FIRST DIVISION
December 1, 2014

No. 1-13-0480
2014 IL App (1st) 130480-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | Appeal from the |
| | ) | Circuit Court of |
| Respondent-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | |
| | ) | 06 CR 24410 (2) |
| BRIAN WESTON, | ) | |
| | ) | Honorable |
| | ) | Neera Lall Walsh, |
| Petitioner-Appellant. | ) | Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred with the judgment.

**ORDER**

*Held:* Defendant's postconviction petition should not have been dismissed at the first stage because it was arguable that counsel's performance fell below an objective standard of reasonableness.

¶ 1 Defendant Brian Weston was convicted by a jury of first degree murder and attempted first degree murder. Defendant appealed his convictions arguing that there were a number of errors during his trial, including a lack of sufficient evidence to prove him guilty beyond a reasonable doubt. This court found that where defendant's conviction rested on the testimony of a single eyewitness, the evidence was sufficient for a rational jury to find defendant guilty of

murder and attempted murder beyond a reasonable doubt, and upheld defendant's convictions. Defendant then filed a postconviction petition in the trial court alleging that counsel was ineffective for: (1) failing to introduce evidence that the victim (and single eyewitness) had failed to identify defendant in a lineup on May 4, 2005; (2) failing to introduce defendant's state-issued photo identification card taken three days after the crime to show that he did not match the victim's description of her attacker; and (3) failing to call defendant's mother and sister to testify that defendant never wore his hair in the kind of haircut the victim described. The trial court dismissed defendant's postconviction petition as frivolous and patently without merit. Defendant now appeals.

¶ 2 The facts of this case, as stated on direct appeal, are as follows. See *People v. Weston*, 1-09-2122 (2011) (unpublished order under Supreme Court Rule 23). Nyoka Williams, the victim, had an intermittent relationship with William Yelvington, a member of the Vice Lords street gang. At some point in April 2005, Noyoka returned home to find Yelvington in her room with a large number of firearms laid out on her bed, including rifles and shotguns. Yelvington was accompanied by fellow Vice Lord Travis Weston. Nyoka had met Travis a number of times.

¶ 3 About a week later and following an argument, Yelvington broke into Nyoka's apartment with a rifle and threatened to kill her if she called 911. Nyoka called 911 anyway and Yelvington fled. Nyoka later obtained an order of protection against him.

¶ 4 On April 29, 2005, Nyoka went to bed early. About three hours later, she awoke to find a man standing over her, pointing a gun at her face. Nyoka later described the man, who she had never met, as dark-skinned, in his early twenties, about 5'6" or 5'7" tall and with a short "afro" hairstyle, and wearing a grey hooded sweatshirt. The man repeatedly asked for the location of

Yelvington's guns. Travis Weston then entered the room with Tai, Nyoka's sister. The man then shot Tai and Nyoka. Tai died of her wounds, but Nyoka eventually recovered.

¶ 5 Nyoka spoke with police investigators a number of times about the incident. Nyoka told them that Travis was one of the attackers, but that she had never met the other man before. She was shown photo arrays with possible suspects on two occasions, once in May 2005, soon after the attack, and again in September 2005. Neither photo array led to a successful identification. In September 2006, however, Nyoka viewed yet another photo array, this time containing defendant's picture. She identified defendant as the man who shot her and she picked him out of a lineup a week and a half later. Defendant turned out to be Travis Weston's brother.

¶ 6 Defendant and Travis were charged with Tai's murder and Nyoka's attempted murder. Defendant and Travis were tried together by a double jury. Defendant's jury ultimately convicted him of both crimes and he was sentenced to consecutive sentences of 45 years for Tai's murder and 30 years for Nyoka's attempted murder. On direct appeal to this court, his convictions were affirmed.

¶ 7 On September 21, 2012, defendant filed a *pro se* postconviction petition, arguing in part that his trial counsel was ineffective for three reasons. First, defendant contended his trial counsel was ineffective for failing to submit into evidence a photo he took for a state-issued identification card on May 3, 2005, less than three days after the offense, which showed that he did not have an afro at the time. In an affidavit dated September 4, 2012, defendant claimed that he told his counsel about the existence of this photo and that his counsel should have subpoenaed evidence of this photo at trial to show that defendant was misidentified. Defendant did not attach a copy of the photo, but stated that he could not attach a copy because the correctional facility he

was in did not allow that form of identification inside of the prison for security purposes, and that the only way he could obtain it would be through a subpoena.

