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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-238
)	
LUIS T. GONZALEZ,)	Honorable
)	John A. Barsanti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's summary dismissal of defendant's postconviction petition was proper: although the court improperly based the dismissal partially on the petition's untimeliness, the court properly found additionally that the petition was frivolous under the applicable standard, and its failure to state its rationale did not warrant reversal; as defendant did not assert that his petition was not frivolous, and as his claims indeed were without merit, we affirmed the dismissal.

¶ 1 Defendant, Luis T. Gonzalez, appeals the summary dismissal of his postconviction petition. He contends that the court improperly dismissed the petition on the basis that it was not timely filed. However, because the court also properly found that the petition was frivolous and patently without merit, we affirm.

¶ 2 Defendant pleaded guilty to aggravated robbery (720 ILCS 5/18-5(a) (West 2006)), and was sentenced to an extended term of 20 years' imprisonment. More than five years later, on July 20, 2012, he filed a postconviction petition, alleging that trial counsel was ineffective.

¶ 3 On August 14, 2012, the trial court summarily dismissed the petition. The court's order notes that the petition was filed well after the three-year limitations period and did not properly assert a claim of actual innocence to take advantage of a statutory exception to the limitations period. See 725 ILCS 5/122-1(c) (West 2012). The order further states, "The Court hereby finds the instant Petition is frivolous and patently without merit, has no arguable basis in law or fact, and is barred as being filed too late to be considered." Defendant timely appeals.

¶ 4 Defendant contends that summarily dismissing the petition because it was filed late was improper, given that the supreme court has held that the three-year deadline is the equivalent of a statute of limitations that the State may choose to waive. The State responds that, while dismissal on the basis of untimeliness was improper, the court's order also reflects a procedurally proper and factually correct finding that the petition was frivolous and patently without merit, and we should affirm the dismissal on that basis. We agree with the State.

¶ 5 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a method by which criminal defendants can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding contains three distinct stages. *Id.* at 10. At the first stage, the trial court must, within 90 days of the petition's filing, independently review it, taking its allegations as true unless they are affirmatively refuted by the record, and determine whether the petition is frivolous or patently without merit. *Id.*; see 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court

decides that the petition is frivolous or patently without merit, it must dismiss it in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 6 A *pro se* petition may be dismissed under section 122-2.1(a)(2) if it has no arguable basis in law or in fact. A petition lacks an arguable basis in law or in fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. Our review of the first-stage dismissal of a postconviction petition is *de novo*. *Id.* at 9.

¶ 7 A trial court may not summarily dismiss a petition on the basis that it was not timely filed. *People v. Bocclair*, 202 Ill. 2d 89, 100 (2002). In *Bocclair*, the court held that a finding that a petition is frivolous relates to its substantive merit, and an untimely petition does not necessarily lack merit. *Id.* The court further noted that the three-year limit is equivalent to a statute of limitations that the State may choose to waive. *Id.* Thus, the trial court here improperly considered the timing of the petition's filing in deciding to summarily dismiss it.

¶ 8 However, in addition to finding the petition untimely, the court also found that it was frivolous and patently without merit, which is the proper standard for dismissal under section 122-2.1(a)(2). It may be, as defendant suggests, that the court's finding of frivolousness was something of an afterthought, but it does not follow that we may simply ignore it. As the State points out, we may affirm the judgment on any basis that appears in the record. *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983). Moreover, it is the court's judgment that we review, and not whatever else the court may have said. *Id.* This suggests that defendant's recourse is to argue that the judgment was wrong on the merits, but he does not do so. By failing to so argue, defendant virtually concedes that the petition presented no nonfrivolous issues and, thus, that it was properly dismissed on the merits.

¶ 9 In his reply brief, defendant insists that the correctness of the judgment is not the issue. Rather, according to defendant, the issue is “whether the court’s dismissal of the petition was procedurally proper.” Of course, a defendant may question the procedures the court followed, but such an argument must generally be accompanied by an assertion that the procedural errors led to an incorrect result.

