2018 IL App (1st) 160796-U

No. 1-16-0796

Order filed September 28, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 15286
	)	
DION HAYES,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm trial court's dismissal of defendant's first stage petition for relief under the Post-Conviction Hearing Act over defendant's contention that trial counsel provided ineffective assistance during his plea hearing.

¶ 2 Defendant Dion Hayes appeals the summary dismissal of his 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 where he made an arguable claim of ineffective assistance of counsel for failing to advise him of the elements of the offense to which he pled

guilty and allowing him to plead guilty to an offense unsupported by the factual basis. For the following reasons, we affirm.

¶ 3 Defendant pled guilty to home invasion causing injury, home invasion while armed with a firearm, one count of aggravated unlawful use of a weapon (AUUW), and three counts of aggravated assault of a police officer. The court sentenced him to concurrent prison terms of seven years' for home invasion causing injury (720 ILCS 5/19-6(a)(2) (West 2012)) and three years' for AUUW (720 ILCS 5/24-1.6(a)(1) (West 2012)).

¶ 4 The State had charged defendant with 18 counts of various offenses relating to a police chase and subsequent home invasion that took place on July 28, 2013. On November 5, 2014, defendant was set to begin trial, but defense counsel requested that the court participate in a plea conference with respect to six of the charges: two counts of home invasion, one count of AUUW, and three counts of aggravated assault of a police officer. During the plea hearing, the State noted that defendant "may have a *** defense to possession that he was armed with a gun when he went into the house."

¶ 5 The court thereafter extensively admonished defendant about his rights and the applicable sentencing ranges for the various offenses. During the admonishments, defendant indicated that he understood the rights he was giving up by pleading guilty and that he was not "force[d]," "promise[d]" anything, or "beat *** up" in exchange for pleading guilty. The court found that defendant knowingly and voluntarily gave up his right to trial and a presentence investigation prior to sentencing.

¶ 6 The parties stipulated to the following factual basis. On July 28, 2013, around 3 p.m., Chicago police officers Duszak, Schur, and Cheryl Hurley were dispatched to 115th Street and

Western Avenue in response to an incident at a funeral. Chicago police officer Michael Hurley was also dispatched to that location and observed a 2006 Dodge Charger driving out of the cemetery at a high rate of speed. He pursued the vehicle, which had multiple occupants. The vehicle continued fleeing and eventually crashed. Defendant exited the passenger side of vehicle and pointed a handgun at Officers Duszak, Schur, and Cheryl Hurley, who feared for their safety and were put in reasonable apprehension of a battery. Schur struck defendant with his vehicle in Preston Park, which knocked the gun out of defendant's hand. The officers then recovered and inventoried the gun, which was determined to be a Luger hollow point .9 millimeter caliber containing a live round. They also recovered a magazine containing 28 live rounds.

¶ 7 The officers pursued defendant, who fled on foot. Defendant ran to the backyard of a nearby home and was confronted by the owners, Justin and Rita Rodriguez. Defendant pushed Justin and "pleaded" with them to allow him to enter their home to flee from the officers. The Rodriguezes attempted to stop defendant, and defendant pushed them out of the way and entered their house without authority. Justin attempted to stop defendant from running up the stairs in the house, and defendant offered to pay Justin money to allow him to hide in the house from the police. The officers arrived at the house shortly thereafter and arrested defendant. Defendant resisted arrest and was "identified by all the witnesses as the passenger in the [Dodge] vehicle, [as] the person who pointed the gun" at officers. Defendant did not have a valid firearm owner's identification (FOID) card or a concealed carry permit on the day of the offense.

¶ 8 The court accepted the factual basis and found defendant guilty of home invasion causing injury, home invasion while armed with a firearm, AUUW, and three counts of aggravated assault of a police officer. The State nolle-prossed the remaining 12 charges. The court

subsequently asked about any injuries relating to the offenses, and the State informed the court that Justin Rodriguez sustained minor injuries to his right elbow, but did not receive medical attention. The court continued the case for sentencing, but informed defendant, who was out on bond, that if he did not appear, he would "blow[] off this deal," under which he would be sentenced to seven years' imprisonment for home invasion and three years' imprisonment for "the gun count and the aggravated assault of peace officers." Defendant indicated that he understood and did not have any questions about the plea.

¶ 9 On January 13, 2015, the trial court sentenced him to concurrent prison terms of seven years' for home invasion causing injury and three years' for AUUW. The trial court then admonished defendant regarding his appeal rights, and defendant indicated he did not have any questions about those rights.

