2017 IL App (2d) 150191-U
No. 2-15-0191
Order entered July 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of DuPage County.
Respondent-Appellee,	)	
	)	
v.	)	No. 08-CF-3227
	)	
JERRY L. LOCKHART,	)	Honorable
	)	John J. Kinsella,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE McLaren delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: At first stage of postconviction proceeding, trial court properly summarily dismissed defendant's *pro se* petition alleging ineffective assistance of counsel due to failure to investigate witness who purportedly would have contradicted State's witness's testimony; trial counsel's dismissal was proper where defendant failed to attach affidavit of witness, failed to explain its absence, and evidence of defendant's guilt was overwhelming; trial court affirmed.

¶ 2 Defendant, Jerry Lockhart, appeals 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 2014)). On appeal defendant argues that the trial court erred when it dismissed his petition because he

presented the gist of a constitutional claim of ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 4, 2011, after a jury trial, defendant was convicted of first degree murder and armed robbery. The trial court sentenced defendant to 30 years' imprisonment for the first degree murder conviction and 10 years for the armed robbery conviction, both sentences to be served concurrently. On direct appeal, defendant argued, *inter alia*, his conviction and sentence for armed robbery should be vacated because he was convicted of and sentenced for felony murder predicated on the armed robbery offense. This court affirmed defendant's conviction and sentence for murder but vacated his conviction and sentence for armed robbery because the armed robbery conviction was a lesser included offense of the felony murder conviction. See *People v. Lockhart*, 2013 IL App (2nd) 110344-U, ¶¶ 34, 38 (June 19, 2013). We set forth the facts of the case in our Rule 23 order and recount them here to the extent necessary to resolve defendant's current appeal.

¶ 5 Defendant was charged with two counts of armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)) and six counts of first degree murder (720 ILCS 5/9-1(a)(1), 5/9-1(a)(2)2)(West 2012)), including felony murder (720 ILCS 5/9-1(a)(3) (West 2012)), based on the underlying felony of armed robbery. The State alleged that defendant, Dewaun Tate, and Seneca Berry committed the above offenses when they robbed the Dollar Store in Hanover Park and stabbed the cashier with a knife causing her death.

¶ 6 At defendant's trial Berry, 15 years old at the time of the offenses, testified as follows. He lived in Hanover Park next door to Tate, also known as "Dee," and on November 20, 2008, Tate came to Berry's house and said something about stealing and told Berry to meet him at defendant's garage. When Berry arrived at defendant's garage, Tate and defendant were already there. Defendant had a box cutter and Tate had a knife. Defendant told Berry and Tate that the

three of them were going to rob The Dollar Store, where Berry and Tate would lure the cashier away from the cash register while defendant took the money. Defendant said they were not going to use the box cutter or knife, but they were going to scare the cashier. Defendant also said that after the robbery they would meet back at defendant's garage to "split up" the money.

¶ 7 Berry also testified that as he walked to the Dollar Store with Tate and defendant they saw a police car. Defendant told Berry to "keep going" and defendant "turned around and walked back toward the alley." Defendant told Berry and Tate that he was "going to wait in the garage for us." As Berry and Tate continued to walk toward the Dollar Store, Tate said that he was going to "lure the cashier to the back" of the store while Berry took the money out of the cash register. Tate entered the store first and Berry followed. Berry saw a customer with a child and the cashier (later identified as Vatsala Thakkar). Tate asked the cashier about some hooks and the customer pointed to an aisle. The customer paid for her items and left the store. The cashier went down the aisle toward Tate. Then the cashier said, "Oh, no, what are you doing? I'm calling the police." The cashier came up the aisle with Tate behind her and Tate made a stabbing motion at the cashier. The cashier screamed. The cashier "kept going toward the door and she was like inside the door, but outside the door, and I seen [Tate] do another stabbing motion, and [the cashier] lady went out the door." Tate opened the cash register and "we started grabbing money."

¶ 8 Berry continued his testimony as follows. Berry and Tate returned to defendant's house where defendant was waiting for them in the kitchen. Berry and Tate took the money out of their pockets and placed it on the counter. Tate placed a knife on the counter and left the kitchen. There was blood on the tip of the knife. Defendant took some money from a "wad" of "bills" and gave it to Berry. As Berry started walking toward the front door, defendant told him, "Don't tell nobody, don't say nothing to nobody." Berry was arrested the following day. Initially he

denied knowing anything about the incident. Later he told the police various false stories. During cross examination, Berry agreed with defense counsel that he was "a liar." He testified that he entered into a plea agreement with the State in which the murder charge was dropped and in exchange he was convicted of armed robbery and sentenced to a 17-year prison term. The agreement required Berry to testify truthfully against defendant and Tate.

