

NOTICE  
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2011 IL App (4th) 100931-U

Filed 7/15/11

NO. 4-10-0931

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
YURI ERMAKOV,	)	No. 06CF425
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.  
Presiding Justice Knecht and Justice McCullough concurred in the judgment.

### ORDER

- ¶ 1 *Held:* A postconviction petition that lacks the verifying affidavit required by section 122–1(b) of the Post-Conviction Hearing Act (725 ILCS 5/122–1(b) (West 2008)) is subject to summary dismissal.
- ¶ 2 A postconviction petition that does not have, attached to it, any corroborating affidavits, records, or other evidence and which offers no explanation for the absence of these materials fails to comply with section 122–2 of the Post-Conviction Hearing Act (725 ILCS 5/122–2 (West 2008)) and is subject to summary dismissal.
- ¶ 3 For purposes of sections 122–1(b) and 122–2 of the Post-Conviction Hearing Act (725 ILCS 5/122–1(b), 122–2 (West 2008)) a so-called "affidavit" that lacks a notarization does not qualify as an affidavit, despite a certification pursuant to section 1–109 of the Code of Civil Procedure (735 ILCS 5/1–109 (West 2008)), a section that is inapplicable to the Post-Conviction Hearing Act.
- ¶ 4 Defendant, Yuri Ermakov, who is serving a 12-year prison sentence for criminal sexual assault (720 ILCS 5/12–13(a)(4) (West 2004); 720 ILCS 5/12–13(a)(4) (West 2006)), filed a petition for postconviction relief, and the trial court summarily dismissed the petition as frivolous

and patently without merit. See 725 ILCS 5/122–2.1(a)(2) (West 2008). Defendant appeals, arguing that three allegations in his petition state the gist of a constitutional claim, namely: (1) his trial counsel rendered ineffective assistance by failing to move for a severance of the charge of criminal sexual assault from other, unrelated charges; (2) his trial counsel rendered ineffective assistance by failing to object to damaging hearsay; and (3) the prosecutor committed misconduct by vouching for the credibility of witnesses in his opening statement and by misstating the evidence in his closing argument.

¶ 5 We do not reach those allegations. Instead, we affirm the summary dismissal because (1) defendant failed to comply with the requirement in section 122–1(b) of the Post-Conviction Hearing Act (725 ILCS 5/122–1(b) (West 2008)) that he verify his petition by affidavit and (2) he failed to comply with the requirement in section 122–2 (725 ILCS 5/122–2 (West 2008)) that he attach to his petition any necessary affidavits, records, or other evidence or, alternatively, explain in his petition why such evidence is not attached.

¶ 6 I. BACKGROUND

¶ 7 On March 23, 2006, a grand jury returned an indictment of three counts against defendant. Count I charged him with aggravated criminal sexual abuse (720 ILCS 5/12–16(f) (West 2004); 720 ILCS 5/12–16(f) (West 2006)), a Class 2 felony (720 ILCS 5/12–16(g) (West 2004); 720 ILCS 5/12–16(g) (West 2006)), in that between September 2005 and March 2006, he fondled the buttocks of A.D., over whom he held a position of authority. (We are obtaining the names of the victims from defendant's brief; their names are blanked out in the indictment.)

¶ 8 Count II charged him with criminal sexual assault (720 ILCS 5/12–13(a)(4) (West 2004); 720 ILCS 5/12–13(a)(4) (West 2006)), a Class 1 felony (720 ILCS 5/12–13(b)(1) (West

2004); 720 ILCS 5/12–13(b)(1) (West 2006)), in that between September 2005 and March 2006, he placed his finger in the sex organ of S.G., over whom he held a position of authority.

¶ 9 Count III charged him with contributing to the delinquency of a child, a Class A misdemeanor (720 ILCS 130/2a (West 2006)), in that on February 25, 2006, he provided an alcoholic beverage to A.D.

¶ 10 On March 13, 2006, the trial court arraigned defendant on this indictment, and Carol Dison entered her appearance as his attorney.

¶ 11 On March 28, 2006, defendant pleaded not guilty to counts I through III and requested a trial by jury.

