a meritorious claim that his trial counsel was ineffective for failing to call his mother, Juanita Guerrero, who would have testified

that her boyfriend, Saul Rodriguez, was the shooter in question, as well as other exculpatory witnesses who would have corroborated Saul's guilt. We affirm.

¶ 3 The record shows that defendant was charged with murder stemming from the April 2, 2005, shooting death of Miguel Diaz near 2431 South Christiana Avenue in Chicago. During their investigation of the shooting, police questioned Ramon Ayala, defendant's friend for 10 years, and Josefina Rodriguez, defendant's girlfriend. Each gave statements implicating defendant and both testified before the grand jury. In his statement to the police and his grand jury testimony, Ayala stated that on the date in question he and defendant were standing in front of defendant's house, when Diaz, with whom defendant had been fighting, passed on the sidewalk. Ayala stated that defendant pulled a gun from his waistband and fired at Diaz. Ayala heard four or five shots and fled. In her statement to police and her grand jury testimony, Josefina stated that she was with defendant when he was arrested, and, before arriving at the station, defendant told her to say that he was with his cousin and brother-in-law at the time of the shooting. While Josefina was waiting to be questioned at the police station, she heard defendant yelling through the walls that he loved her and to tell police he was with his brother-in-law. Josefina acknowledged in her statement that she had been treated well by police.

¶ 4 At trial, both Ayala and Josefina Rodriguez recanted their previous statements. They testified that they had each been handcuffed to a wall for three days, and did not receive anything to eat or drink until the last day. Josefina also testified that defendant yelled he loved her and "tell the truth" through the wall, but did not say anything else. The assistant State's Attorneys who took the statements testified that neither Ayala nor Josefina complained of mistreatment, and Detective Kevin Bor similarly testified that neither was mistreated.

¶ 5 Ernest Centeno testified that he saw defendant, Ayala, and Diaz standing five houses down from him on April 2, 2005. He heard a sound like firecrackers and saw defendant extend

his arm toward Diaz. Centeno heard additional shots and crouched down by his car. When he looked up, he saw defendant walk back to his house.

¶ 6 Defendant's aunt, Maria Guerrero, testified that on April 2, 2005, she was at 2431 South Christiana Avenue along with 10 other people, but defendant was not present. Maria was in the kitchen when she heard gunshots. She ran outside and saw two men get into a gray car and speed away from the scene.

¶ 7 Defendant testified that he was driving in a van with several occupants, including his cousin (Arthur Guerrero) and brother-in-law (Cordell Williams) at the time of the shooting. When he returned home, he saw yellow crime scene tape around the house and was subsequently arrested. Defendant denied shouting instructions to Josefina Rodriguez at the police station. Defendant's cousin Arthur and brother-in-law Cordell corroborated defendant's testimony about being in the van at the time of the shooting.

¶ 8 The jury found defendant guilty of first degree murder, and also found that he personally discharged a firearm, proximately causing Diaz' death. The court then sentenced defendant to 53 years' imprisonment, which included a 25-year enhancement for personally discharging a firearm. We affirmed that judgment on appeal. *People v. Guerrero*, No. 1-08-3659 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On January 5, 2012, defendant filed a *pro se* post-conviction petition, alleging, in pertinent part, that he was actually innocent of the shooting in question, that his trial counsel was ineffective for failing to call several witnesses, including his mother, to corroborate that Saul Rodriguez was the actual offender, and that appellate counsel was ineffective for failing to raise these issues on appeal. Defendant specifically alleged that he "recently learned, from his immediate family members, that they knew who the actual offender was, that they had been prepared to testify to such fact in court but, that my lawyer did not call either of them to give

testimony at my trial and that such fact did not come out earlier due to family conflicts and accusations, as well as personal fears and family concerns." Defendant further commented that "the discovery related to this case actually listed such available witnesses."

¶ 10 Besides his own affidavit, defendant attached to his petition the affidavits of his mother (Juanita Guerrero), another cousin (Daniela Guerrero), an uncle (Eladio Guerrero), and Danny Martinez. Juanita averred that on April 2, 2005, she and members of her family heard shots outside and when they rushed out of the house to see what had happened, she heard a car speeding down the alley. She learned that a man had been shot and that her son, defendant, was charged with the murder. Subsequently, her boyfriend, Saul Rodriguez, admitted to Juanita that he was the shooter in question. He specifically told her that when he arrived at the scene, he "threw up a gang sign to the [victim]," and when the victim put up a rival gang sign, he shot him. Saul and his friend then quickly drove away from the scene. Juanita explained that she did not come forward sooner because she was afraid of Saul and believed that nobody would be able to identify defendant as the shooter. Defense counsel indicated that Juanita would be called to testify at trial, but she was never called. Juanita concluded by attesting that she was prepared to testify to the statements in her affidavit.

