FOURTH DIVISION
September 26, 2013

No. 1-11-2868

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 29728
	)	
DANIEL CORTES,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's *pro se* post-conviction petition affirmed where it was not arguable that defendant was prejudiced by counsel's failure to inform defendant of potential sentence if convicted; 6-year sentence for attempted murder was void because it did not include mandatory 15-year firearm enhancement; judgment affirmed and mittimus corrected.

¶ 2 Defendant Daniel Cortes appeals from an order of the circuit court summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He argues the circuit court erred in summarily dismissing his petition

because his petition stated an arguable basis in law and fact that his trial counsel was ineffective for failing to advise him prior to trial on the potential sentences he faced. Additionally, the State contends that defendant's 6-year sentence for attempted first degree murder is void because it fails to include a mandatory 15-year firearm enhancement. We affirm the circuit court's judgment and correct the mittimus to add the 15-year firearm enhancement to defendant's sentence for attempted first degree murder.

¶ 3 The record shows that on November 20, 2001, two individuals, Joseph Miera and William Pelmer, were the targets of bullets fired in the area of Cermak and Wolcott in Chicago. Miera died as a result. A grand jury indicted defendant on 12 counts of first degree murder, 2 counts of attempted first degree murder, 1 count of aggravated discharge of a firearm, and 4 counts of aggravated unlawful use of a weapon. Following a bench trial, defendant was convicted of first degree murder and attempted first degree murder. Defendant received the minimum 20-year prison sentence for first degree murder, plus the mandatory 25-year firearm enhancement, and the minimum 6-year prison sentence for attempted first degree murder, with the sentences to run consecutively, for a total of 51 years.

¶ 4 On direct appeal, defendant argued the following issues: (1) he was denied effective assistance of counsel because his counsel failed to file a motion to suppress certain evidence; (2) the trial court erred in admitting certain evidence; (3) the State failed to prove him guilty beyond a reasonable doubt; (4) the trial court erred by sentencing him to consecutive terms of imprisonment; (5) the trial court erred by applying the 25-year sentencing enhancement; (6) his sentence violated the due process and proportionate penalties provisions of the Illinois Constitution; and (7) his enhanced sentence constituted an impermissible double enhancement. This court affirmed defendant's convictions and sentences on December 29, 2004. *People v. Cortes*, No. 1-03-1802 (2004) (unpublished order under Supreme Court Rule 23), *appeal denied*,

217 Ill. 2d 574 (No. 100019) (2005). Defendant's petition for leave to appeal to the supreme court was denied on December 1, 2005. *People v. Cortes*, 217 Ill. 2d 574 (No. 100019) (2005) (disposition of petition for leave to appeal).

¶ 5 Defendant filed the instant untimely *pro se* post-conviction petition on April 12, 2011. In relevant part, defendant alleged he was denied his right to effective assistance of counsel because his trial counsel failed to inform him of the punishment he faced if convicted. Additionally, defendant contended his appellate counsel was ineffective because he did not raise this issue on direct appeal. Defendant raised other claims relating to his indictments and his 25-year firearm enhancement. However, we only consider the above effective assistance of counsel claim because it is the only claim defendant has raised in this appeal. Ill. S. Ct. R. 341(h)(7) (eff. Feb 6, 2013); *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 6 In support of his petition, defendant attached a memorandum of law which, in relevant part, stated that defendant was not told that he faced a 25-year firearm enhancement or consecutive sentences if convicted, and that his trial counsel did not personally inform him or discuss with him the cumulative punishment he faced. Defendant argued he was prejudiced as a result "because he had no idea of the potential punishment he faced while preparing for trial" and because "[n]ot having this information prevented him from seeking a possible plea agreement, which most certainly would have resulted in a lesser sentence." He added that "it was imperative" that he know "with some certainty the***potential sentence he faced in preparing for trial."

¶ 7 Defendant also attached an affidavit which averred that: (1) he had no knowledge prior to trial that he faced a 25-year firearm enhancement for personally discharging a firearm; (2) he had no knowledge that he faced consecutive sentences "of any sort"; and (3) his trial counsel never discussed with him the possible sentences he faced if convicted.