¶ 9 Manuel Garcia testified as follows. He was a convicted felon. Garcia was arrested in August 2009 and was transported to the DuPage County jail on September 1, 2009, where he shared a "pod" with defendant until Garcia was released on October 5, 2009. Garcia decided to plead guilty to the charge of felony burglary in exchange for a sentence of time served and probation. He decided to cooperate with police detectives because it was "the right thing to do." He received no consideration for the information he provided to the State regarding defendant.

¶ 10 Garcia testified that he lived in Aurora but he sold marijuana in Hanover Park. A week before the murder, he was in Hanover Park with Luis Escobar and Jesse Mora when defendant came by to buy some marijuana. Defendant wanted to buy a gram which cost $5 but defendant only had $4. Defendant said he "was going to rob The Dollar Store with his boys."

¶ 11 Garcia testified that the day before the murder he was with Escobar, his wife, Angel, and Mora, when defendant came by again to buy marijuana. Defendant wanted to buy two ounces which cost about $16. Defendant did not have the money and told Garcia that he should "front it to him because he was going to rob the dollar store." "Front" meant that Garcia should have given defendant the marijuana and defendant would pay Garcia back.

¶ 12 Garcia also testified that, between 1:30 and 2 p.m. on the day of the murder defendant came back to buy marijuana and this time had money. Defendant said that he got the money from robbing The Dollar Store. Garcia did not sell defendant marijuana "[b]ecause it was dirty money."

¶ 13 Garcia also testified that in September 2009, while he was in the same pod in the DuPage County jail as defendant, Escobar told him to "listen to the b******t that [defendant] was feeding everybody." Accordingly, Garcia sat down at a table in front of a television with Escobar and another man. Defendant was sitting at a "second table" with "Ducey." Defendant said that "Seneca [Berry] was the one that didn't want to do it, and D was the one, and that he [defendant] stood out in front." Garcia also saw defendant on October 17, 2009, while they were on their way to court. Defendant asked Garcia if he was the one "who snitched."

¶ 14 During cross-examination Garcia testified as follows. When Garcia told the police about the September 2009 conversation, Garcia did not tell the police that Ducey was present, and Garcia told the police that defendant personally told him the things he heard at the jail. Garcia first tried to use his information about defendant to have his felony burglary charge reduced to a misdemeanor charge because he did not want a felony conviction on his record. Garcia did not want a felony conviction because it would affect his ability to get a job.

¶ 15 Hanover Park police officer Victor Di Vito testified as follows. At approximately 1:43 p.m. on the day of the incident, he received a dispatch that there was an unresponsive woman lying in the parking lot outside The Dollar Store. When Di Vito arrived, the woman, later identified as Vatsala Thakkar, the cashier at The Dollar Store, was not breathing, and "there was a heavy amount of blood around her." An ambulance took her to a nearby hospital where she was pronounced dead upon arrival.

¶ 16 Forensic pathologist Nancy Jones testified that the cause of the victim's death was multiple stab wounds.

¶ 17 In October 2014, defendant filed a *pro se* postconviction petition wherein he alleged ineffective assistance of trial counsel for failure to investigate a potential witness, Luis Escobar. Defendant argues that he was prejudiced by trial counsel's failure to investigate Escobar's

potential testimony because Escobar's testimony would have contradicted Garcia's testimony that defendant confessed involvement in the offense to Garcia. Defendant asserted that the State's case was "weak" without Garcia's testimony and that Garcia's testimony supported the "weak" and "unreliable" testimony of the State's key witness, Berry. Defendant argued, therefore, if trial counsel would have investigated Escobar's potential testimony there was a reasonable probability for a different result. Defendant also claimed ineffective assistance of appellate counsel for failure to raise the claim of ineffective assistance of trial counsel.

¶ 18 Defendant attached his affidavit wherein he stated, "[p]rior to trial and following the testimony of Garcia I told Counsel to interview Ducey (David Lucas) and Luis Escobar who would have testified that they first met Garcia in DuPage County Jail and that I never bragged or confessed to being involved in the offense at the Dollar Store." Defendant also averred that he instructed counsel "to interview these potential defense witnesses *** [h]owever, Counsel failed to do so."

¶ 19 Defendant also attached a police report, dated October 7, 2009, and written by detective William Weil. The report indicates that Garcia told Weil that on the day of the murder Escobar was with Garcia when defendant said that he had just robbed the Dollar Store. The report also indicates that after interviewing Garcia, Weil interviewed Escobar at the DuPage County Jail and told Escobar that he was present when defendant spoke about the incident at The Dollar Store just after it occurred. Weil's report indicated that Escobar denied that he was present during such a conversation.