¶ 8 Second, defendant claimed that his trial counsel was ineffective for failing to investigate or call his mother and sister as witnesses so that they could testify that defendant did not have an afro during the relevant time period. And third, defendant claimed that his trial counsel was ineffective for failing to bring forth evidence showing that defendant was placed in a lineup on May 4, 2005, and that Nyoka viewed that lineup but failed to identify him.

¶ 9 The trial court found, with respect to the photo, that "it is unclear how this photo would have aided [defendant] at trial" because "the fact that [defendant] did not have an afro three days after the offense does not prove that he did not have an afro when he committed the offense." The trial court found this argument to be without merit.

¶ 10 With respect to the claim that counsel failed to investigate or call his mother and sister as witnesses, the trial court noted that whether to call a particular witness is a matter of trial strategy. It found that such a claim could not form the basis for a claim of ineffective assistance of counsel unless the trial strategy was so unsound that counsel could be said to have entirely failed to conduct any meaningful adversarial testing of the State's prosecution. The trial court further noted in its written order that when a defendant attacks the competency of his counsel for failing to call witnesses, he must attach to his postconviction petition affidavits showing the potential testimony of such witnesses and explain the significance of their testimony. The trial court found that defendant did not make the requisite factual showing because he failed to submit an affidavit from any of the potential witnesses, and merely stated as to what his mother and sister would have testified.

¶ 11 Finally, the trial court found that with respect to defendant's argument that counsel should have put forth the evidence that Nyoka viewed him in a lineup on May 4, 2005, that the record "clearly undercuts [defendant's] allegations." The court noted that the record showed that Nyoka viewed two photo arrays, but did not identify anyone from those arrays as the shooter. The court noted that she viewed another photo array on September 19, 2006, which included defendant's photo, and that she successfully identified defendant at that time. The trial court stated "the record shows that [defendant] did not participate in a physical lineup before he was arrested on September 30, 2006." The court found that because the record contradicted the petition, there was no arguable basis to conclude that trial counsel was deficient. Defendant now appeals.

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)), provides a method by which people imprisoned in the penitentiary in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Tate*, 2012 IL 112214, ¶ 8. "Thus, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *Id*. Because an action for postconviction relief is initiated by a person under criminal sentence, most petitions are filed *pro se* by people who are incarcerated and lack the means to hire their own attorney. *Id*.

¶ 13 In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *Hodges*, 234 Ill. 2d

¶ 14 at 10 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. "Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *Tate*, 2012 IL 112214, ¶ 9.

¶ 15 If the circuit court does not dismiss the petition as frivolous or patently without merit, the petition advances to the second stage, where the court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). If no such showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. If, however, a substantial showing of a constitutional violation is set forth, the petition advances to the third stage, where the circuit court conducts an evidentiary hearing. *Id*. We review the summary dismissal of defendant's postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 16 In the case at bar, defendant contends that the circuit court erred in summarily dismissing his postconviction petition because he presented an arguable claim of ineffective assistance of trial counsel. In other words, defendant claims that his petition was not frivolous or patently without merit and should have been advanced to the second stage and docketed for further consideration, and the State ordered to answer or otherwise respond. Defendant alleges that trial counsel was ineffective for: (1) failing to investigate or call his mother and sister to testify that he did not match the victim's description of her assailant, (2) failing to introduce his state-issued ID card that contained a photo taken three days after the offense, and (3) failing to introduce evidence that the victim failed to identify him in a line-up on May 4, 2005.

¶ 17 In evaluating defendant's claims of ineffective assistance of counsel at the first stage, a more lenient formulation of the *Strickland* test applies: "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. "This 'arguable' *Strickland* test demonstrates that first-stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of proceeding." *Tate*, 2012 IL 112214, ¶ 20.