¶ 12 On June 14, 2007, a grand jury returned a second indictment against defendant, this one consisting of five counts. Count IV charged him with contributing to the delinquency of a child (720 ILCS 130/2a (West 2006)) in that in February 2006, he provided an alcoholic beverage to E.A.

¶ 13 Count V charged him with contributing to the delinquency of a child (720 ILCS 130/2a (West 2006)) in that during the period of January to February 2006, he provided an alcoholic beverage to A.G.

¶ 14 Count VI charged him with criminal sexual assault (720 ILCS 5/12–13(a)(4) (West 2004); 720 ILCS 5/12–13(a)(4) (West 2006)), a Class 1 felony (720 ILCS 5/12–13(b)(1) (West 2004); 720 ILCS 5/12–13(b)(1) (West 2006)), in that during the period of September 2005 to January 2006, he placed his finger in the sex organ of S.G., in relation to whom he held a position of trust, supervision, or authority.

¶ 15 Count VII charged him with attempt (aggravated criminal sexual abuse) (720 ILCS 5/8–4(a), 12–16(f) (West 2006)), a Class 3 felony (720 ILCS 5/8–4(c)(4) (West 2006)), in that he

performed a substantial step toward the commission of aggravated criminal sexual abuse by kissing A.D. and by fondling the buttocks of A.D., in relation to whom he held a position of trust, supervision, or authority.

¶ 16 Count VIII charged him with attempt (aggravated criminal sexual abuse) (720 ILCS 5/8–4(a), 12–16(f) (West 2006)), a Class 3 felony (720 ILCS 5/8–4(c)(4) (West 2006)), in that in March 2006, he performed a substantial step toward the commission of aggravated criminal sexual abuse by kissing A.J. and by fondling the buttocks of A.J., in relation to whom he held a position of trust, authority, or supervision.

¶ 17 On June 22, 2007, defendant appeared personally and by Dison, and the trial court arraigned him on the second indictment. He pleaded not guilty to counts IV, V, VI, VII, and VIII. The court granted a motion by the State to amend *instanter* count III to reflect the date of February 26, 2006, instead of February 25. Also, without objection by defendant, the court granted a motion by the State to dismiss counts I and II. The court scheduled jury selection for July 9, 2007, ordering defendant to appear on that date and admonishing him regarding proceedings *in absentia*.

¶ 18 Dison did not move to sever any of the counts of the indictments.

¶ 19 The jury trial occurred on July 10, 11, and 12, 2007. Defendant attended the trial until the jury went into deliberation. When the jury returned to the courtroom to deliver its verdicts, he was nowhere to be found. The jury found him guilty of counts III, IV, and VI and acquitted him of the remaining counts. On August 20, 2007, the trial court sentenced him, *in absentia*, to 12 years' imprisonment for count VI and imposed no sentence for counts III and IV.

¶ 20 Defendant was a fugitive in Russia until August 18, 2011, the day before he filed his petition for postconviction relief. On August 19, 2011, the day of the filing, he was present in the

trial court with his attorney, who at that time was Stephen L. Richards. Richards stated to the court: "For that purpose, however, I would like to—Mr. Ermakov has reviewed the petition. Because he was in Russia he was not able to do a notarized affidavit. I would like to have him sworn in open court to the affidavit which he has executed to support the petition." The court, however, declined to swear defendant to the affidavit, stating: "He doesn't need to be sworn in open court for a certificate. It's a 'I certify under the laws that this is true and correct.' I'm not too sure he needs to be sworn as to that. \*\*\* Just if he hasn't signed it, you need to have him sign it and have it filed."

¶ 21 Defendant says in his brief: "Mr. Ermakov then signed the petition and affidavit in open court, without objection by anyone, including the judge and the state." That statement does not appear to be entirely accurate. The petition itself bears only the electronic signature of Richards under the phrase "Respectfully submitted"—and it is unsworn. It is true that defendant signed a statement attached to petition, a statement entitled "affidavit," but this statement does not refer directly to the petition, and it lacks a notarization. Instead, defendant's signature appears under the following language: "I, the undersigned, a non-attorney, under penalties as provided by law pursuant to 735 ILCS 5/1–109, certifies [*sic*] that the statements set forth herein are true and correct."