¶ 20 Defendant did not provide an affidavit from Escobar.

¶ 21 On January 16, 2015, the trial court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. Defendant, *pro se*, filed a notice of appeal. On March 17, 2015, this court granted defendant's motion to file a late notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues that the trial court erred by summarily dismissing his postconviction petition alleging ineffective assistance of counsel for failure to investigate Escobar as a potential witness. Petitioner contends that Escobar's testimony would have contradicted Garcia's testimony.

¶ 24 The Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a three-step procedural mechanism by which a convicted defendant can assert that there was a substantial denial of his constitutional rights in the proceedings that resulted in his conviction. *People v. Harris*, 224 Ill. 2d 115 (2007). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). At the first stage, a postconviction petition may be summarily dismissed if the claims in the petition are frivolous and patently without merit, meaning it has "no arguable basis either in law or fact." *People v. Tate*, 2012 IL 112214, ¶ 9. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). See 725 ILCS 5/122-2.1(a)(2) (West 2014). To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill. 2d at 11; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). We review the summary dismissal of a first-stage postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9; *People v. Allen*, 2015 IL 113135, ¶ 25.

¶ 25 Defendant contends that counsel was ineffective for failing to investigate Escobar as a potential witness to testify during defendant's trial. Defendant claims that Escobar denied being

present in the county jail when, as Garcia testified, defendant made inculpatory statements. Defendant argues that Escobar would have "contradicted Garcia's testimony," Escobar "would have denied having ever meeting Garcia prior to their being in jail together, *** [and] would have testified that [defendant] did not confess in jail" in Escobar's presence. The State counters that defendant failed to attach an affidavit from Escobar as required by section 122-2 of the Act and that defendant cannot demonstrate prejudice. We agree with the State.

¶ 26 Section 122-2 of the Act requires a defendant to support the allegations in his postconviction petition by either attaching factual documentation to the petition or otherwise explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2014); *People v. Delton,* 227 Ill. 2d 247, 253 (2008). The purpose of this requirement is to show that the allegations in the petition are capable of independent or objective corroboration. *Delton,* 227 Ill. 2d at 254; *People v. Allen*, 2015 IL 113135, ¶ 34. It is well settled that an allegation that trial counsel provided ineffective assistance because he failed to investigate and present testimony from witnesses must be supported by affidavits from those proposed witnesses. *People v. Jones,* 399 Ill. App. 3d 341, 371 (2010) (citing *People v. Enis,* 194 Ill. 2d 361, 380 (2000)). A defendant's failure to attach the affidavits or documentation required by section 122-2 of the Act, or otherwise explain their absence, is "fatal" to his postconviction petition and alone justifies summary dismissal of that petition. *Delton*, 227 Ill. 2d at 255 (citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002)). Without affidavits from the proposed witnesses, the reviewing court cannot determine whether those witnesses could have provided testimony favorable to the defendant, and thus, further review of the claim is not necessary. *Jones*, 399 Ill. App. 3d at 371 (citing *Enis*, 194 Ill. 2d at 380). If a postconviction petition is not properly supported with attachments as required by section 122-2, the court need not reach the question of whether it states the gist of a constitutional claim to survive summary dismissal. *Delton,* 227 Ill. 2d at 255.

¶ 27 We are mindful of defendant's argument that his petition implies he could not obtain Escobar's affidavit because he was incarcerated and needed the assistance of appointed counsel. We note that the Act applies only to individuals who are "imprisoned in the penitentiary" but nevertheless includes the affidavit requirement. See 725 ILCS 5/122-1, 122-2 (West 2014). Because the Act contemplates that defendants seeking postconviction relief are likely to be imprisoned, the fact of incarceration, without more, does not adequately explain defendant's failure to obtain an affidavit from Escobar. Here, defendant did not describe any efforts that he made to obtain the necessary affidavit or any unsuccessful attempts he made to acquire it. Thus, the trial court's summary dismissal of defendant's petition was proper because defendant failed to attach the purported witness's affidavit to support the allegations in his petition and failed to sufficiently explain its absence, as required by the pleading requirements of section 122-2 of the Act.