¶ 8 On June 16, 2011, the circuit court summarily dismissed the petition. In relevant part, the circuit court stated that even if it was unreasonable for counsel not to discuss the sentencing enhancement with defendant, defendant failed to show how this failure was prejudicial. The court concluded that defendant failed to establish the gist of a constitutional claim under the Act and dismissed the petition accordingly.

¶ 9 In this court, defendant asserts his petition stated an arguable basis in law and fact that his trial counsel was ineffective for failing to advise him on the potential sentences he faced prior to trial—specifically, the possibility of receiving consecutive sentences and the 25-year firearm enhancement. Defendant contends that he was prejudiced because had he known of the potential sentences he faced, he would have pursued plea negotiations with the State. In addition, according to defendant, his trial counsel's failure to inform him about potential sentences inevitably affected other critical pre-trial decisions, such as whether to testify, call witnesses on his behalf, and elect a bench trial.

¶ 10 The Act provides a three-step process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2010); *People v. Pendleton*, 223 Ill. 2d 458, 472-73 (2006). Proceedings begin when a defendant files a petition in the circuit court where the original proceeding took place. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). To meet the Act's pleading requirements, a *pro se* defendant must allege enough facts to make out a claim that is arguably constitutional, such that it states the gist of a constitutional claim. *Id*. The petition need only present a limited amount of detail, and does not need to set forth the claim in its entirety or include legal arguments or citations to legal authority. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Despite this low threshold, a *pro se* defendant must still attach affidavits, records, or other evidence supporting the petition's allegations to establish that the petition's allegations are capable of objective or independent corroboration.

Hodges, 234 Ill. 2d at 10. If the circuit court determines that the petition is frivolous or patently without merit, the petition is dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. We review the circuit court's dismissal of a post-conviction petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 11 Defendant's petition involves a claim of ineffective assistance of trial and appellate counsel. At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19. A defendant who claims that his appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *People v. Paleologos*, 345 Ill. App. 3d 700, 704 (2003). If the underlying issue is meritorious, then the defendant has suffered prejudice. *Id*.

¶ 12 It may be arguable that trial counsel's performance was objectively unreasonable for failing to discuss possible sentences with defendant. Taking the allegations in defendant's petition as true (*Edwards*, 197 Ill. 2d at 244), defendant's trial counsel did not tell defendant any of the possible punishments he faced if convicted, including a 25-year firearm enhancement and consecutive sentences. For purposes of a plea offer or negotiations, a criminal defense attorney is obligated to inform his client about the maximum and minimum sentences that can be imposed for the offenses with which his client is charged. *People v. Curry*, 178 Ill. 2d 509, 528 (1997) (citing ABA Standards for Criminal Justice § 4-5.1, Commentary (2d ed. 1980)); *People v. Clark*, 406 Ill. App. 3d 622, 638-39 (2010). The State observes that defendant only relies on

cases which occur in the context of guilty plea offers or discussions. See *Missouri v. Frye*, __ U.S. __, 132 S. Ct. 1399, 1408 (2012) (further defining effective assistance of counsel during plea negotiations to include the duty to communicate formal offers from the prosecution); *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1388 (2012) (where ineffective advice of counsel led to rejection of a favorable plea offer, noting that the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences). However, the court in *Clark* rejected the concept that "when a defendant enters a plea of *not* guilty, it is *solely* the court's responsibility, not counsel's, to inform the defendant of the maximum and minimum sentences that can be imposed for the offense with which the defendant is charged." (Emphasis in original.) *Clark*, 406 Ill. App. 3d at 640.

¶ 13 Nonetheless, defendant fails to demonstrate how he was prejudiced by his trial counsel's performance. As a preliminary matter, we confine our analysis to the allegations in defendant's petition, and not the additional allegations regarding prejudice that defendant raises for the first time in his brief, such as that counsel's failure to inform defendant about his sentence affected decisions about whether to call witnesses and choose a bench trial. *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010) (quoting *People v. Jones*, 211 Ill. 2d 140, 148 (2004) to state, " 'the question raised in an appeal from an order dismissing a post-conviction order is whether the allegations raised *in the petition*, liberally construed and taken as true, are sufficient[.]' ") (Emphasis in original.)

