2017 IL App (2d) 141137-U
No. 2-14-1137
Order filed March 2, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERIC PENCE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-1767 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited his claim that trial counsel was ineffective, as that claim was not in defendant's postconviction petition; in any event, his petition did not establish that counsel was arguably ineffective, specifically that defendant was arguably prejudiced by counsel's alleged failure to inform him of a ramification of his admission to a petition to revoke probation, as defendant had no plausible defense to the petition.

¶ 2 Defendant, Eric Pence, appeals from an order of the circuit court of Du Page County summarily dismissing his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant argues that the trial court erred in dismissing his postconviction petition, because the petition stated the gist of a constitutional claim that his

attorney rendered ineffective assistance of counsel by failing to advise him that his bargained-for sentence of time served would actually result in defendant serving a year in prison given that he did not have a residence that was acceptable for sex-offender mandatory supervised release (MSR). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 20, 2012, defendant was indicted on five counts of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2012)), one count of traveling to meet a minor (720 ILCS 5/11-26(a) (West 2012)), and one count of grooming (720 ILCS 5/11-25(a) (West 2012)). On July 31, 2012, defendant agreed to plead guilty to one count of traveling to meet a minor and one count of grooming, in exchange for the dismissal of the remaining counts. The trial court accepted defendant's guilty plea and continued the matter for sentencing. On the day of the sentencing hearing, the parties informed the court that they had agreed to concurrent sentences of 30 months of sex-offender probation. The agreement also called for defendant to spend 180 days in jail, with credit for 376 days already served. The court accepted the agreement and sentenced defendant accordingly.

¶ 5 On March 31, 2014, the State filed a petition to revoke defendant's probation, and defendant was taken into custody. The petition alleged that defendant "accessed the Internet without authorization" and "viewed pornographic websites" and "viewed child pornography." On April 21, 2014, the State and defense counsel were before the court. The State advised the court that the police conducted a forensic analysis of defendant's computer but did not find any pornography. The State further advised the court that, in any event, defendant had self-reported and told his probation officer that he was going to submit to additional treatment. The parties agreed to leave the petition pending until April 30, 2014, at which time defendant would be

released on a personal recognizance bond and submit to additional treatment. On April 30, 2014, defendant was released with all conditions of probation to continue.

¶ 6 On June 23, 2014, the parties were once again before the court. The State filed an amended petition to revoke, which incorporated the allegations in the initial petition and additionally alleged that defendant failed to report to meetings with his probation officer, failed to attend sex-offender treatment, and missed a scheduled meeting with the health department. The court asked defendant if he wished to respond. Defendant stated: "Yes. I missed those appointments, and there is no excuse and I apologize." When the court stated: "Well, you haven't been going to treatment," defendant responded: "Yeah. There is no excuse as to why I missed that." Defense counsel asked that defendant be released on a personal recognizance bond, and the court denied the request.

¶ 7 On July 16, 2014, the parties announced that they had reached an agreement on the amended petition to revoke probation. Defendant agreed to enter an admission in exchange for the State's agreement to a sentence of two years in the Department of Corrections (DOC) followed by one year of MSR. Defendant would be given credit for 431 days spent in custody during the pendency of the case. The court admonished defendant regarding the nature of the allegations in the petition and his right to contest the petition at an evidentiary hearing. The court further admonished defendant as to the possible penalties associated with the underlying offenses. The court admonished defendant that his prison sentence would be followed by one year of MSR. The factual basis for the admission indicated that defendant's probation officer would testify that defendant failed to attend a sex-offender treatment appointment on May 14, 2014, and failed to attend a health-department appointment on June 16, 2014. In addition, he would testify that defendant admitted to accessing the Internet without authorization and viewing

pornographic websites. Thereafter, the court accepted defendant's admission and sentenced him to two years in the DOC, followed by one year of MSR.