¶ 11 Daniela Guerrero, Eladio Guerrero, and Danny Martinez, attested that they heard or saw a car fleeing the scene after the shooting. Daniela also attested that Juanita told her that Saul admitted that he shot the victim. Defendant's affidavit essentially reiterated the arguments in his petition. Defendant also attached a supplemental police report to his petition, which listed potential witnesses including Eladio Guerrero, Danny Martinez, Daniela Guerrero, and Juanita Guerrero.

¶ 12 On March 23, 2012, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found that his actual innocence claim failed where

the evidence supporting his claim was not newly discovered, and he failed to demonstrate that the evidence would change the result on retrial. The court also determined that defendant's ineffective assistance of trial counsel claim failed where counsel's decision not to present additional witnesses was a matter of trial strategy, and defendant did not suffer any prejudice as a result. Finally, the court found that appellate counsel was not ineffective for failing to raise non-meritorious issues.

¶ 13 In this appeal, defendant does not present his actual innocence and ineffective assistance of appellate counsel claims. Instead, defendant contends that he raised an arguable claim of ineffective assistance of trial counsel based on counsel's failure to call Juanita Guerrero as a witness, who would have testified that Saul Rodriquez committed the murder of Diaz.

Moreover, defendant asserts that trial counsel was ineffective for failing to call other exculpatory witnesses, *i.e.*, Daniela Guerrero, Eladio Guerrero, and Danny Martinez, who would have corroborated Saul's guilt.

¶ 14 The threshold question, as raised by the State, is whether the allegation was included in defendant's petition because a claim that is not raised in the petition cannot be argued for the first time on appeal. See *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993) (a claim not raised in the petition is waived). Despite the State's arguments to the contrary, we find that defendant's petition, when liberally construed (*People v. Jones*, 213 Ill. 2d 498, 505 (2004)), raised the claim at bar. Although defendant's petition does not state his claims as precisely as his brief, it is clear that he was arguing an ineffective assistance of trial counsel claim for counsel's failure to call witnesses. He specifically states in his petition that "his trial counsel was ineffective for failing to present a misidentification defense." In particular, defendant asserted his trial counsel failed to call several witnesses who knew who the actual offender was, and that, although they had been prepared to testify in court, defense counsel never called them to the stand. Moreover,

defendant attached several affidavits from witnesses in order to corroborate his theory that Saul Rodriquez was the shooter, and that this fact would have come to light at trial if defense counsel had called them as witnesses. We therefore turn to the merits of defendant's petition, which we review under the *de novo* standard of review. See *People v. Tate*, 2012 IL 11214, ¶ 10 (stating that the summary dismissal of a post-conviction petition is reviewed *de novo*).

¶ 15 The Act provides a method by which persons imprisoned in the penitentiary can assert that their convictions resulted from a substantial denial of their constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). At the first stage of post-conviction proceedings, the trial court must independently review the petition, taking the allegations as true and determine whether the petition is "frivolous or patently without merit." *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis in either law or in fact. *Tate*, 2012 IL 112214, ¶ 9. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16.

¶ 16 The first stage in the proceedings allows the trial court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). Because most first-stage post-conviction petitions are drafted by defendants with little legal knowledge, the "threshold for survival [i]s low." *Tate*, 2012 IL 112214, ¶ 9. A defendant alleging ineffective assistance of counsel at the first stage of proceedings must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Id.* at ¶ 19, citing *Hodges*, 234 Ill. 2d at 17.

¶ 17 In discussing the merits of defendant's claim, the State argues that trial counsel's decision not to call Juanita Guerrero, Daniela Guerrero, Eladio Guerrero, and Danny Martinez was a matter of sound trial strategy. However, because a discussion of trial strategy at this stage is inappropriate, we will limit our analysis to whether defendant was arguably prejudiced by counsel's failure to call the above witnesses. See *Tate*, 2012 IL 112214, ¶ 22 (noting that the State's strategy argument was "more appropriate" for the second stage of post-conviction proceedings, where both parties are represented by counsel and a defendant must make a substantial showing of a constitutional violation).

¶ 18 There is no dispute the statement by Saul as noted in Juanita's affidavit is hearsay because it was an out-of-court statement offered to prove the truth of the matter asserted, *i.e.*, Saul killed Diaz. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). It is well established that "extrajudicial declarations of a third party, not made under oath, that he committed the crime, are purely hearsay, and even though they are declarations against interest, are inadmissible." *People v. Villegas*, 222 Ill. App. 3d 546, 550 (1991), quoting *People v. Lettrich*, 413 Ill. 172, 178 (1952). Thus, Saul's statement constitutes inadmissible hearsay.