¶ 10 As noted, defendant does not make such an argument here. Rather, he likens this case to one in which the trial court fails to rule on a petition within 90 days, as section 122-2.1(a)(2) requires. In that case, the remedy is to remand for second-stage proceedings without considering the substantive merits of the lower court’s ruling. *People v. Brooks*, 221 Ill. 2d 381, 394 (2006). The analogy fails, however, because section 122-2.1(a)(2) specifically prescribes the 90-day limit. It does not similarly prescribe a particular format for a finding of frivolousness, and defendant cites no case holding that such a finding must take any particular form or include any particular language. In any event, the court’s order was procedurally proper. It was made within 90 days of the petition’s filing. It tracks the statutory language in finding that the petition was frivolous and patently without merit, and, further, it paraphrases *Hodges* in stating that the petition had no arguable basis in law or in fact.

¶ 11 Defendant’s real complaint seems to be that the trial court did not make any specific findings in support of its conclusion that the petition was frivolous. Section 122-2.1(a)(2) does provide that the court should specify “the findings of fact and conclusions of law it made in reaching its decision.” 725 ILCS 5/122-2.1(a)(2) (West 2012). The only findings and conclusions in the dismissal order here relate to the late filing and why the statutory exception for actual-innocence claims does not apply. However, this provision has been held to be directory rather than mandatory. *People v. Porter*, 122 Ill. 2d 64, 82-83 (1988); *People v.*

Rutkowski, 225 Ill. App. 3d 1065, 1067 (1992). In *Porter*, the court noted that a defendant would not be prejudiced by the failure to comply with the “findings and conclusions” provision, because the ultimate dismissal is still subject to appellate review. *Porter*, 122 Ill. 2d at 83.

¶ 12 This reinforces our conclusion that defendant’s recourse would be to challenge the merits of the court’s ruling, *i.e.*, to argue that the petition raised at least one nonfrivolous issue, but he does not do so. Moreover, we agree with the State that the petition raised only frivolous issues.

¶ 13 The issues in the petition fell into several broad categories. Defendant first complained that counsel failed to investigate defendant’s fitness to stand trial. The record shows that counsel stipulated to a report prepared for a case in Bureau County that found defendant fit. However, the petition did not contain any new evidence relating to defendant’s fitness. Thus, defendant has not shown that further investigation of this issue would likely have produced a different result.

¶ 14 Defendant alleged that counsel told him that he would be found guilty of the offense (presumably meaning if he went to trial). An attorney’s honest assessment of a defendant’s chances at trial is not a basis for a claim that counsel’s ineffective assistance rendered a plea involuntary (*People v. Wilson*, 295 Ill. App. 3d 228, 237 (1998)), and defendant has not shown that counsel’s prediction was objectively unreasonable.

¶ 15 The petition further alleged that defendant did not “understand the legal system” and that counsel misled him. However, defendant provided no specifics and did not explain how his lack of understanding or counsel’s alleged misleading influenced his decision to plead guilty.

¶ 16 Defendant raised various complaints about counsel’s failure to investigate the case. Defendant pointed to various minor inconsistencies in witness statements, but it is not clear how

counsel's failure to investigate these points (if indeed he did not) affected the outcome of the proceeding.

¶ 17 Defendant finally raised several claims about the charging instrument and counsel's failure to "challenge the grand jury process." Defendant's point is not entirely clear, as he alleged no specific defects in the indictment or in the charging process that would have led to a dismissal of the charges. Generally, a valid charging instrument is not a jurisdictional prerequisite to a conviction. See *People v. Benitez*, 169 Ill. 2d 245, 256 (1996). Moreover, a voluntary guilty plea waives all nonjurisdictional defects. *People v. Cunningham*, 286 Ill. App. 3d 346, 348 (1997). Defendant did not allege that his guilty plea was involuntary due to the (unspecified) defect in the indictment process.

¶ 18 The judgment of the circuit court of Kendall County is affirmed.

¶ 19 Affirmed.