¶ 8 On August 29, 2014, defendant filed a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)), seeking to withdraw his admission to the petition to revoke probation. Defendant alleged that, upon entering his admission, he was transported to the DOC where he was given credit for time served and referred for MSR. However, he was not placed on MSR, because he did not have an address to provide for purposes of registering as a sex offender. Defendant maintained that "[p]arole is holding Defendant illegally and in deprivation of his Due Process rights as he has committed no substantive violation of the rules of parole." Defendant further alleged that had he known he would suffer the "unconstitutional deprivation of his liberty because of his homelessness, he would never have entered the admission."

¶ 9 On September 12, 2014, defendant filed an amended petition under section 2-1401 of the Code. Again, defendant argued that, had he known of the penal consequences of his admission to the petition to revoke, he never would have entered his admission. In addition, defendant sought an order declaring section 3-3-7 of the Unified Code of Corrections (730 ILCS 5/3-3-7 (West 2014)), "Conditions of Parole, Mandatory Supervised Release, or Aftercare Release," unconstitutional on its face and as applied.

¶ 10 On October 21, 2014, the State filed a motion to dismiss defendant's amended section 2-1401 petition, arguing that neither of defendant's claims is cognizable under section 2-1401.

¶ 11 On October 27, 2014, defendant filed a second amended section 2-1401 petition. Defendant added the allegation that he was "never admonished that his parole term could be turned into a penitentiary sentence at the discretion of parole without any proactive violation on

his part." He again asserted that, had he known of the penal consequences that would follow from his homelessness, he never would have entered the admission.

¶ 12 On that same day, defendant filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant alleged that he "was never admonished that his parole term could be turned into a penitentiary sentence at the discretion of parole without any proactive violation on his part." He alleged that "[t]he [DOC's] turnaround policy *** unjustly targets indigent and homeless parolees, merely because they lack the funds to purchase or otherwise pay for housing that passes [DOC] standards." He further alleged that the "policy is an unconstitutional delegation of legislative authority as *** it gives an administrative body, [DOC] *** authority to arbitrarily apply the legislation to usurp the fundamental right of a parolee's freedom if they are indigent or homeless." He further alleged that section 3-3-7 of the Unified Code of Corrections "fails to give a person of ordinary intelligence fair notice that their indigence or homelessness is contemplated conduct which is forbidden by the statute and subjects them to further incarceration beyond the terms of their sentence as they are advised in court." He alleged that the "addition of [MSR] to agreed-upon sentence violates Due Process because the sentence imposed is more onerous than the one the Defendant agreed to at the time of the plea hearing." According to defendant, he "did not have fair notice that his indigence and homelessness would subject him to further incarceration beyond his agreed upon sentence either by statute or by the court." He asked that the court declare section 3-3-7 unconstitutional on its face or as applied to defendant.

¶ 13 The court heard arguments on the second amended section 2-1401 petition. Defense counsel argued:

"We have a situation where my client is advised to one year of [MSR].

> What he hasn't been admonished to, what he wasn't aware of, what I wasn't aware of at the time is a turnaround policy of the [DOC], which allows them not to release a Defendant if he does not have an address or he's homeless."

Counsel argued further:

> "If he had known, and what we're saying for the 2-1401, if he had known that simply because he was indigent, simply because he did not have a place to live, without any proactive action on his part, that he could be refused to be released from parole, that would have had a tremendous effect on his decision whether or not to go forward with the plea agreement on this case."

¶ 14 The trial court rejected the argument and dismissed the petition. The court thereafter set the matter for ruling on defendant's postconviction petition.

¶ 15 On November 10, 2014, the trial court summarily dismissed defendant's postconviction petition. The court found that the effects of DOC policy regarding MSR were collateral consequences of defendant's admission. The court further found that section 3-3-7 was not unconstitutionally vague, nor did it improperly delegate legislative authority to the DOC. Finally, the court noted that, if defendant had a claim that the DOC was improperly requiring him to serve his MSR in prison, he should pursue that claim against the DOC.