¶ 18 We first address defendant's claim that his trial counsel should have called his mother and sister to testify. The State contends that defendant's trial counsel had a sound strategic reason for not calling defendant's mother and sister. According to the State, the testimony of defendant's mother and sister that defendant did not wear his hair in an afro at the time of the commission of the offense would not benefit defendant and instead would "be seen as biased." The State provides no authority for this argument, but we assume that it is referring to the idea that it was trial strategy for defense counsel to fail to call the witnesses because they were defendant's relatives. See *People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011) (counsel could have decided testimony of witness would not be helpful because she was related to defendant); *People v. Barcik*, 365 Ill. App. 3d 183, 192 (2006) (defendant's fiancé likely would not have been considered credible); *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (trial counsel not ineffective for failing to call defendant's cousins as alibi witnesses); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (counsel's decision not to call witnesses related to defendant was a matter of trial strategy).

¶ 19 While “it is well established that decisions concerning whether to call certain witnesses for the defense are matters of trial strategy left to the discretion of trial counsel,” (*People v. Banks*, 237 Ill. 2d 154, 215 (2010), and that such decisions are “generally immune” from ineffective assistance claims (*People v. Enis*, 194 Ill. 2d 361,378 (2000), "[t]he State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced." *Tate*, 2012 IL 112214, ¶ 22.

¶ 20 The trial court, however, based its dismissal of this claim on the fact that defendant failed to make the requisite factual showing of what the witnesses would attest to when he failed to attach their affidavits to his petition. Postconviction petitions can be summarily dismissed if unsupported by “affidavits, records or other evidence” (725 ILCS 5/122-2 (West 2012)). It is the petitioner's burden to support the allegations with affidavits, records, or other evidence that contains specific facts. *People v. Jackson*, 213 Ill. App. 3d 806, 811 (1991). "Unsupported conclusional allegations in the petition or in the defendant's own affidavit are not sufficient to require a post-conviction hearing under the Act." *Id*.

¶ 21 Here, defendant's contentions regarding his family members' testimony were unsupported by affidavits from his sister or his mother. While we are aware that section 122-2 of the Act states that if the defendant is unable to attach the required affidavits, he "shall state why the same are not attached," (725 ILCS 5/122-2 (West 2012)), we believe that defendant's stated reason was not sufficient. Our supreme court has held that the purpose of section 122-2 is to establish that a petitioner's allegations are capable of "objective or independent corroboration." *People v. Hall*, 217 Ill. 2d 324, 33 (2005). While a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth facts which can be corroborated and are

objective, or "contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254-5 (2008). Here, defendant claims that the affidavits of his mother and sister were not attached because they were in the mail and "the mail process is slow," which we do not believe sufficiently explains how the affidavits were unobtainable. See *People v. Wideman*, 2013 Il App (1st) 102273, ¶ 18 (petitioner's argument about the difficulties inmates face in obtaining notarized affidavits did not amount to an adequate explanation as to why the affidavits were unobtainable)). However, because we find that defendant's next two arguments have at least an arguable basis in law or fact, defendant's entire petition must advance to the second stage of post-conviction proceedings. *People v. Cathey*, 2012 IL 111746, ¶ 34 (partial summary dismissals are not permitted under the Act) (citing *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001)).

¶ 22 Next, defendant contends that his trial counsel should have introduced his state-issued ID card that purportedly contains a picture of him taken three days after the commission of the crime. The State contends that it was not ineffective assistance of counsel to fail to present evidence of this photo ID card because it would have been possible for defendant to have altered the style of his hair after the night of the crimes and then have his picture taken. The State contends that "indeed, he would have had a huge motive to do so." We note, however, that there is no picture attached to the petition, and that we do not know what defendant's hair looked like in it. Defendant stated in his affidavit attached to his petition that "the reason why this state identification card isn't attached with this petition is because I'm currently in prison at Statesville Correctional Center and this prison institution won't allow this form of identification to be allowed inside this prison for security purpose. And the only way a paper copy of this I.D. could be sent to me is through a subpoena."