¶ 10 Defendant mailed a *pro se* motion to withdraw his plea on February 17, 2015, alleging that the prosecutor withheld evidence and he was "rushed" to trial before he could obtain necessary evidence. On June 17, 2015, the trial court denied the motion, concluding that it was untimely because it was filed more than 30 days after sentencing and noted defendant's attorney "negotiated an excellent deal" that was "very beneficial" to defendant because he was eligible for a term of 6 to 30 years imprisonment. Defendant filed a *pro se* notice of appeal on June 26, 2015.

¶ 11 Defendant also mailed a motion to reconsider the trial court's denial of motion to withdraw on July 2, 2015. The motion was filed on August 4, 2015. On August 21, 2015, the trial court denied defendant's motion to reconsider, stating that its earlier ruling denying defendant's motion to withdraw was to stand.

¶ 12 On direct appeal, the State Appellate Defender filed a motion for leave to withdraw as appellate counsel, pursuant to *Anders v. California*, 386 U.S. 738 (1967), concluding that an appeal would be without arguable merit because the trial court lacked jurisdiction to consider defendant's untimely motion to withdraw his plea. We vacated the trial court's June 17, 2015, order and dismissed the appeal for lack of jurisdiction.[1] *People v. Hayes*, 2017 IL App (1st) 152158-U (summary order). In our summary order, we concluded that the trial court lacked jurisdiction to deny defendant's motion to dismiss because it was without jurisdiction to consider the motion, which was filed outside of the 30-day window following defendant's sentencing. *Id.* at ¶ 6. We also concluded that we lacked jurisdiction to consider the merits of defendant's appeal because he did not file a timely motion to withdraw his plea pursuant to Illinois Supreme Court Rule 604(d) (Ill. S.Ct. R. 604(d) (eff. Dec. 11, 2014)).[2] *Id.* at ¶ 8.

¶ 13 While his direct appeal was pending, defendant filed a *pro se* postconviction petition under the Act on October 2, 2015. In his petition, defendant claimed, *inter alia*, that counsel was ineffective during the plea hearing and negotiations. Specifically, defendant claimed that defense counsel was ineffective for "wrongfully" advising defendant to plead guilty when counsel knew the plea lacked a factual basis, and counsel failed to "go over" the case with defendant and inform him of the elements of home invasion. Defendant stated that a police report contradicted the factual basis given because it showed that (1) Justin Rodriguez was not injured when

[1] The summary order contained a typographical error and dates the trial court's order as June 15, 2015.

[2] The summary order declined to address defendant's August 4, 2015, motion to reconsider and the subsequent August 21, 2015, order because those filings were not before us on appeal. We pointed out that, for the same reason the trial court lacked jurisdiction to rule on defendant's motion to withdraw, it likewise lacked jurisdiction to consider the motion to reconsider. *People v. Hayes*, 2017 IL App (1st) 152158-U, ¶1, n.1. Additionally, defendant's motion to reconsider was not contained in the record, although it is now part of the postconviction record on appeal.

defendant entered his residence; and (2) defendant dropped the gun he was holding in the park prior to entering the residence and, accordingly, did not enter the dwelling while in possession of a firearm. Further, defendant argued counsel knew, or should have known, that the State would have been unable to show proof of injury or entry into the dwelling with a firearm, yet failed to object to the plea's erroneous factual basis. Defendant further claimed that counsel "forced" him into pleading guilty by using "scare tactics," such as "promising" he would lose at trial and stating that defendant would face 16 years' imprisonment if he went to trial. Defendant argued he was prejudiced by counsel's performance because it "deprived [him] of a fair plea." He additionally asked the court to withdraw his plea based on ineffective assistance of counsel.

¶ 14 In support of his petition, defendant attached, in pertinent part, his own affidavits and an excerpt from his arrest report. In an affidavit dated September 3, 2015, defendant averred that, before he went into court on the date of his guilty plea, he asked counsel to seek a continuance because there were witnesses who would testify to a version of events on the day in question that contradicted the police version. Counsel informed defendant that the court was "rushing" him to trial, and counsel would have the court "conference the case and get the lesser-charge," which counsel described as criminal trespass to residence.

