2012 IL App (2d) 110428-U
No. 2-11-0428
Order filed September 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-1430
GEOMARRIO M. HENDERSON,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to call witnesses: defendant did not attach affidavits from those witnesses or provide an explanation for their absence; his indigence and his assurance of his diligence were insufficient to establish that he could not have obtained the affidavits. We affirmed the judgment of the trial court.

¶ 1 Defendant, Geomarrio M. Henderson, appeals from the trial court's summary dismissal of his petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He alleged that his counsel was ineffective for failing to investigate and call witnesses in

his trial, leading to his conviction of armed violence (720 ILCS 5/33A-2(a) (West 2004)), which was predicated on possession of a controlled substance (720 ILCS 570/402(c) (West 2004)). Defendant failed to support his claim with affidavits from the witnesses showing that they would testify as he alleged and he failed to provide an explanation for the absence of those affidavits as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). Thus, the trial court properly dismissed the petition, and we affirm.

¶ 2 I. BACKGROUND

¶ 3 In September 2005, defendant was indicted on a charge of armed violence, which alleged that, on June 26, 2005, he knowingly possessed less than 15 grams of cocaine while armed with a handgun. The charge arose out of an incident where defendant was shot and cocaine was found underneath him when he was being attended to by paramedics.

¶ 4 Before trial, the defense moved to bar the State from presenting evidence from a police report by Officer Brian Shields. The defense alleged that the report contained new information and was not tendered to them until three days before trial. The State informed the trial court that Shields was the first person to observe the cocaine at the scene. Defense counsel stated that she had not attempted to interview Shields or other officers before trial because, from her experience, police officers generally would not speak with defense counsel. The trial court denied the motion on the basis that other officers also saw the cocaine at the scene.

¶ 5 At trial, the evidence showed that, on June 26, 2005, officers Dave Tellner and Dean Tucker were dispatched to a domestic disturbance. There was no disturbance when they arrived but, as they prepared to leave, an individual flagged them down and pointed to the rear of their squad cars. The officers then saw defendant riding a bike on the sidewalk.

¶ 6 The officers followed defendant, and Tellner told him to stop. Defendant continued, and Tucker pulled his squad car into a driveway to block defendant. Defendant passed between the squad cars and turned up a driveway across the street. The officers began to chase him on foot. As defendant continued up the driveway, he dropped a black plastic bag. Defendant lost control of the bike and fled on foot. As defendant was running toward a fence, the officers saw him reach into his waistband and raise a handgun. Tucker fired one or two shots at defendant, hitting defendant in the leg. Defendant took two steps, jumped the fence, and fell, where he then lay on his stomach.

¶ 7 When questioned by the officers, defendant told them that the gun was behind him. Tellner rolled defendant over to check his waistband and did not find anything. Neither officer saw anything under defendant. Tellner rolled defendant back over and cuffed his hands behind his back. An ambulance was called, and more officers arrived at the scene.

¶ 8 Shields testified that he arrived at the scene and saw defendant lying on his stomach with his hands cuffed behind him. Shortly after, paramedics and Officer Matthew Fitchel arrived. Both Shields and Fitchel testified that, when the paramedics rolled defendant onto a back board, they observed a baggie with what appeared to be cocaine on the ground where defendant had been. Fitchel's written report did not mention the cocaine, but did document that Fitchel stood next to Shields when the paramedics treated defendant. Fitchel also knew that Shields had written a report. Shields rode with defendant to the hospital. On cross-examination, defense counsel challenged Shields' memory about details of the scene. She also challenged his failure to document the cocaine sighting in his own report.

¶ 9 Evidence technicians at the scene collected, among other items, a baggie of cocaine and a handgun. A pair of jeans was also recovered, which had a red stain and had entrance and exit holes from a bullet. No fingerprints were on the baggie.

¶ 10 Officer Brian Olsen interviewed defendant at the hospital. Defendant admitted that he had the gun but denied knowledge of the cocaine, stating that there would be no reason for his fingerprints to be on the drugs. When Olsen asked if that was because defendant wore gloves, defendant laughed. Olsen allowed defendant to use the phone in his room, and another officer, Todd Edwards, overheard defendant tell a person over the phone that, when the paramedics cut his pant leg open, the police found his "shit."

¶ 11 Defendant's motion for a directed verdict was denied. Defendant testified and denied that he had either the gun or the cocaine. During closing arguments, defendant's counsel attacked the credibility of the officers, especially Shields. During deliberations, the jury requested Shields' report and transcripts of Olsen's testimony and Edwards' cross-examination.

¶ 12 The jury found defendant guilty, and he thereafter filed a motion for a new trial. Following a hearing, the trial court denied the motion, and it later sentenced defendant to 17 years' incarceration. On appeal, he argued ineffective assistance of counsel in regard to his counsel's cross-examination of Shields, and this court affirmed. *People v. Henderson*, No. 2-08-0672 (2010) (unpublished order under Supreme Court Rule 23).