¶ 16 Defendant timely appealed both the dismissal of his section 2-1401 petition and the summary dismissal of his postconviction petition. However, on appeal, defendant challenges only the summary dismissal of his postconviction petition.

¶ 17 II. ANALYSIS

¶ 18 The Act provides a method by which criminal defendants can assert that their convictions and sentences were the result of a substantial denial of their rights under the United States

Constitution, the Illinois Constitution, or both. See 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2014). "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014); see *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006).

¶ 19 "A postconviction proceeding not involving the death penalty contains three distinct stages." *Hodges*, 234 Ill. 2d at 10. This appeal concerns a summary dismissal at the first stage. At the first stage, the trial court must independently review the petition, taking the allegations as true, and determine whether the claim in the petition is frivolous or patently without merit. *Id.* A postconviction petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Id.* at 16. A petition that has no arguable basis in law or in fact is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* An indisputably meritless legal theory is one that is completely contradicted by the record, and a fanciful factual allegation is one that is fantastic or delusional. *Id.* at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 20 On appeal, defendant has abandoned his challenge to the constitutionality of section 3-3-7 of the Unified Code of Corrections, and he admits that "[i]t would not be feasible to require a trial judge to admonish a defendant of all of the requirements of [MSR] before accepting that defendant's guilty plea." Instead, defendant advances an entirely new claim—ineffective assistance of counsel. Defendant argues that the trial court erred in summarily dismissing his postconviction petition, because the petition (in light of the record) stated the gist of a claim that counsel was ineffective for failing to advise him that he would have to serve his MSR in prison.

In response, the State argues that, because defendant failed to raise this claim in his petition, it is forfeited, and we should not consider it. We agree with the State.

¶ 21 The Illinois Supreme Court has repeatedly found that a defendant forfeits an argument or claim on appeal if that argument or claim was not raised in the postconviction petition. See *People v. Petrenko*, 237 Ill. 2d 490, 500-03 (2010); *Pendleton*, 223 Ill. 2d at 473-75; *People v. Jones*, 211 Ill. 2d 140, 147 (2004). The State directs our attention to three appellate court cases upholding forfeiture of claims on appeal where the claims were not alleged in postconviction petitions. We will address each in turn.

¶ 22 First, in *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 15, the defendant raised in his *pro se* postconviction petition a single claim of ineffective assistance of counsel that he divided into four subparts. One subpart alleged that trial counsel prevented the defendant from testifying, telling the defendant that it would " 'give the state the opportunity to bring up your background.' " *Id.* On appeal from the summary dismissal of the petition, the defendant argued that counsel was ineffective for misinforming the defendant that, if he were to testify, his " 'prior juvenile adjudications of guilt would be available for impeachment.' " (Emphasis omitted.) *Id.* ¶ 19. The court found that the issue was forfeited because of "the total absence of a mention of the defendant's 'juvenile background' in the postconviction petition." *Id.* ¶ 23.

¶ 23 In *People v. Cole*, 2012 IL App (1st) 102499, the postconviction petition alleged: (1) the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to " 'properly question the venire' " regarding the principles underlying the trial; and (2) the prosecutor engaged in misconduct during closing argument when he injected his personal belief by characterizing one of the victims as " 'a credible witness.' " *Id.* ¶ 4. The trial court summarily dismissed the postconviction petition, reasoning that the claims could have been

raised on direct appeal and were rebutted by the record. *Id.* ¶ 5. On appeal, the defendant claimed for the first time that appellate counsel's failure to raise the issues rendered his assistance constitutionally deficient. *Id.* ¶ 9. The court found that, because the postconviction petition included no allegations against appellate counsel's performance, the defendant was precluded from asserting those claims for the first time on appeal. *Id.* ¶ 16. Accordingly, the court affirmed the summary dismissal of the defendant's petition. *Id.* ¶ 25.