¶ 14 In his petition, defendant contended that not knowing about his potential sentence "prevented him from seeking a possible plea agreement, which most certainly would have resulted in a lesser sentence." Defendant's petition additionally alleged that it was imperative that he know the potential sentence he faced while preparing for trial. It is well-established that

the State need not initiate or participate in plea bargaining, and a defendant does not have any constitutional, statutory, or other lawful right to plea bargain. *People v. Boyt*, 129 Ill. App. 3d 1, 17 (1984), *aff'd*, 109 Ill. 2d 403 (1985). The record contains no mention of plea discussions, and defendant does not assert in his petition or accompanying documents that any plea discussions occurred. All he alleges is that he *would have* sought a possible plea bargain if he had known the punishment he faced. The opportunity to plea bargain is not guaranteed, and defendant's claims, standing alone, amount to broad, conclusory allegations, which are insufficient under the Act. Compare *People v. Miller*, 393 Ill. App. 3d 629, 639-40 (2009) (the defendant's claim that had his counsel informed him of an extended term, he would have accepted an offer to plead guilty, standing alone, amounted to no more than " 'subjective, self-serving [testimony,] insufficient to satisfy' " the prejudice requirement for ineffective assistance claims), with *People v. Paleologos*, 345 Ill. App. 3d 700, 705-06 (2003) (post-conviction petition was docketed for second-stage review where the defendant claimed he relied on counsel's incorrect information when he rejected an offer to plead guilty and the defendant indicated he would have accepted the plea offer had he known the actual sentence he could receive if convicted). Defendant presents even broader allegations than the defendant in *Miller*, as defendant here did not even allege that an actual plea offer was available. As defendant failed to present an arguable claim that he was prejudiced, his petition was properly dismissed.

¶ 15 Next, the State argues for the first time on appeal that defendant's 6-year sentence for attempted murder is void and should be increased to 21 years to reflect a mandatory 15-year firearm enhancement. The State cites *People v. Arna*, 168 Ill. 2d 107, 113 (1995), which held that a sentence which does not conform to a statutory requirement is void, and may be corrected by the appellate court at any time. We agree with the State and correct defendant's sentence accordingly. At the time of defendant's offense, as a Class X felony, the minimum sentence for

attempted first degree murder was 6 years plus a 15-year sentence enhancement if a defendant committed the offense while armed with a firearm. 730 ILCS 5/5-8-1(a)(3) (West 2000); 720 ILCS 5/8-4(c)(1)(B) (West 2000). However, at the time defendant was sentenced, the 15-year firearm enhancement for attempted first degree murder had been found unconstitutional (*People v. Morgan*, 203 Ill. 2d 470 (2003)), and so was not added to defendant's sentence. Approximately two years later, the 15-year firearm enhancement was revived by *People v. Sharpe*, 216 Ill. 2d 481 (2005), which overruled *Morgan*. Further, the firearm enhancement was found to apply to cases pending on direct review at the time *Sharpe* was decided. *People v. Hauschild*, 226 Ill. 2d 63, 77-80 (2007); *People v. Lee*, 376 Ill. App. 3d 951, 967 (2007) (*Sharpe* must be applied to cases on direct review at the time *Sharpe* was decided—October 6, 2005). Here, defendant's petition for leave to appeal to the supreme court was denied on December 1, 2005. As *Sharpe* had been decided while defendant's case was pending on direct review, the 15-year firearm enhancement applies to defendant's sentence. Thus, defendant's attempted murder sentence is void because it does not include the mandatory 15-year firearm enhancement. See *Arna*, 168 Ill. 2d at 113. Because defendant was given the minimum sentence for attempted murder, we will add on the 15-year firearm enhancement without remanding for resentencing.

¶ 16 Defendant urges us to overrule *Arna*, contending that it was wrongly decided because it is rooted in outdated jurisdictional law. However, because the appellate court lacks authority to overrule decisions of the supreme court (*People v. Artis*, 232 Ill. 2d 156, 164 (2009)), we decline to do so.

¶ 17 For the foregoing reasons, the judgment of the circuit court is affirmed and we order defendant's mittimus corrected to reflect a 21-year sentence for attempted murder.

¶ 18 Affirmed; mittimus corrected.