¶ 23 Although defendant fails to state what that identification card would reveal, it is arguable that his counsel was ineffective for not introducing it. As the trial court noted, "it is unclear how this photo would have aided [defendant] at trial" because "the fact that [defendant] did not have an afro three days after the offense does not prove that he did not have an afro when he committed the offense." If his hair was shorter than an afro in the picture, defendant clearly could have cut his hair in the three days since the commission of the crime, and it would not have been ineffective assistance of counsel for trial counsel to choose not to include it. On the other hand, if it was much longer than an afro, it would certainly be something trial counsel should have put into evidence. See *People v. Corder*, 103 Ill. App. 3d 434 (1982) (trial counsel ineffective for failing to present evidence of a driver's license taken six days after the offense that showed defendant with a full beard when the officer had stated the defendant was clean shaven at the time of the offense). Accordingly, while we share the trial court's frustration with defendant's lack of supporting facts as to why the photo ID would be useful in this case, we find that it was not so deficient as to be considered "fanciful," and thus defendant's claim of ineffective assistance of counsel had at least an arguable basis in fact or in law. See *Hodges*, 234 Ill. 2d at 10 (a petition which lacks an arguable basis in fact is one which is based on a fanciful factual allegations).

¶ 24 Finally, we address defendant's contention that defense counsel was ineffective for failing to present evidence of defendant's non-identification in a lineup several days after the commission of the crime. Defendant contends that he was arrested on May 3, 2005, and that he was placed in a lineup with his brother and codefendant Travis Weston on May 4, 2005, but that the Nyoka failed to identify him at that time. Specifically, defendant argued in his petition that prior to trial, he informed defense counsel that on May 3, 2005, he was arrested and taken to

Area One police station. He claimed he was questioned by detectives about the shooting of Nyoka and Tai, and that he was then placed in a lineup with his brother Travis Weston that was "viewed by Nyoka." Defendant stated that he was told by detectives that Nyoka did not identify him. Defendant further claimed that defense counsel told him that he had a photo of the lineup that took place on May 4, 2005, in his possession. However, defendant stated that on the day of trial, defense counsel told him that he only had a report of the arrest and questioning of defendant on May 3, 2005, and that it did not mention anything about a lineup, only that defendant was questioned.

¶ 25 Initially, the State notes that defendant failed to attach to his petition a copy of an arrest report documenting his arrest on May 3, 2005, or a police report documenting the lineup he claims took place on May 4, 2005. The State contends, citing to *People v. Collins*, 202 Ill. 2d 59, 67-68 (2002), that the lack of documentation attached to defendant's postconviction petition was fatal to this claim. As noted above, however, while it is true that postconviction petitions can be summarily dismissed if unsupported by "affidavits, records or other evidence" (725 ILCS 5/122-2 (West 2012)), this is only the case if they are also unsupported by an explanation for the absence of such documentation. See *Collins*, 202 Ill. 2d at 67-68. Here, defendant states in his affidavit attached to his petition that the reason why the non-identification evidence is not attached to the petition is because "upon ordering my police reports through the Freedom of Information Act I didn't receive this line-up array[, and the] only thing I have to verify this claim is the arrest report on May 3, 2005, which [states] that I was brought in for questioning of the murder and attempt murder." Defendant has therefore met the pleading requirements under section 122-2 of the Act.

¶ 26 The trial court found that the record contradicted defendant's allegations regarding the lineup as the record showed that defendant did not participate in a lineup until after he was arrested on September 30, 2006. We note, however, that the record is silent as to whether defendant participated in a lineup on May 4, 2005, as the police report indicating the participants of the May 4, 2005, lineup is not in the record. At this stage of the postconviction proceedings, however, we must take all of defendant's allegations in his petition and his supporting affidavit as true unless they are directly contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) (all well-pled allegations are to be taken as true and liberally construed unless contradicted by the record). Accordingly, we find that defendant's petition must go to a second-stage hearing where defendant would be represented by counsel. If the records indicate that defendant was not one of the people who participated in the May 4, 2005, lineup, then we would agree with the trial court that the record clearly contradicts defendant's argument. Overall, we express no opinion as to whether defendant's affidavits ultimately will support a substantial showing of a constitutional violation, as that is a second-stage issue, and only find that defendant has met the threshold necessary to survive summary dismissal.

¶ 27 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for a second-stage proceedings.

¶ 28 Reversed and remanded.