¶ 24 In *People v. Mars*, 2012 IL App (2d) 110695, the defendant asserted in his petition, among other things, that " '[d]efense counsel failed to challenge the sufficiency of the grand jury indictment which omitted essential elements of the charges.' " *Id.* ¶ 31. The defendant argued that " '[b]ut for, [*sic*] counsel's ineffective assistance of counsel's [*sic*] no trier of fact could have found [the defendant] guilty beyond any reasonable doubt of first degree murder.' " *Id.* The trial court summarily dismissed the petition, and the defendant appealed. *Id.* ¶ 11. On appeal, the defendant claimed that appellate counsel was ineffective for failing "on direct appeal to argue that the trial court erred in not dismissing the 2007 indictment, because it was subject to compulsory joinder with the 2005 indictment and violated [the] defendant's right to a speedy trial." *Id.* ¶ 31. We found this claim forfeited. *Id.* ¶ 33. In so doing, we noted that the defendant's petition was organized and coherent and that it demonstrated that he was aware of legal concepts, including claims that appellate counsel was ineffective, and was able to articulate to what relief he thought he was entitled. *Id.* Moreover, we observed that "[n]o matter how liberally we construe the [allegation raised in the defendant's petition], viewing it in context, we cannot conclude that by this allegation [the] defendant actually raised a claim relating to *appellate* counsel's failure on direct appeal to raise the issue of compulsory joinder and violation of his right to a speedy trial." (Emphasis in original.) *Id.*

¶ 25 Defendant argues that the above cases are distinguishable. He argues that *Coleman* is distinguishable because here, unlike in *Coleman*, the relevant facts are the same now as they were in the trial court. He argues that *Cole* is distinguishable because here, unlike in *Cole*, he is not attempting to bootstrap a supreme court rule violation into a constitutional claim for the first time on appeal. He argues that *Mars* is distinguishable because here, unlike in *Mars*, defendant is not completely changing his claim between his petition and his appeal; instead, he is changing only his legal theory.

¶ 26 Defendant argues that his case falls under the holding of *Hodges*. In *Hodges*, the defendant filed a postconviction petition alleging that "his trial counsel was ineffective for failing to produce evidence that would have supported his claim of self-defense." *Hodges*, 234 Ill. 2d at 6. More specifically, the defendant alleged that "counsel failed to investigate or interview three potential witnesses whose testimony would have corroborated [the] defendant's theory." *Id.* The defendant contended that the witnesses, whose affidavits were attached to the petition, "would have corroborated his claim of self-defense, and he argued that, because of counsel's incompetence, the jury 'did not get a chance to hear any of this evidence.' " *Id.* at 6-7. The trial court summarily dismissed the petition, the appellate court affirmed, and our supreme court reversed and remanded with directions. *Id.* at 8, 23. In doing so, our supreme court addressed whether the witnesses' testimony would have supported a second-degree-murder instruction, which the appellate court did not consider. *Id.* at 21. The State argued that our supreme court, like the appellate court, should not address that issue when the defendant did not raise that issue in his petition. *Id.* Our supreme court disagreed, noting that "the issue of whether [the] defendant's *pro se* petition, which focused on self-defense, could be said to have included allegations regarding 'unreasonable belief' second degree murder—*i.e.*, imperfect self-

defense—is at a minimum the type of 'borderline' question which, under a liberal construction, should be answered in [the] defendant's favor." *Id.*

¶ 27 Defendant argues that, under *Hodges*, as long as the petition and supporting documentation set forth facts that show the possibility that the defendant's constitutional rights were violated, the petition satisfies the "gist" standard, even if it does not name the right that was violated. According to defendant, the issue raised in this appeal—ineffective assistance of counsel—concerns facts that were pled in defendant's petition and are readily apparent in the record. He asserts that "[t]he only aspect of the issue that has changed between the trial court and this Court is the legal theory regarding who was responsible for telling [him] about that consequence of his admission."[1]