¶ 15 Defendant averred counsel later told him that the State was seeking 16 years imprisonment and that he would get "cremated" if he proceeded to trial. Counsel also informed defendant that the "judge didn't go for lesser-charge" but was willing to sentence him to seven years' imprisonment if defendant pled that day. Defendant still wanted to go to trial but counsel "forc[ed]" him to take the plea, but never explained the counts to which he would plead guilty. Defendant claimed counsel repeatedly told him to "take the 7 [years] to avoid the 16 [years]"

"till I gave in to his comand [*sic*] ignoring my wishes to prove my innocents [*sic*]." Defendant further averred, "The only reason I didn't say anything about [counsel] forcing me to take time because I was scared for my life and freedom and wasn't thinking straight only going off what my lawyer told me." Defendant also claimed he requested his attorney obtain two videos, which would contradict the police report and show that he was not speeding, but his attorney did not do so.

¶ 16 In another "sworn statement," dated October 4, 2015, which was not notarized, defendant stated he did not feel he would have a fair hearing on his petition and alleged the trial court "showed an bias, illwill [*sic*], animosity towards [defendant]" throughout the plea and motion to withdraw proceedings. He claimed the court's hostility was demonstrated by the court not believing defendant, noting that it knew defense counsel for over 20 years, and "yelling repeatidly [*sic*] 'why didn't I say this 1st.' " The court also referenced another one of defendant's cases and, according to defendant, stated, "Bye Bye back to the penitentiary you go" after dismissing defendant's motion to withdraw his plea. Defendant further claimed the court showed bias by finding him guilty of offenses without sufficient factual bases. He took issue with the court denying his motion to withdraw his plea based on timing, rather than ruling on the merits.

¶ 17 Defendant also attached three pages of his arrest report. An excerpt from the report, which summarized the facts of the case, showed, in relevant part, that after defendant pointed his gun at the officers, Officer Duszak "struck the above offender with his vehicle causing the above offender to fall and drop the handgun." The report went on to state that defendant fled on foot to the Rodriguez residence. The "victim and complainant" section of the report stated Justin Rodriguez was not injured, hospitalized, or treated and released.

¶ 18 On October 9, 2015, the trial court apparently "denied" defendant's postconviction petition:

> "Dion Hayes he plead guilty. It was a negotiated plea. He got seven years. About four months later he tried to withdraw his plea saying his lawyer didn't do this and didn't do that and didn't research the case properly. It was untimely. I've already rejected his motion to withdraw the plea because it was untimely.
>
> Plus, which he plead guilty on the day the case was set for trial. There were multiple witnesses here. The State would be highly prejudiced to have to recall witnesses now after they negotiated a plea, which involved some reduced charges I believe. So now he is filing an affidavit. I think he is still asking to withdraw his plea.
>
> Motion defendant pro se -- successive pro se motion defendant to withdraw the plea is denied. It's untimely. Clerk to notify."[3]

¶ 19 On November 20, 2015, defendant's motion for substitution of judge was heard before a supervising judge. The motion was mailed on October 4, 2015, and alleged the trial court was biased against him. The supervising judge found defendant's allegations were insufficient to warrant a substitution.

¶ 20 On November 20, 2015, after defendant's motion for substitution of judge was denied, the trial court again denied defendant's "motion for successive PC" and ordered the October 9, 2015, order "to stand." Defendant was in court on that date, and had the following exchange with the court.

[3] We say "apparently" because, although the court characterized defendant's filing as a motion to withdraw his plea, the record before us does not show that defendant had any pending motions aside from his initial postconviction petition.

[THE COURT]: "Well, your motion to withdraw your plea is absolutely denied. I'm not -- I don't have even to talk to you about this now.

I'm not -- I'm bringing you up here as a courtesy to your sister. That's your sister; correct?

[DEFENDANT]: Yes, sir.

[THE COURT]: Sister, come on up.

I just want to let your sister see you, she came all the way to see you. Your motion is denied, it's untimely. The State was ready for trial, they had all their witnesses here. You wanted to plead guilty, you got a moderate sentence. Then way after the fact, you want to withdraw your plea.

And you're blaming Bob Lucent[i] for your troubles. And that's --

[DEFENDANT]: Excuse me, your Honor. And it also, that I pled guilty to a count that -- that the evidence ain't even say that I -- I, um, did, your Honor. It says the gun was in the house. That's what I pled to. It wasn't -- my due process rights was violated.

[THE COURT]: Yeah, that's what you say and I disagree.

[DEFENDANT]: I have the evidence right here to prove it, your Honor.