¶ 22 On October 25, 2010, the trial court entered an order summarily dismissing the postconviction petition as frivolous and patently without merit. In its order, the court substantively evaluated the allegations of the petition, but the court also noted a procedural deficiency. The court wrote: "Under 735 ILCS 5/122–1(b), the Petition filed August 19, 2010 is neither signed by Petitioner nor totally verified by affidavit. It is questionable at this time whether this Petition is filed pursuant to the Statute or should be dismissed outright."

¶ 23 This appeal followed.

¶ 24

## II. ANALYSIS

¶ 25 Section 122–1(b) of the Post-Conviction Hearing Act provides that "[t]he [postconviction] proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122–1(b) (West 2008). Section 122–2 provides in part: "The 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 2008). Thus, according to section 122–1(b), the petition itself has to be verified by affidavit. Also, according to section 122–2, the petition has to have supporting evidence attached to it, or, alternatively, the petition has to explain why no evidence is attached. Insomuch as the supporting evidence is in the form of statements, the statements must be affidavits (or else the use of the word "affidavits," in section 122–2, would be superfluous).

¶ 26 The supreme court has interpreted sections 122–1(b) and 122–2 as creating two different requirements: a requirement of "subjective verification" (section 122–1(b)) and a requirement of "independent corroboration" (section 122–2). *People v. Collins*, 202 Ill. 2d 59, 67 (2002). The supreme court explained in *Collins*:

"The necessity of a sworn verification is addressed in section 122–1 of the Act, which provides that a post-conviction proceeding is initiated by the filing of a petition 'verified by affidavit.' 725 ILCS 5/122–1(b) (West 2000). The necessity of attaching 'affidavits, records, or other evidence' to the petition is addressed in section 122–2, which provides 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.' (Emphasis added.) 725 ILCS 5/122-2 (West 2000). Thus, under the plain language of the Act, the sworn verification described in section 122-1 serves a purpose wholly distinct from the 'affidavits, records, or other evidence' described in section 122-2. The former, like all pleading verifications, confirms that the allegations are brought truthfully and in good faith. See, e.g., *In re Marriage of Pitulla*, 202 Ill. App. 3d 103, 120 (1990). The latter, by contrast, shows that the verified allegations are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 66-67.

It follows that a valid postconviction petition always will be accompanied by at least one affidavit: the affidavit verifying the truth of the petition itself. In addition, the petition must have corroborating evidence attached to it, or the petition must give a reasonable explanation for the lack of such attachments. If statements outside the record are required to corroborate the allegations of the petition, those statements must be in the form of affidavits attached to the petition, or the petition must explain why such affidavits are not attached.

¶ 27 Defendant has attached a statement to his petition for postconviction relief. It is a statement signed by him "under penalties of perjury as provided by law pursuant to 735 ILCS 5/1-109," but the statement is not notarized. It is true that section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2008)) allows a person to verify a document by certification and that "[a]ny pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to

under oath." Section 1–109, however, is part of the Code of Civil Procedure, not the Code of Criminal Procedure of 1963 (of which the Post-Conviction Hearing Act is a part). Section 1–109 is applicable "whenever *in this Code*"—that is, in the Code of Civil Procedure—a "document or pleading filed in any court of this State is required or permitted to be verified, or made, or sworn to or verified under oath." (Emphasis added.) 735 ILCS 5/1–109 (West 2008). "Section 1–109 does not indicate \*\*\* that verification is an acceptable substitute when a statute other than the Code of Civil Procedure requires notarization." *Mashni Corp. v. Laski*, 351 Ill. App. 3d 727, 735 (2004); see also *People v. Tlatenchi*, 391 Ill. App. 3d 705, 715 (2009). We are unaware of any provision of the Code of Criminal Procedure of 1963 adopting section 1–109 of the Code of Civil Procedure. Therefore, for purposes of the Post-Conviction Hearing Act, "affidavit" means "affidavit"—a notarized document, sworn to before a person authorized by law to administer oaths (*Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002); 2 Ill. L. & Prac. *Affidavits* §4, at 648 (1953))—not a certification pursuant to section 1–109. The appellate court made that point explicit several years before defendant filed his postconviction petition. In *People v. Niezgoda*, 337 Ill. App. 3d 593, 595 (2003), the appellate court held: "[A]n affidavit filed pursuant to the [Post-Conviction Hearing] Act must be notarized to be valid."