¶ 13 In December 2010, defendant filed a *pro se* postconviction petition, alleging that his trial counsel was ineffective for failing to investigate and call the paramedics as witnesses at trial for the purpose of discrediting Shields, and that his appellate counsel was ineffective for failing to raise the issue on appeal. Defendant alleged in his petition that he was certain that the paramedics would

testify that they did not see a bag of cocaine when he was rolled over. He attached notarized affidavits to his petition, in one of which he stated that the trial record supported his claim and that he made a diligent effort to complete his petition. He did not provide affidavits from the paramedics, nor did he provide an explanation for their absence.

¶ 14 The trial court summarily dismissed the petition, determining that the decision not to call the paramedics was reasonable trial strategy and that the allegations concerning ineffective assistance of trial counsel were decided on direct appeal. Defendant timely appeals.

¶ 15 II. ANALYSIS

¶ 16 Defendant contends that his petition had an arguable basis in law and fact such that the trial court erred when it summarily dismissed it. The State concedes that the trial court was incorrect when it found that the issue was previously addressed on direct appeal. However, the State counters that, without affidavits establishing what the paramedics would say, the record does not support defendant's claims, and defendant failed to explain why he did not include the affidavits.

¶ 17 "Except in cases where the death penalty has been imposed, the Act establishes a three-stage process for adjudicating a postconviction petition." *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 37 (citing *People v. Jones*, 213 Ill. 2d 498, 503 (2004)). "At the first stage, the trial court must review the petition within 90 days of its filing to determine whether it is either frivolous or patently without merit." *Id.* (citing 725 ILCS 5/122-2.1(a)(2) (West 2008)). "If the trial court determines that the petition is either frivolous or patently without merit, it must dismiss the petition in a written order." *Id.*

¶ 18 A *pro se* postconviction petition is frivolous or patently without merit when it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition has

no basis in law when it is based on an 'indisputably meritless legal theory,' meaning that the legal theory is 'completely contradicted by the record.' " *Carballido*, 2011 IL App (2d) 090340, ¶ 37 (quoting *Hodges*, 234 Ill. 2d at 16). "A petition has no basis in fact when it is based on 'fanciful factual allegation[s],' meaning that the factual allegations are 'fantastic or delusional.' " *Id.* (quoting *Hodges,* 234 Ill. 2d at 17). "If the court does not dismiss the petition as frivolous or patently without merit, then the petition advances to the second stage." *Id.*

¶ 19 "We review *de novo* a trial court's first-stage dismissal." *Id.* "At the dismissal stage of a postconviction proceeding, all well-pleaded facts not positively rebutted by the original trial record are taken as true." *Id.* ¶ 40 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)).

¶ 20 Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant arguing ineffective assistance of counsel must show not only that his or her counsel's performance was deficient but that the defendant suffered prejudice as a result. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Under the two-prong *Strickland* test, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Id.* at 144.

¶ 21 A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010). In the absence of such an affidavit, a court cannot determine whether the proposed witness could have provided testimony favorable to the defendant, and further review of the claim is unnecessary. *Id.* The requirement of supporting attachments is codified in section 122-2 of the Act, providing that

"[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010).

¶ 22 "The purpose of the 'affidavits, records, or other evidence' requirement is to establish that a petition's allegations are capable of objective or independent corroboration." *Hodges*, 234 Ill. 2d at 10 (citing *People v. Delton*, 227 Ill. 2d 247, 254 (2008)). " 'Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.' " *Id.* (quoting *Delton*, 227 Ill. 2d at 254-55). Here, although the trial court did not dismiss the petition based on defendant's failure to provide affidavits, we may affirm for any reason warranted by the record, regardless of the reasons relied on by the lower court. *People v. Caballero*, 179 Ill. 2d 205, 211 (1997).

¶ 23 Here, without affidavits from the witnesses and without an explanation for the absence of those affidavits, summary dismissal was proper. Defendant argues that the affidavits were not required, because he alleged that he was certain that the paramedics did not see cocaine when he was rolled over. However, the question is not what defendant subjectively believes; it is how the paramedics would actually testify.

¶ 24 Defendant also claims that he provided a sufficient explanation for the lack of the affidavits, because he was indigent and could not reasonably be expected to obtain affidavits from the paramedics. He also notes that he averred that he was diligent in his preparation of his petition. But those assertions do not show that he made any efforts to obtain the affidavits or that obtaining them was not possible. Without the affidavits, there is nothing to establish that defendant's allegations are capable of objective or independent corroboration, and further review is unnecessary.

¶ 25 III. CONCLUSION

¶ 26 The trial court properly dismissed the petition. Accordingly, we affirm the judgment of the circuit court of Kane County.

¶ 27 Affirmed.