[THE COURT]: No, no. Listen, we're not going there because you're not withdrawing your plea. You could have gone to trial, you didn't want to go to trial. The witnesses were here and then as --

[DEFENDANT]: I had --

[THE COURT]: -- then a long time later --

[DEFENDANT]: -- ineffective assistance of counsel, Judge.

[THE COURT]: No, I don't believe that. I don't believe that. So the order of 10/9/15 to stand. The successive post-conviction is denied.

[DEFENDANT]: You say that -- you say my post-conviction is denied?

[THE COURT]: Yes.

[THE DEFENDANT]: Did you even read it, your Honor?

[THE COURT]: Sure I read it. I read it. Yeah, you want to withdraw your plea. Then you ask me a second time. And I read it. And it's untimely. And (inaudible) --

[DEFENDANT]: My post-conviction --

[THE COURT]: It's manipulative. That -- you could have gone to trial if you wanted to. You didn't want to go to trial. You pled guilty. You got a moderate sentence under the circumstances. And --

[DEFENDANT]: Excuse me, your Honor.

[THE COURT]: -- we're done with this.

[DEFENDANT]: Excuse me, your Honor. I have the evidence --

[THE COURT]: And that's why I didn't want to bring you up here.

[DEFENDANT]: I have the evidence to --

* * *

[THE COURT]: We're done. I don't have to talk to you about this because this is over. This is -- you have no grounds for this.

[DEFENDANT]: Excuse me, your Honor.

[SHERIFF]: Okay, c'mon.

[DEFENDANT]: So you deny my post-conviction, your Honor?

[THE COURT]: Yeah, I sure did.

* * *

[THE COURT]: Sorry, I know he's driving you crazy, too."

¶ 21 The record shows that the clerk of the circuit court sent defendant a letter notifying him that "on 11-20-15, the Honorable Judge JAMES B LINN denied your motion for SUCCESSIVE PC. ORDER OF 10-09-15 TO STAND."

¶ 22 Defendant thereafter retained private counsel, who filed on defendant's behalf a motion to reconsider the denial of his postconviction petition. In the motion, counsel asserted defendant's postconviction claims were different "attacks" than those set forth in his motion to withdraw. Although the court lacked jurisdiction to consider the untimely motion to withdraw, defendant's postconviction petition was timely and required that the court determine whether the petition was frivolous or patently without merit. Counsel further argued that, based on the court's November 20, 2015, order, the court appeared to believe defendant's petition was "another request for reconsideration of the untimely motion to withdraw guilty plea which had previously been denied." Finally, counsel asserted that defendant's petition established the gist of a constitutional claim of ineffective assistance of counsel at the plea hearing. Counsel reiterated that there was no proof of injury to the Rodriguezes, and argued defendant did not knowingly plead guilty because he believed he was pleading to the home invasion with use of a firearm count.[4] Had defendant known he was pleading to the home invasion causing injury count, he

[4] This is contrary to defendant's assertion in his postconviction petition that the home invasion with use of a firearm count lacked a sufficient factual basis because his arrest report showed that he dropped the gun prior to entering the residence.

would have "tak[en] his chances at trial because the evidence of injury was nonexistent or very thin."

¶ 23 On January 7, 2016, the trial court denied defendant's motion to reconsider. Neither defendant nor defense counsel was present during the court's ruling. The court stated,

> "[Defendant]'s got counsel who filed a motion to reconsider post-conviction petitions was denied. This is a case where there was a negotiated plea of guilty. He received a seven years sentence after pleading guilty to a home invasion and related charges. There were multiple witnesses that were ready to testify, and he pled guilty and was admonished beforehand what he was pleading guilty to, what the factual basis was. He made an untimely motion to withdraw his plea and then he is coming back complaining pro se, and now with counsel, in a motion to reconsider that ineffective assistance of counsel.
>
> I find that this claim is wholly without merit. This case was set for trial. There was a negotiation. He asked to have a conference with the Court. He was sentenced moderately. One year over the minimum. Maximum 30 years penitentiary. He accepted that. He didn't make any statement about withdrawing the plea or wanting to go to trial until after more than 30 days after this plea.
>
> I find what he's doing is being manipulative and there is no basis to say his counsel was ineffective. He certainly was aware of what he was pleading guilty to and what the minimum and maximum sentences could be to admonish again. So this motion defendant to reconsider denial of post-conviction is denied."

