

NOTICE
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2017 IL App (5th) 140435-U

NO. 5-14-0435

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Clinton County.
)	
v.)	No. 02-CF-105
)	
GEORGE G. ATCHISON,)	Honorable
)	Dennis E. Middendorff,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's postconviction petition was properly dismissed by the circuit court where the defendant failed to prove a substantial violation of his constitutional rights.

¶ 2 The defendant, George G. Atchison, appeals the first-stage dismissal of his postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other

document supporting his appeal. The defendant did not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Clinton County.

¶ 3

BACKGROUND

¶ 4 On June 19, 2002, the State charged the defendant, by way of information, with first-degree murder and concealment of a homicidal death. On August 8, 2002, the State filed a seven-count indictment against the defendant. Counts I-IV charged first-degree murder. Counts V and VI charged aggravated criminal sexual assault, and count VII charged concealment of homicidal death. The indictment was signed by foreperson Robert Phillips.

¶ 5 On November 15, 2002, the defendant pleaded guilty to count III of the indictment (first-degree murder) in exchange for a 40-year sentence and the State's agreement to drop the remaining counts. During the plea hearing, the court, speaking to the defendant, stated: "It's my understanding from the agreement that the State and your counsel have reached, that you have reached an agreement on a 40-year sentence. That would also carry a period of Mandatory Supervised Release of three years." Later in the hearing the court again advised the defendant that he would be subject to a three-year term of MSR. The court stated: "And you realize that even after that 40 years, you'll have a period of Mandatory Supervised Release of three years?" The defendant replied, "Yes, Your Honor." Additionally, at different points during the hearing, the defendant indicated that

he was not under the influence of anything that would affect his ability to think, that he received his GED at age 18, and that he understood what was happening in the proceedings. The mittimus did not include a term of mandatory supervised release (MSR).

¶ 6 On January 7, 2013, the defendant filed a section 2-1401 petition for relief of judgment (735 ILCS 5/2-1401 (West 2012)). The defendant raised three issues in his section 2-1401 petition: (1) the validity of the indictment, (2) the addition of a three-year term of MSR that was not included in the mittimus, and (3) the constitutionality of the truth-in-sentencing laws requiring him to serve 100% of his 40-year sentence.

¶ 7 With regard to the indictment, the defendant argued the record did not contain a certificate showing the impaneling of the grand jury as required by Supreme Court Rule 608(a)(2) (eff. Jan. 1, 1998), so there was no evidence that the grand jury was properly impaneled and sworn. The defendant also asserted that the State was required to seek leave of the court to file an indictment against him.

¶ 8 With regard to the term of MSR, the defendant argued that he did not understand that the MSR term would be served after the completion of his 40-year term of incarceration and that the circuit court did not have the authority to impose the MSR term.

¶ 9 With regard to his sentence, the defendant argued that the public act that changed the law so that defendants convicted of first-degree murder would receive no good-conduct credit and would be required to serve 100% of their sentence had been declared unconstitutional.

¶ 10 The State filed a motion to dismiss. It attached the circuit court's administrative files to its motion. The August 7, 2002, docket entry states "G.J. impaneled, foreperson [and] jurors sworn and instructed as to duties—foreperson Robert Phillips 18 present 6 indictments returned ***." The August 8, 2002, entry noted that the grand jury returned "1 indictment 7 counts" in open court. The circuit court granted the motion, dismissing the section 2-1401 petition with prejudice. The defendant then filed a motion to reconsider. On March 26, 2013, the circuit court denied the defendant's motion to reconsider. The defendant filed a timely notice of appeal.

¶ 11 While the appeal from the dismissal of his section 2-1401 petition was pending, the defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). The defendant again raised a number of issues.

¶ 12 The first issue raised by the defendant was that because the record lacked a Rule 608(a)(2) certificate, there was no proof that the grand jury was properly summoned, impaneled, and sworn, and that the indictment was therefore invalid and the circuit court lacked personal jurisdiction.

¶ 13 The second issue raised by the defendant was that the Illinois Department of Corrections (IDOC) violated his due process rights by adding a three-year term of MSR to his sentence.

¶ 14 The third issue raised by the defendant was that the statutes in effect at the time he committed his crime that required him to serve 100% of his sentence were

unconstitutional. Therefore, he argued, he is allowed to serve as little as 50% of his sentence if granted good-conduct credits.

¶ 15 The fourth issue raised by the defendant was that he received ineffective assistance of counsel because his trial counsel failed to object to the State's charging procedures, the requirement of an MSR term, and his being required to serve 100% of his sentence.

¶ 16 The fifth issue raised by the defendant was that the State committed official or prosecutorial misconduct by failing to verify that the grand jury was properly summoned and impaneled. This claim was premised on the missing Rule 608(a)(2) certificate.

¶ 17 On June 26, 2014, the circuit court dismissed the defendant's postconviction petition as frivolous and patently without merit. The defendant filed a motion to reconsider that the circuit court denied. This timely appeal followed.

¶ 18 After the filing of this appeal, this court dismissed the defendant's appeal of his section 2-1401 petition for want of prosecution.

¶ 19 ANALYSIS

¶ 20 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage the court

determines whether the petition is frivolous and patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition as being frivolous and patently without merit, it moves to second stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). But, if the court determines the petition is frivolous and patently without merit, it dismisses the petition *sua sponte*. *Id.* A petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in law or in fact. *Id.* at 11-12. "A petition which lacks an arguable basis either in law or in fact [a gist] is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 16-17. *Res judicata* and waiver apply to claims in a postconviction petition, and they are a valid basis for a trial court to dismiss a claim in a postconviction petition *sua sponte*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 21 An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, a defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Albanese*, 104 Ill. 2d at 525. Second, a defendant

must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670.