¶ 19 In turn, a hearsay affidavit generally is not sufficient to support a post-conviction claim. *People v. Gray*, 2011 IL App (1st) 091689, ¶ 16. This insufficiency accords with the fact that a hearsay statement offered to prove the matter asserted is dependent on the credibility of the out-of-court declarant. *Caffey*, 205 Ill. 2d at 88. Although claims are presumed to be true for purposes of first-stage review, this presumption does not oblige the court to allow a claim to withstand first-stage dismissal when it is based on inadmissible hearsay because an affidavit attached to a post-conviction petition should consist of factual propositions to which the affiant could testify. *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 54; Ill. S. Ct. R. 191 (eff. Jan. 4,

2013). Accordingly, hearsay is generally not admissible due to its lack of reliability unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 88.

¶ 20 Defendant argues that Saul's statement would be admissible under the hearsay exception for a declaration against penal interest, relying on *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (stating that where hearsay testimony regarding a declaration against penal interest bears adequate assurances of trustworthiness and is critical to the defense, its exclusion deprives the defendant of a fair trial). In so arguing, defendant emphasizes that Maria Guerrero's trial testimony, as well as the affidavits of Daniela, Eladio, and Danny, corroborated Saul's alleged confession to Juanita, and thus showed that the statement was trustworthy. We disagree.

¶ 21 In *Chambers*, the United States Supreme Court identified four factors a trial court should consider to determine whether a statement against penal interest is sufficiently reliable. *Chambers*, 410 U.S. at 300-01. Specifically, the trial court should determine (1) whether the statement is self-incriminating and against the declarant's interest; (2) whether it was made spontaneously to a close acquaintance shortly after the crime occurred; (3) whether it was corroborated by other evidence; and (4) whether there was an adequate opportunity to cross-examine the declarant. *Id.*; *People v. Williams*, 193 Ill. 2d 1, 19-20 (2000). Not all the factors need to be present, but ultimately the question to be considered is whether the statement was "made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness." *People v. Bowel*, 111 Ill. 2d 58, 67 (1986), quoting *Chambers*, 410 U.S. at 300-01.

¶ 22 Here, although Saul's statement is self-incriminating and against his interest, defendant fails to establish the remaining *Chambers* factors. The statement was not made shortly after the crime occurred where Juanita attests that Saul confided in her "after some time had passed since the shooting." The statement was also not sufficiently corroborated by other evidence. Juanita's

affidavit attested that Saul told her that he "jumped in the car and left the area as quickly as [he] could" after shooting Diaz. Defendant maintains that this statement is corroborated by the trial testimony of Maria Guerrero, the affidavits of Eladio Guerrero, Danny Martinez, and Daniela Guerrero, and a supplemental police report. However, these sources only corroborate that a car left the scene at the time of the shooting. This is insufficient to establish a reliable indicia of trustworthiness that Saul shot Diaz. Regarding the last factor, there was no opportunity to cross-examine Saul and defendant did not allege that Saul was unavailable to be cross-examined. Therefore, defendant was not even arguably prejudiced by trial counsel's decision not to call Juanita as a witness because she could not have testified to Saul's inadmissible hearsay statement.

¶ 23 In addition, the proposed testimony of Daniela, Eladio, or Danny had no probative value. As stated above, these witnesses' affidavits are insufficient to corroborate Saul's alleged statement to Juanita where none of them actually saw the shooting. We further note that although Daniela attested that Juanita told her that Saul confessed to Juanita that he was the shooter in question, this statement also amounts to hearsay that is inadmissible for the same reasons we found Saul's statement to Juanita inadmissible. Therefore, it is not arguable that defendant was prejudiced by trial counsel's decision not to call these witnesses to testify.

¶ 24 In reaching this conclusion, we find defendant's reliance on *People v. Tenney*, 205 Ill. 2d 411 (2002), to be misplaced because there the hearsay declarant (Lionel Lane) already had been prosecuted and convicted for the subject crime. At Lane's trial, his hearsay confession to another person was admitted as evidence. *Id.* at 440. Under these "unique and rare circumstances," the supreme court held that Lane's hearsay confession should also have been admitted at Tenney's trial even though the *Chambers* factors were not satisfied. *Id.* at 430-41. The unique factual situation in *Tenney* does not apply here to render Saul's statement admissible.

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¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.