

No. 1-15-0719

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 1739
	)	
ALEX PICALLO,	)	Honorable
	)	Colleen A. Hyland,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Pierce and Justice Neville concurred in the judgment.

**O R D E R**

¶ 1 *Held:* We affirm the circuit court's summary dismissal of defendant's postconviction petition where defendant failed to raise an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Alex Picallo appeals from the circuit court's summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2014).

On appeal, defendant contends that he raised an arguable claim that trial counsel was ineffective for failing to disclose to him exculpatory evidence showing he did not use force against the

victim, A.C., before he entered his guilty plea to the charge of aggravated criminal sexual assault. He also claims that trial counsel was ineffective for failing to file a motion to withdraw his guilty plea. We affirm.

¶ 3 The record shows that defendant and his codefendants Jonathan Leanos, Majeed Khalifeh, and Vicente Hernandez, who are not parties to this appeal, were charged with multiple counts of aggravated criminal sexual assault, child pornography, kidnapping, and unlawful restraint. In particular, as relevant to this appeal, defendant was charged with aggravated criminal sexual assault based on the allegation that he and his codefendants knowingly committed an act of sexual penetration upon A.C., to wit: contact between defendant's penis and A.C.'s vagina, by the use of force or threat of force, and the criminal sexual assault was perpetrated during the commission of child pornography. When the charged offenses occurred on January 8, 2011, A.C., was 14 years old and defendant was 16 years old.

¶ 4 On November 10, 2011, the State filed a "Notice of Disclosure," which stated that on September 28, 2011, A.C. met with two assistant State's Attorneys and a child sexual abuse expert. During this meeting, A.C. stated in part that she previously had consensual sex with defendant and codefendant Khalifeh "on a different date," and that she had lied to police about the previous consensual sex because she was embarrassed.

¶ 5 On December 9, 2011, defendant and codefendant Leanos were before the trial court in this matter to enter negotiated guilty pleas. Regarding defendant, the State told the court that in exchange for a plea of guilty to one count of aggravated criminal sexual assault, it would accept a sentence where defendant would serve six years' imprisonment, he would be required to register as a sex offender for life, and he would have to serve a period of mandatory supervised release (MSR) between three years and life. The court explained to defendant the rights he was

relinquishing by pleading guilty and informed him of the minimum and maximum applicable sentences. Defendant indicated that he understood. He then told the court that he was not threatened or promised anything in exchange for the plea, and that he was pleading guilty of his own free will.

¶ 6 The State provided the court a factual basis to support the plea, and stated it would have presented a cell phone video recording of sex acts involving the victim to support the underlying child pornography charge. The State specifically provided that A.C. would testify that after engaging in a sex act with codefendant Leanos she attempted to leave his residence, but Leanos grabbed her, threw her against a wall, and said that she was going to do what he told her to do. A.C. was in fear for her life and got dressed. Leanos told A.C. that he was going to pick up his friends and that she would have sex with them. A.C. sat in the backseat of Leanos' car as he drove and picked up defendant and codefendants Khalifeh and Hernandez. They returned to Leanos' residence in Stickney, Illinois where she went into the bedroom with Hernandez. Hernandez forced A.C. to perform oral sex on him and to engage in vaginal sex. When Khalifeh and defendant entered the bedroom, Hernandez left. Defendant forced A.C. to give him oral sex, while Khalifeh was having both vaginal and anal sex with her. A.C. asked defendant why he was doing this to her and he replied that she needed to "deal with it." Leanos and Hernandez returned to the bedroom and began video recording the sex acts between A.C., defendant, and Khalifeh with their cell phones. Defendant and Khalifeh switched positions, and Khalifeh was now receiving oral sex from A.C. while defendant was having vaginal sex with her. When defendant and Khalifeh were done, Leanos tried to have vaginal sex with A.C., but stopped and said they had to leave.

¶ 7 The court entered a finding of guilt against defendant on the aggravated criminal sexual assault charge, sentencing him to six years' imprisonment and a 10-year term of MSR. In doing so, the court found that defendant understood the charges against him and the possible penalties, and that he entered into his guilty plea voluntarily. The court admonished defendant of his rights on appeal, but he did not file a motion to withdraw his guilty plea, nor did he file a direct appeal.