¶ 28 *Hodges* does not support defendant's argument. In *Hodges*, the legal theory advanced in the postconviction petition was that counsel was ineffective for failing to present testimony from three witnesses who would have supported the defendant's claim of self-defense. *Id.* at 19. The legal theory considered on appeal was whether counsel was ineffective for failing to present that testimony to support the defendant's claim of second-degree murder. *Id.* at 20-21. Second-degree murder is distinguishable from self-defense "only in terms of the nature of defendant's belief at the time of the killing." *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1993). "If the defendant's belief as to the use of force was reasonable, self-defense may apply. If the defendant's belief was unreasonable, a conviction of second degree murder may be appropriate."

[1] Although defendant concedes that he cannot cite any prevailing standard of conduct that specifically required defense counsel to affirmatively advise defendant that his agreed sentence would require him to serve his MSR in prison, he argues that the holdings of *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *People v. Hughes*, 2012 IL 112817, warrant such a conclusion.

Id. Thus, it is clear why the court considered the defendant's allegations to fall on the borderline of including allegations as to second-degree murder. Here, however, defendant's petition argued that neither section 3-3-7 of the Unified Code of Corrections nor the trial court gave him notice that his homelessness would subject him to incarceration. Defendant now purports to claim that he received the ineffective assistance of counsel, an entirely different claim. This is not the type of borderline case contemplated by *Hodges*.

¶ 29 In any event, even if we were to hold that defendant's petition was sufficient to imply a claim of ineffective assistance of counsel, he failed to state (or even imply) a sufficient "gist" of that claim. To prevail on an ineffective-assistance claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the first stage of postconviction proceedings, however, a petition alleging ineffective assistance 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. *Hodges*, 234 Ill. 2d at 17. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance. *Strickland*, 466 U.S. at 697. If it is easier to dispose of such a claim on the basis that it lacks sufficient prejudice, then the court may proceed directly to the second prong and need not address whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 30 The postconviction petition failed to present an arguable claim that defendant was prejudiced. According to defendant, "[t]he petition in this case stated the petitioner would not have entered the admission had he known it would cause him to serve a year in prison." In support, defendant cites to page two of his postconviction petition. However, this allegation

does not appear on page two or anywhere else in the postconviction petition. In any event, as acknowledged by defendant, the supreme court has made clear that "[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice. [Citation.]" (Internal quotation marks omitted.) *Hughes*, 2012 IL 112817, ¶ 64. Rather "a defendant must assert either a claim of actual innocence or articulate a plausible defense that could have been raised at trial." *Id*.

¶ 31 The postconviction petition is devoid of facts that would support a claim of innocence or that articulate a plausible defense to the petition to revoke probation. Nevertheless, defendant argues that the record supports the possibility of viable defenses. We disagree. As noted, the petition to revoke probation alleged that defendant "accessed the Internet without authorization," "viewed pornographic websites," and "viewed child pornography." Defendant argues that, because a forensic examination of his computer revealed no evidence of pornography, he has an arguable defense. However, the petition to revoke probation was not based on defendant's use of *his* computer to access the Internet and view pornography; indeed, he could have used *any* computer to do so. Moreover, it was specifically noted at the hearing that defendant had self-reported to his probation officer. Thus, the absence of evidence of pornography on defendant's computer is irrelevant and not an arguable defense.

¶ 32 The petition to revoke further alleged that defendant failed to report to probation on two occasions, failed to attend sex-offender treatment on two occasions, and failed to attend a health-department meeting on one occasion. Defendant claims that he "may or may not have had defenses" to these claims; however, defendant cites no factual support for any defenses, either in the postconviction petition or in the record. Indeed, the record rebuts the existence of a defense.

When asked why he missed the various appointments, defendant twice stated that he had "no excuse" and apologized.

¶ 33 Based on the foregoing, defendant forfeited the claim he purports to raise, and in any event such claim was subject to dismissal on the merits.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the circuit court of Du Page County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 36 Affirmed.