¶ 22 Rule 608(a)(2) certificate

¶ 23 The defendant first argued that the absence of a Rule 608(a)(2) certificate meant that the grand jury was not properly summoned, impaneled, and sworn. The defendant claimed that this error deprived the circuit court of personal jurisdiction and that its judgment was void. He also argued that the missing Rule 608(a)(2) certificate demonstrated that the State failed to verify that the grand jury was properly summoned and impaneled.

¶ 24 Rule 608(a)(2) requires that the record on appeal include a certificate of the circuit clerk showing the impaneling of a grand jury if the prosecution was commenced by an indictment. The absence of a Rule 608(a)(2) certificate does not deprive the court of jurisdiction. *People v. Kliner*, 2015 IL App (1st) 122285. Moreover, the defendant's claim that the grand jury was not properly sworn is directly refuted by the record. The court records introduced by the State in the section 2-1401 proceedings indicate that the grand jury was sworn, that Robert Phillips was the foreperson, and that a seven-count indictment, the same as the defendant's, was returned on the same date as the defendant's, signed by the same foreperson. The defendant's claim that the trial record must include the returned summons of the grand jurors is an indisputably meritless legal theory. There

is no such requirement. Illinois law requires that a grand jury be impaneled and sworn by the court, and that the indictment be in writing, state the name and statutory provision of the offense, set forth the nature and elements of the offense, as well as the date and county in which it occurred, and the name of the accused. 725 ILCS 5/112-2 (West 2000); 725 ILCS 5/111-3 (West 2000); *People v. Bell*, 2013 IL App (3d) 120328, ¶ 8. There is no requirement to show anything regarding the summons of the grand jurors. Finally, the defendant claims that the indictment is invalid because the State did not seek leave of the court to file the indictment after the defendant had already been charged via an information. There is no law precluding the State from seeking an indictment after first charging a defendant via an information; and this is routinely done in Illinois. It is not violation of the defendant's constitutional rights.

¶ 25 Three-year term of MSR

¶ 26 The defendant next alleged that the IDOC added a three-year term of MSR to his 40-year sentence, making his sentence 43 years, and that the IDOC does not have the authority to modify the sentence imposed by a judge. While the mittimus does not include a term of MSR, the record reveals that the trial court informed the defendant at the time of the plea that he would be required to serve a three-year term of MSR following his 40 years of incarceration. In fact the trial court did this twice. There is also no indication that the defendant had any problems understanding the proceedings at his plea hearing. The defendant cited to cases where a defendant was not informed of the term of MSR that he would serve after completing his term of incarceration. In those cases, the defendant's length of incarceration was reduced by the length of the required

term of MSR so that the defendant received the benefit of the bargain of his plea. That is simply not the case here. The defendant was clearly made aware at the time of his plea that he would serve a three-year term of MSR after completing his 40 years of incarceration. Even though the court failed to include the term of MSR to which it was required to sentence the defendant, and to which it did sentence the defendant, on the mittimus, by law, the defendant's sentence included the term of MSR. 730 ILCS 5/5-8-1(d) (West 2000); *People v. McChriston*, 2014 IL 115310, ¶ 12.

¶ 27 Good-time credit

¶ 28 At the time the defendant committed murder, anyone convicted of first-degree murder was not eligible for good-conduct credit and had to serve the entire sentence imposed by the court. 730 ILCS 5/3-6-3 (West 2000). The defendant argued that he was eligible for day-for-day credit because the public act which promulgated this statute was found unconstitutional. This claim is meritless. Prior to the enactment of Public Act 89-404 (eff. Aug. 20, 1995), everyone incarcerated with the IDOC, except those serving a term of natural life, was entitled to good-conduct credit of up to 180 days per year. 730 ILCS 5/3-6-3(a)(1), (a)(2) (West 1994). That meant that in theory, inmates, other than those serving natural life sentences, could end up serving only half of the sentence imposed by the court. Public Act 89-404 changed the law so that those convicted of first-degree murder were not entitled to any good-conduct credit. Pub. Act 89-404, § 40 (eff. Aug. 20, 1995) (adding 730 ILCS 5/3-6-3(a)(2)(ii)). The Illinois Supreme Court found this act unconstitutional because it violated the single subject rule of the Illinois Constitution. *People v. Reedy*, 186 Ill. 2d 1, 12 (1999). Importantly, the *Reedy* court

noted that Public Act 90-592 (eff. June 19, 1998) cured the effect of Public Act 89-404's invalidation with regards to the good-conduct credit. *Reedy*, 186 Ill. 2d at 17-18. Therefore, the constitutional deficit complained of by the defendant was cured by the legislature prior to the date he committed his crime. The defendant seemed to admit that this occurred, but claimed that subsequent public acts were invalid, making the changes accomplished by Public Act 90-592 likewise invalid. This argument is meritless. If acts enacted after Public Act 90-592 modifying the good-conduct statute were indeed invalid, then the last constitutional embodiment of that law would be the law in force. *People v. Gersch*, 135 Ill. 2d 384, 390 (1990). Here, that would be Public Act 90-592 that provides that the defendant was ineligible for good-conduct credit.

¶ 29 Ineffective assistance of counsel

¶ 30 The last claim raised by the defendant is that his trial counsel was ineffective for failing to raise the issues we address above. The first prong of the *Strickland* analysis is whether the trial counsel acted in an objectively unreasonable manner. As we have found there was no error in any of the issues raised by the defendant, his counsel cannot have acted in an unreasonable manner. Trial counsel is not unreasonable for failing to raise frivolous issues. See *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 31 CONCLUSION

¶ 32 The circuit court properly dismissed the defendant's postconviction petition. OSAD's motion for leave to withdraw is granted, and the circuit court of Clinton County's order is affirmed.

¶ 33 Motion granted; affirmed.