¶ 28 Because defendant's statement lacks a notarization, it is not an affidavit; no affidavit is attached to his postconviction petition, as the State correctly observes in its brief. See *Roth*, 202 Ill. 2d at 494 ("[S]tatements in a writing not sworn to before an authorized person cannot be considered affidavits.") And, as we have noted, his petition must have, at a minimum, one attached affidavit: the affidavit verifying the truth of the petition. See 725 ILCS 5/122–1(b) (West 2008). Also, if no corroborating evidence (such as affidavits) is attached to the petition, the petition must



explain why such evidence is not attached. 725 ILCS 5/122–2 (West 2008). Defendant's petition contains no such explanation. Consequently, defendant has violated both the verification requirement in section 122–1(b) and the pleading requirement in section 122–2.

¶ 29 The supreme court has held:

"[T]he failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a post-conviction petition (*People v. Turner*, 187 Ill. 2d 406, 414 (1999)) and by itself justifies the petition's summary dismissal (*People v. Coleman*, 183 Ill. 2d 366, 380 (1998), quoting *People v. Jennings*, 411 Ill. 21, 26 (1952))." *People v. Collins*, 202 Ill. 2d at 66.

This unqualified holding in *Collins* applies to defendant's petition. His petition suffers from the same deficiency which *Collins* held to merit summary dismissal: the petition has no corroborating evidence attached to it, other than defendant's unsworn statement, which as we have explained, does not count as an affidavit, and the petition gives no explanation for this lack of attachments. Indeed, defendant's petition is more deficient than the petition in *Collins* because defendant's petition also lacks the sworn verification pursuant to section 122–1(b) (725 ILCS 5/122–1(b) (West 2008)). See *Collins*, 202 Ill. 2d at 62 (noting that the petition itself had a "sworn verification").

¶ 30 In *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011), the appellate court held that a postconviction petition unverified by the affidavit required by section 122–1(b) was subject to summary dismissal. The appellate court stated: "[S]ince the defendant was seeking relief pursuant to the [Post-Conviction Hearing] Act, the affidavit he filed attesting to the veracity of his petition needed to be notarized in order to be valid. [Citation.] As it was not, the defendant is not entitled to

any relief. [Citation.]" *Id.*

¶ 31 This requirement of an affidavit is not a trivial formality. It aims to ensure that the finality of a criminal conviction is not lightly challenged. Once the period for direct appeal expires, the value of finality becomes stronger. The deterrent of a prosecution for perjury is calculated to prevent this finality from being called into question by collateral proceedings lacking a sound factual basis. By dispensing with affidavits, we would eliminate this deterrent and frustrate the legislative intent.

¶ 32 Defendant insists, however, that his failure to submit an affidavit is explained and therefore excused. He argues: "[T]he lack of a notarized affidavit was adequately explained by the circumstance that Mr. Ermakov was in Russia when the affidavit was executed and could not notarize the affidavit in Russia. His counsel explained this circumstance to the court and offered to have him sworn to the petition and affidavit, an offer which the court refused."

¶ 33 Nevertheless, on the day of the hearing to which defendant refers, August 19, 2011, defendant was not in Russia. Rather, he was in the United States, in the Champaign County courthouse, where notaries public no doubt could be found. So, this excuse of his sojourn in Russia—an excuse which, in any event, defendant does not state in his petition (see 725 ILCS 5/122–2 (West 2008))—is not a reasonable excuse. And the trial court did not have authority to excuse defendant from the requirements of sections 122–1(b ) and 122–2 any more than we have such authority.

¶ 34 In sum, in our *de novo* review (*People v. Davis*, 403 Ill. App. 3d 461, 464 (2010)), we affirm the summary dismissal of the postconviction petition in this case because (1) the petition is not verified by an affidavit (see 725 ILCS 5/122–1(b) (West 2008)) and (2) the petition does not

have, attached to it, any affidavits, records, or other evidence, and it offers no explanation for their absence (see 725 ILCS 5/122-2 (West 2008)).

¶ 35

### III. CONCLUSION

¶ 36

For the foregoing reasons, we affirm the trial court's judgment.

¶ 37

Affirmed.