¶ 8 On December 8, 2014, defendant, through private counsel, filed a postconviction petition, alleging several claims of ineffective assistance of trial counsel. He alleged that he did not use force during his contact with A.C. on the date of the incident, but instead had consensual sexual relations with her. Defendant also alleged that prior to the date of the plea, trial counsel was tendered a notice of disclosure by the State, but counsel never apprised him of it. According to defendant, the notice of disclosure showed that A.C. had changed her proposed testimony in signification fashion such that an essential element of the crime charged, *i.e.*, the use of force, was subject to "litigation and challenge." Moreover, counsel did not show defendant the videotape evidence of the incident, which, he believed, did not support his plea of guilty. Defendant asserts that had he known of the notice of disclosure and been shown the videotape, he would not have pled guilty and would have gone to trial. Defendant further maintained that his family apprised trial counsel that he wanted to withdraw his plea because he did not use force in engaging in sexual relations with A.C., but counsel responded that he no longer represented defendant and told them to seek other counsel.

¶ 9 Defendant finally argued that trial counsel failed to inform him prior to the time of the plea that he was subject to 10 years of MSR and would have to register as a sex offender. On appeal, however, defendant makes no argument about trial counsel's alleged failure to inform him of the 10-year MSR term or his need to register as a sex offender. Accordingly, he has

forfeited this claim. See *People v. Evans*, 405 Ill. App. 3d 1005, 1007 (2010) (citing Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived \*\*\*.")).

¶ 10 In support of his petition, defendant attached the notice of disclosure, his own affidavit, which essentially repeated the claims in his petition, and an affidavit from his mother, Beatriz Picallo. Defendant's mother averred that she told counsel that her son wanted to withdraw his plea, but that counsel responded that he no longer represented defendant and that she should get a new attorney.

¶ 11 On February 27, 2015, the circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. The court held that defendant's plea was entered voluntarily, and defendant failed to establish any ground that could have been presented in a motion to withdraw the plea that would have warranted a finding that counsel was ineffective for failing to file the motion.

¶ 12 On appeal, defendant contends that his trial counsel was ineffective for failing to disclose exculpatory evidence to him prior to his plea proceedings. In particular, defendant maintains that had counsel divulged the State's notice of disclosure and the contents of the video, which, according to defendant, both rebutted that he used force in engaging in sexual relations with A.C., he would not have pled guilty and, instead, proceeded to trial on the merits.

¶ 13 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2014). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis

in either fact or law. *Id.* at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [at the first stage is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an indisputably meritless legal theory is one that is "completely contradicted by the record." *Id.* at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10. Thus, we review the trial court's judgment, rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 14 To state a claim of ineffective assistance of trial counsel in the context of a guilty plea, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *i.e.*, deficiency and prejudice. Thus, to survive the first stage of postconviction proceedings, a petition claiming ineffective assistance of counsel need only demonstrate (1) that it is *arguable* counsel's representation fell below an objective standard of reasonableness, and (2) that it is *arguable* defendant was prejudiced by counsel's performance. (Emphasis added.) *Hodges*, 234 Ill. 2d at 17. However, if a defendant fails to show he was arguably prejudiced by his counsel's actions, then we can dispose of the ineffective claim on this prong alone. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 46. Here, we proceed directly to the prejudice prong as defendant's petition does not allege sufficient facts to make out an arguable claim of prejudice.

¶ 15 In the guilty plea context, prejudice exists if there is a reasonable probability that, but for counsel's errors, the defendant would have pled not guilty and would have insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). A bare allegation that the defendant would have pled not guilty and insisted on a trial is not enough to show prejudice. *Id.* (citing *People v. Rissley*, 206 Ill. 2d 403, 458-59 (2003)). Instead, "the defendant's claim must be accompanied by

either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335-36 (citing *Rissley*, 206 Ill. 2d at 459-60). We acknowledge that the court in *Hall* considered a second-stage dismissal of a postconviction petition. However, the appellate court has applied the reasoning in *Hall* to first-stage dismissals. See *e.g.*, *People v. McCoy*, 2014 IL App (2d) 100424-B.

