

THIRD DIVISION
February 8, 2017

No. 1-14-2949

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).

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.)	Nos. 10 CR 1407
)	10 CR 27
)	
FREDRIC HAYWOOD,)	Honorable
)	Arthur F. Hill,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed over his claim of ineffective assistance of trial counsel.

¶ 2 Defendant Fredric Haywood 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)). He contends that the trial court erroneously dismissed his petition when it improperly relied on matters outside of the record to conclude that defendant failed to present an arguable claim of ineffective assistance of counsel. Defendant argues that defense counsel was ineffective for failing to protect his interest by delaying sentencing.

¶ 3 In 2009, defendant and several co-defendants¹ were charged under two indictments in cases 10 CR 27 and 10 CR 1407 with various offenses related to their participation in a scheme involving mortgage applications and corresponding loans. Defendant additionally faced pending federal charges.

¶ 4 From his arraignment in January 2010 until August 2012, defense counsel informed the trial court numerous times that defendant was working toward a plea agreement with the State but was delaying pleading until after he resolved his federal case to avoid a sentence enhancement in federal court. Defendant, the trial court, and the State also acknowledged on the record delaying defendant's pleading and sentencing until his federal case was resolved.

¶ 5 On August 17, 2012, the parties informed the court that they reached a plea agreement. The agreement stated defendant would plead guilty to one count of organizer of continuing financial crimes enterprise in case 10 CR 1407 and one count of theft in case 10 CR 27 in exchange for two concurrent sentences of 12 years to be served concurrent with his expected federal sentence. The court admonished defendant of his rights and the rights he waived by

¹ Co-defendants are not parties to this appeal.

pleading guilty. After hearing the State's factual bases, defendant pled guilty. The court found that defendant understood the nature of the charges and that his plea was voluntary. The court agreed to delay sentencing.

¶ 6 On December 27, 2012, defendant indicated that he wished to proceed to sentencing. The court admonished defendant and he waived his right to presentence investigations. Thereafter, the court sentenced defendant to 12 years' imprisonment on each conviction to be served concurrently and concurrent with "any federal sentence." Defendant's subsequent appeal to this court was dismissed for failure to file a postplea motion as required by Supreme Court Rule 604 (eff. July 1, 2006). *People v. Haywood*, 2015 IL App (1st) 130859-U (unpublished order under Supreme Court Rule 23).

¶ 7 In April 2014, defendant filed a *pro se* petition for postconviction relief. The petition alleged, among other things, that defendant's trial counsel was ineffective for "allowing" defendant to plead and proceed to sentencing in the state court case prior to sentencing in the federal case which resulted in an enhanced federal sentence. Defendant attached to his petition his federal indictment; an April 23, 2012 federal plea agreement containing an anticipated sentence range of 110 to 137 months' imprisonment; a federal Statement of Correction to defendant's federal presentence investigation report, including his state court convictions in the instant case and a guideline imprisonment range of 151 to 188 months' imprisonment; and the judgment in defendant's federal case sentencing him to 151 months' imprisonment.

¶ 8 The trial court dismissed defendant's petition for postconviction relief as patently frivolous and without merit. The court concluded that defendant failed to demonstrate that his

attorney's performance was deficient because defense counsel delayed sentencing for over two years. Additionally, the court noted that defendant delayed the resolution of his federal case and took judicial notice of defendant's federal motion to continue sentencing and the federal court's minute order granting defendant's motion. Finally, the court determined that defendant failed to establish prejudice because defendant was sentenced within the range recommended prior to his state court convictions. In support of its conclusion, the court took judicial notice of a United States' Supplemental Sentencing Memorandum which recommended a sentencing range of 121 to 151 months' imprisonment. This appeal followed.

¶ 9 On appeal, defendant contends that the trial court erred by dismissing his petition for postconviction relief by improperly relying on federal court documents outside of the record to conclude that defendant failed to make an arguable claim for ineffective assistance of counsel. The State counters that defendant failed to establish ineffective assistance of counsel because 1) his attorney's performance was not deficient, and 2) the alleged prejudice was to an unrelated federal case rather than the instant case.

¶ 10 The Act allows criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Harris*, 206 Ill. 2d 1, 12 (2002).

¶ 11 At the first stage of postconviction proceedings, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous

or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be summarily dismissed as “frivolous or patently without merit only if the petition has no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as those that are fantastic or delusional. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). We review the summary dismissal of a petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 12 To survive the first stage, a *pro se* litigant’s 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). The allegations in the petition must be taken as true and liberally construed. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 13 At the first stage of postconviction proceedings, an ineffective assistance of counsel claim may not be dismissed if it is arguable that: (1) counsel’s performance “fell below an objective standard of reasonableness;” and (2) the defendant was prejudiced by counsel’s deficient performance. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1994)). The first prong requires us to consider whether there is an arguable basis to find that counsel’s performance was “objectively unreasonable under prevailing professional norms.” *People v. Cathey*, 2012 IL 111746, ¶ 23. The second prong requires an inquiry into whether there

is an arguable basis to conclude that, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* The failure to satisfy either prong will defeat an ineffective assistance claim. *People v. Enis*, 194 Ill. 2d 361, 377 (2002).

¶ 14 We first note that defendant and the State disagree as to whether the trial court improperly took judicial notice of documents from defendant's federal case. However, we need not determine whether the trial court erred by taking judicial notice of matters outside of the record because defendant's petition fails to make an arguable claim of ineffective assistance of counsel without a review of those documents. See *Hodges*, 234 Ill. 2d at 9.

¶ 15 Next, we note that defendant has failed to identify any rule, statute, or constitutional provision that entitled him to delay the proceedings. Defense counsel's performance cannot be deficient for failure to delay the proceedings in the absence of any legal right to do so. Moreover, even if we assume delay was a permissible and required strategy, we find that the record belies defendant's claim that defense counsel's performance fell below an objective standard of reasonableness. *Enis*, 194 Ill. 2d at 377. On the contrary, the record reveals that defense counsel delayed defendant's plea and sentencing numerous times for almost two years to avoid resolving the state case before defendant's federal case. Additionally, defendant acknowledged on the record that he was waiting to plead guilty until his federal case resolved in order to avoid an enhanced federal sentence. Thus, defendant was aware of the possible sentencing enhancement, and he voluntarily proceeded to pleading and sentencing despite that risk. Without more, we cannot conclude defense counsel was deficient for permitting defendant to proceed to sentencing after fully informing him of the potential enhanced sentence in federal court. Therefore,

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defendant's claim has no arguable basis in law. See *Hodges*, 234 Ill. 2d at 16. Accordingly, we conclude that the trial court properly dismissed defendant's petition. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010) (noting that we may affirm on any basis supported by the record if the judgment is correct).

¶ 16 For the foregoing reasons, we affirm the decision of the trial court.

¶ 17 Affirmed.