¶ 24 On appeal, defendant contends that the court erroneously dismissed his petition because he stated an arguable claim of ineffective assistance of counsel.

¶ 25 The Act provides a three-stage process as a means for criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Defendant's petition for postconviction relief was summarily dismissed at the first stage. At the first stage of postconviction proceedings, the trial court independently reviews the petition, taking the allegations as true, and determines 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); *People v. Tate*, 2012 IL 112214, ¶ 9. 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).

¶ 26 To survive the first stage, a 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 9; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). We review *de novo* the summary dismissal of a postconviction petition. *Hodges*, 234 Ill. 2d at 9. On *de novo* review, we apply the same analysis that a trial court would perform and our review is "completely independent" of the trial court's decision. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 27 Defendant pled guilty to two counts of home invasion. For the first count, defendant pled guilty to knowingly entering the dwelling place of Rita Rodriguez without authority when he knew one or more persons were present, and intentionally causing injury to Justin Rodriguez's arm by pushing and struggling with him. See 720 ILCS 5/19-6(a)(2) (West 2012). With respect to the second count, defendant pled guilty to knowingly entering the dwelling place of Rita Rodriguez without authority when he knew one or more persons were present and, while armed with a firearm, used force or threatened the imminent use of force, whether or not injury occurred. See 720 ILCS 5/19-6(a)(3) (West 2012).

¶ 28 Defendant contends that he stated an arguable constitutional claim that trial counsel was ineffective during plea proceedings for failing to inform him of the elements of the home invasion counts to which he pled and allowing him to plead to counts unsupported by the facts, thus rendering his plea involuntary and unknowing. Specifically, he asserts that counsel was ineffective for (1) failing to object to the insufficient factual basis of the plea, (2) failing to inform him that the home invasion counts required proof of an injury or entry into the Rodriguez dwelling with a firearm, respectively, and (3) forcing him to plead guilty by telling him the plea would expire and he would lose at trial.

¶ 29 To state a claim of ineffective assistance of counsel in first stage postconviction proceedings, defendant must allege that it is arguable that: (1) counsel's performance "fell below an objective standard of reasonableness;" and (2) defendant was prejudiced by counsel's deficient performance. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 30 In the context of a guilty plea, an attorney's conduct is deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently, and to establish prejudice, the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). A defendant's bare allegation that he would have pled not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice. *Id.* 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." *Id.* at 335-36. Thus, whether counsel's deficient representation caused the defendant to plead guilty turns largely on predicting whether the defendant likely would have been successful at trial. *Id.* at 336. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson,* 192 Ill. 2d 93, 107 (2000).

¶ 31 Here, defendant's claim fails to state the gist of a constitutional claim. To begin, we note that defendant's allegations are rebutted by the record and forfeited. At the first stage, the common law doctrines of *res judicata* and forfeiture operate to bar the raising of claims that were or could have been adjudicated on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 443-45 (2005). Defendant relies on the factual summary from his arrest report to support his contention that the factual basis for the home invasion counts was insufficient, which would have been available to defendant prior to his plea. Thus, the record demonstrates that this was an issue defendant knew about and could have raised, but did not, on direct appeal. *Blair*, 215 Ill. 2d at 443.

¶ 32 Further, the record rebuts his contention that he would not have pled guilty had he known the elements of the home invasion claims. The record shows that the prosecutor informed the

court during the hearing that Justin Rodriguez suffered minor injuries to his elbow during his altercation with defendant, which rebuts defendant's contention that there was no factual basis for the home invasion causing injury claim. See *People v Calva*, 256 Ill. App. 3d 865, 872 (1993) (amount of evidence sufficient to form the factual basis of a guilty plea is less than is required for proof beyond a reasonable doubt or even a preponderance of the evidence). Defendant concedes in his brief that the threshold for an injury resulting from home invasion is low. See *People v. Dorsey*, 2016 IL App (4th) 140734, ¶ 26 ("injury" within the meaning of the home invasion statute includes "*any* physical, emotional, psychological, or traumatic injury intentionally caused by the defendant to a person inside the dwelling" (Emphasis in original.)). Accordingly, any assertion by defendant that this count lacked a factual basis is belied by the record.

¶ 33 Similarly, the record rebuts defendant's contention that he would not have pled guilty to the home invasion while armed with a firearm count had counsel informed him of the elements. The record shows that the prosecutor acknowledged at the plea hearing that defendant "may" have a defense to that count, and defendant nevertheless persisted in pleading guilty.