¶ 16 In defendant's petition, he claims that he did not use force, but instead had consensual sexual relations with A.C. on the date in question. In so arguing, defendant asserts that trial counsel failed to disclose evidence showing that he had consensual sex with A.C. In particular, defendant alleges in his petition that trial counsel failed to apprise him of the State's notice of disclosure, and failed to show him videotape evidence of the incident. In the notice of disclosure, A.C. stated that she previously had consensual sex with defendant and codefendant Khalifeh "on a different date," and that she lied about the previous consensual sex because she was embarrassed. The videotape, according to defendant, did not demonstrate the element of force required to sustain his conviction.

¶ 17 Despite defendant's contentions to the contrary, his allegation that he did not use force against A.C. during the incident is not a plausible defense where he makes no argument in his petition as to how he could show the act was consensual had he proceeded to trial. Instead, defendant makes only conclusory statements that had counsel shown him the notice of disclosure and the videotape he would not have pled guilty. See *People v. Delton*, 227 Ill. 2d 247, 258 (2008) (broad conclusory allegations, without any factual basis, are not allowed under the Act).

¶ 18 It is noteworthy that A.C.'s statement in the notice of disclosure does not show that she changed her account regarding the events of the incident in question. In fact, nowhere in the notice of disclosure does A.C. state that she had consensual sex with defendant on the date of the

instant offense. On the contrary, it indicates that, during the meeting with the State's Attorneys and the child sexual abuse expert, A.C. "confirmed all the details as previously stated in all the police reports in this matter" regarding the instant offense. Therefore, the notice of disclosure, viewed in its entirety, reaffirms A.C.'s assertion that defendant used force against her on the date of the instant offense.

¶ 19 Moreover, the videotape evidence, which defendant claims demonstrates that he did not use force against A.C., is not included in the record, nor does defendant explain in his petition why the videotape was not included. Defendant thus failed to comply with section 122-2 of the Act, which requires that a postconviction petition contain affidavits, records, or other evidence that supports his allegations, or an explanation for why those documents are absent. 725 ILCS 5/122-2 (West 2014). Such a failure, by itself, justified summary dismissal of his petition. See *People v. Collins*, 202 Ill. 2d 59, 69 (2002) (affirming summary dismissal on the basis of noncompliance with section 122-2 of the Act). Furthermore, even according to defendant's version of events, the video evidence would have been incomplete as most of the sex acts forced upon A.C. were not recorded.

¶ 20 Defendant further claims that trial counsel was ineffective for failing to file a motion to withdraw his guilty plea. Defendant maintained in his petition that he wanted to file said motion because he did not use force in engaging in sexual relations with A.C. However, as shown above, defendant has failed to plead a plausible defense of lack of force that could have arguably rebutted the State's allegations establishing that defendant used force against A.C. As there were no meritorious grounds for filing a motion to withdraw his plea, counsel was not required to file a futile motion to render effective assistance. *People v. Muhammad*, 257 Ill. App. 3d 359, 367



(1993). Therefore, defendant's petition failed to make a showing that it is *arguable* he suffered prejudice as a result of counsel's alleged deficiencies.

¶ 21 Finally, we note that *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), relied on by defendant, are distinguishable from the case at bar. In both cases, the defendants were prejudiced as a result of deficient advice from their attorneys regarding an offer from the State. See *Frye*, 132 S. Ct. at 1410-11 (the defendant's attorney rendered deficient performance when he failed to inform the defendant of a favorable plea offer before it expired, and the defendant established there was a reasonable probability he would have accepted the offer); *Lafler*, 132 S. Ct. at 1383-88 (the defendant rejected a favorable plea offer after counsel erroneously advised him that the State would not be able to prove intent to murder because the defendant shot the victim below the waist). Here, trial counsel did not provide any erroneous advice regarding the negotiated plea agreement, and, as explained above, defendant failed to set forth a plausible defense.

¶ 22 As defendant has failed to articulate a plausible defense, and has only made bare allegations that he did not use force in engaging in sexual relations with A.C., we find that he has not raised an arguable claim of ineffective assistance of trial counsel.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 24 Affirmed.