¶ 28 Defendant argues that his failure to attach Escobar's affidavit and his failure to explain its absence "is not fatal to his petition." Defendant cites *Allen*, 2015 IL 113135, to support his argument. In *Allen,* the defendant was convicted of murder and armed robbery for a shooting. *Id.* ¶ 1. The defendant filed a *pro se* postconviction petition alleging actual innocence and attached an unnotarized statement from Robert Langford, who claimed to be responsible for the shooting and said that the defendant was not involved. *Id.* ¶ 14. The circuit court dismissed the petition as frivolous and patently without merit, noting, *inter alia*, that Langford's statement was unnotarized. *Id.* ¶ 15. The supreme court reversed, holding that lack of notarization "does not prevent the court from reviewing the petition's 'substantive virtue,' as to whether it 'set[s] forth a constitutional claim for relief'. [Citation.]" *Id.* ¶ 34. The court concluded that "[w]hile not an admissible affidavit in its present form, the Langford statement properly qualifies as 'other evidence.' 725 ILCS 5/122-6 (West 2008)." *Id.* The court also stated, "the circuit court may not

dismiss at the first stage solely for failure to notarize a statement styled as an evidentiary affidavit. Instead, the circuit court at the first stage must look to whether the evidentiary attachments *** show[ ] that the petition's allegations are capable of corroboration and identify [ ] the sources, character, and availability of evidence alleged to support the petition's allegations." *Id.* Determining that Langford's statement met this standard, the supreme court reversed and remanded for second-stage proceedings. *Id.* ¶ 48.

¶ 29 In contrast to *Allen*, the question here is not whether defendant failed to attach a notarized statement of his proposed witness, Escobar. Rather, in this case, defendant failed entirely to attach any statement from Escobar. Therefore, this case is distinguishable from *Allen*.

¶ 30 Even if defendant's explanation for his failure to attach the requisite affidavit was sufficient, we would nevertheless affirm the trial court's dismissal of his ineffective assistance of trial counsel claim. A petition seeking postconviction relief for a denial of constitutional rights 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; *People v. Tate*, 2012 IL 112214, ¶¶ 9-12. A petition has no arguable basis in law when it is premised on "an indisputably meritless legal theory," such as a legal theory that the record contradicts. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is founded on a "fanciful factual allegation," including factual claims that are "fantastic or delusional" or belied by the record. *Id*. at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010).

¶ 31 To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) the representation fell below objective standards of reasonableness, and (2) there is a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. *People v. Hall*, 217 Ill. 2d 324, 335 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Failure to establish either *Strickland* prong disposes of a defendant's

claim. *People v. Henderson*, 2013 IL 114040, ¶ 11. Generally, decisions concerning what witnesses to call are considered to be matters of trial strategy that are immune from ineffective assistance of counsel claims. *Enis*, 194 Ill. 2d at 378. However, because our supreme court has held that arguments related to trial strategy are "inappropriate for the first stage" of postconviction proceedings (see *People v. Tate*, 2012 IL 112214, ¶ 22), we proceed with the prejudice prong.

¶ 32 "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26 (citing *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001)).

¶ 33 Defendant contends that Escobar would have rebutted testimony from Garcia that Escobar was present when defendant spoke about his involvement in the robbery at The Dollar Store. Defendant argues that he established prejudice because Escobar's testimony "suggest[s] that Garcia made up his stor[ies] about" all three of his encounters with defendant in which defendant "allegedly confessed involvement in the offense."

¶ 34 In his direct appeal, we determined that the trial did not err by admitting a recording into evidence, but even if its admission was error, it was "harmless error due to the overwhelming evidence of defendant's guilt beyond a reasonable doubt." *Lockhart*, 2013, IL App (2d) 110344-U, ¶¶ 31, 32. Our conclusion that the evidence of defendant's guilt was overwhelming beyond a reasonable doubt strongly undercuts defendant's ability to establish prejudice.

¶ 35 Further, the value of Escobar's purported testimony is questionable. During the State's case-in-chief, defense counsel cross-examined Garcia and attacked his credibility. Defense counsel elicited testimony that Garcia tried to use the alleged information he had about defendant to have his felony charge reduced to a misdemeanor charge. Defense counsel also elicited

testimony from Garcia that he failed to tell police detectives that another person, Ducey, was present when defendant admitted his involvement in the crimes. Further, defense counsel elicited testimony that Garcia told the police that, while in jail together, defendant personally told Garcia that he was involved in the crimes. In addition, during closing argument, defense counsel highlighted that Garcia was a "drug dealer" who after being "arrested for a burglary" wanted a "deal for a misdemeanor *** in exchange for information about [defendant]." Defense counsel told the jury that Garcia had a "bias." Defense counsel also highlighted the inconsistencies in Garcia's testimony. Despite the challenges to Garcia's credibility presented by defense counsel, the jury found defendant guilty. Accordingly, taking defendant's contentions regarding Escobar's potential testimony as true, we determine that defendant did not show he was arguably prejudiced without his potential testimony. Therefore, the trial court properly summarily dismissed defendant's *pro se* postconviction petition.

¶ 36 III. CONCLUSION

¶ 37 The judgment of the circuit court of DuPage County is affirmed.

¶ 38 Affirmed.