¶ 34 Additionally, defendant has not demonstrated that counsel forced him to plead guilty. The record shows that, during the plea hearing, the court admonished defendant regarding the offenses to which he was pleading, including the possible sentencing ranges and the rights he would be giving up by pleading guilty, and defendant repeatedly indicated that he understood. Defendant was present in court when the prosecutor gave the factual basis for the plea. Following the court's acceptance of the factual basis, the court continued the case for sentencing. Prior to going off the record, the court admonished defendant that it was going to follow the plea deal and sentence defendant to seven years' imprisonment with a concurrent three year sentence,

but that defendant, who was out on bond at that time, was required to appear in court at sentencing. Defendant then indicated that he understood the court's admonishments and did not have questions regarding the plea and sentence.

¶ 35 At no point did defendant object to the factual basis of the plea or indicate that counsel forced him to plead guilty. To the contrary, defendant indicated during the admonishments that no one had forced him, promised anything, or "beat [him] up" in exchange for pleading guilty. Thus, the record rebuts his contention that counsel forced him to plead guilty. Although defendant claims counsel used "threats and misinformation" to coerce him into pleading guilty, given the 18 charges against defendant and the possible sentencing range of 6 to 30 years' imprisonment, it was not improper for counsel to inform defendant of the risks of proceeding to trial. See, *e.g.*, *People v. Witherspoon*, 164 Ill. App. 3d 362, 365 (1987) ("a defense attorney's honest assessment of a case cannot be the basis for holding that a defendant's guilty plea was involuntary"). Accordingly, we conclude that defendant forfeited his claim because it could have been raised on direct appeal, and his claim, in any event, is rebutted by the record. See *Blair*, 215 Ill. 2d at 443-44 (forfeiture bars issues that could have been raised, but were not); see also *Brown*, 236 Ill. 2d at 184-85 (a petition may be summarily dismissed where it is contradicted by the record). We therefore find that the trial court properly summarily dismissed defendant's petition.

¶ 36 Moreover, even if we addressed the merits, we would find the same result is warranted. As previously detailed, defendant was extensively admonished regarding his right to plead guilty, and the count on which he was sentenced, home invasion causing an injury to Justin Rodriguez, had a sufficient factual basis. In light of these circumstances, defendant essentially

asks us to find counsel's performance deficient for failing to override defendant's explicit, voluntary choice to plead guilty to a factually-supported offense. We decline to do so. The record demonstrates defendant voluntarily pled guilty, and we cannot find counsel's performance was deficient for interfering with such a plea.

¶ 37 Likewise, defendant cannot show that he was prejudiced by counsel's alleged deficiency. *Hall*, 217 Ill. 2d at 335 (noting a defendant's bare allegation that he would have pled not guilty and insisted on a trial if counsel had not been deficient is insufficient to establish prejudice). We note that although defendant maintains that counsel should have informed him of the elements of the offense of home invasion while armed with a firearm, we find he has not demonstrated that he was prejudiced by counsel's alleged deficiency because he was not sentenced on that count. More importantly, defendant was originally charged with 18 counts, and as a result of his plea, was sentenced on two counts. The home invasion charge was a Class X felony, and therefore, defendant would have faced up to 30 years' imprisonment had he proceeded to trial. Instead, he received a seven-year sentence as part of his plea. Additionally, the evidence against defendant was overwhelming and his chances of success at trial unlikely. *Id.* at 336 (whether counsel's deficient representation causing the defendant to plead guilty largely turns on predicting whether the defendant likely would have been successful at trial.). Accordingly, we find defendant failed to state an arguable claim of ineffective assistance of counsel during the plea negotiations and thus has not presented the gist of a constitutional claim.

¶ 38 Defendant also contends that, even if this court finds his petition is frivolous and without merit, we should remand his case to a different judge for proper consideration under the Act because the record revealed the court demonstrated bias against defendant and denied him proper

first stage consideration of his petition. Defendant argues he is therefore entitled to second stage proceedings regardless of the merit of his petition. The State points out that defendant cites to no authority to support his contention. We reiterate that our review of a summary dismissal of a postconviction petition is *de novo* (*Hodges*, 234 Ill. 2d at 9), and therefore, we "may affirm, on any proper ground, a procedurally proper summary dismissal," even one based on an improper ground (see *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006)). Having concluded that defendant has failed to state the gist of a constitutional claim, the court's dismissal of the postconviction petition is affirmed.

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.