2018 IL App (5th) 140589-U

NO. 5-14-0589

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 13-CF-178
	)	
SAMUEL COBIN,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of the defendant's petition for postconviction relief is affirmed where he failed to set forth the gist of a constitutional claim that counsel misadvised him about the possibility of consecutive sentencing or convinced him to abandon his right to a direct appeal.

¶ 2 The defendant, Samuel Cobin, appeals from the circuit court's summary dismissal of his *pro se* petition for postconviction relief, contending that he was deprived of his constitutional right to the effective assistance of trial counsel. For the reasons that follow, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 On April 13, 2013, Officer Brandon Burris, Officer Jesse Ital, and Officer Lou Kidson, from the Carbondale Police Department, participated in the traffic stop of a vehicle driven by Ebony Shered, and the defendant was a passenger in the vehicle. As a result of the stop, on April 16, 2013, the defendant was charged by information with unlawful possession of cannabis with the intent to deliver more than 30 grams but less than 500 grams of a substance containing cannabis (720 ILCS 550/5(d) (West 2012)) and unlawful possession of more than 30 grams but less than 500 grams of cannabis (*id.* § 4(d)).

¶ 5 On December 19, 2013, the defendant, through counsel, filed a motion to suppress physical evidence and quash arrest, arguing that the officers' search of the defendant and Shered's vehicle was unlawful. On March 25, 2014, at the defendant's hearing on the motion to suppress, the evidence revealed that Officer Burris executed a traffic stop after he witnessed Shered disobeying a stop sign. Because Shered, the driver of the vehicle and the mother of the defendant's children, was crying and upset, Officer Burris believed there to be a possible domestic dispute occurring inside of the vehicle, and he requested the assistance of additional officers. When Officer Burris thereafter issued Shered a ticket for failing to stop at the stop sign, the officers searched Shered's vehicle and the defendant's person. The officers testified that Shered consented to the search, but Shered testified otherwise.

¶ 6 Upon being summoned to the stop, Officer Ital had recognized the defendant's name from a previous incident where the defendant, who was 6 feet 2 inches tall and

weighed approximately 293 pounds, fled from a traffic stop and was found in possession of a weapon and a large amount of cannabis. Officer Ital testified that based on the defendant's history, he was concerned for the safety of the officers and therefore asked the defendant to exit the vehicle and patted him down for weapons. During this search of the defendant's person, Officer Ital recovered from the defendant's sleeve a plastic bag containing 32 grams of cannabis, and when asked, the defendant indicated that it was marijuana. Officer Ital testified that the search of the vehicle revealed "other items."

¶ 7 After hearing the evidence, the court concluded that the officer's patdown of the defendant was appropriate and lawful based upon the circumstances of the stop and the officer's previous contact with the defendant. See *People v. Sorenson*, 196 Ill. 2d 425, 433, 439 (2001) (after a lawful traffic stop, an officer may subject a passenger to a limited search for weapons if a reasonably prudent officer in the circumstances would be warranted in the belief that his or another's safety was threatened, considering the totality of the circumstances, including the officer's subjective feelings). Accordingly, on March 25, 2014, the circuit court denied the defendant's motion to suppress.

¶ 8 Thereafter, on May 6, 2014, at the defendant's guilty plea hearing, the defendant entered a plea of guilty to unlawful possession of 30 grams but less than 500 grams of cannabis (720 ILCS 550/4(d) (West 2012)), in exchange for the dismissal of the charge of unlawful possession of cannabis with the intent to deliver (*id.* § 5(d)). The circuit court admonished the defendant that the crime was punishable by one to three years in the Illinois Department of Corrections, with a mandatory supervised release of one year, and that it was a probationable offense, where probation could last up to 30 months, with a

fine of up to $25,000. The defendant acknowledged that he had received and read the plea of guilty form, that he understood what he read, and that he wished to plead guilty. The assistant State's Attorney notified the circuit court that the defendant committed the current offense while on pretrial release in case number 12-CF-321, so his sentence was mandatory consecutive to the sentence he was serving in that case.

¶ 9 In a first amended judgment entered on May 14, 2014, the circuit court sentenced the defendant to one year in prison, with one year mandatory supervised release, and further ordered that the sentence imposed in this case run consecutively with the sentence imposed in case number 12-CF-321, wherein the defendant pled guilty to felony possession of a firearm and possession of cannabis.

¶ 10 On October 28, 2014, the defendant filed his *pro se* postconviction petition, alleging, *inter alia*, that his trial counsel was ineffective for failing to call a witness, for failing to file a motion to substitute judge, and for failing to subpoena the ticket book from which Shered received her ticket. The defendant further alleged that his trial counsel "stated at [the] last court date that if [the defendant] did not take the 1 year offer that the State would seek consecutive terms and would win, is what he said, but that was a threat." On November 6, 2014, the circuit court, who had presided over the hearing on the defendant's motion to suppress and over the defendant's guilty plea hearing, denied the defendant's postconviction petition, finding it to be "without merit" with "no real basis." The defendant appeals.

¶ 11 DISCUSSION

¶ 12 The defendant contends that the circuit court erred in summarily dismissing his petition for postconviction relief because it set forth the gist of a meritorious claim. The defendant, on appeal, construes his *pro se* postconviction petition to include allegations that his plea counsel misadvised him about the maximum possible sentence he faced and, in essence, convinced him to abandon his right to a direct appeal. We disagree with the defendant's characterization on appeal of his postconviction allegations before the circuit court and conclude that summary dismissal was appropriate in the present case. See *People v. Johnson*, 312 Ill. App. 3d 532, 534 (2000) ("Summary dismissal is a process that exists to cull petitions that are frivolous in nature or patently without merit.").

¶ 13 The Post-Conviction Hearing Act

¶ 14 The Post-Conviction Hearing Act (Act) sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 15 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To survive the first stage, "a petition need only present the gist of a constitutional claim," which is a "low threshold" that requires the

petition to contain only "a limited amount of detail." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "This is a purposely low threshold for survival because most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). A *pro se* petition for postconviction relief is considered 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, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 16 "In considering a petition pursuant to [section 122-2.1 of the Act], the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014); see also *Brown*, 236 Ill. 2d at 184. Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20.

¶ 17 If a petition is not summarily dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss it. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2014). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is

dismissed. *Edwards*, 197 Ill. 2d at 245. "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 18 Effective Assistance of Counsel

¶ 19 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). Traditionally, to succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1999). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 20 In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, "[a]n attorney's conduct is deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently." *Hall*, 217 Ill. 2d at 335. Prejudice exists if there is a reasonable probability that, absent counsel's errors, the defendant would have pled not guilty and insisted on going to trial. *People v. Hughes*, 2012 IL 112817, ¶ 63; *Hall*, 217 Ill. 2d at 335. A bare allegation that the defendant would have pled not guilty and insisted on a trial if counsel had not been deficient is insufficient

to establish prejudice. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 335. Rather, such a claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 335-36. The question of prejudice depends in large part on predicting whether the defendant likely would have been successful at trial. *Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 336.

¶ 21 Initially, as noted by the State, section 122-2 of the Act requires a postconviction petitioner to provide "affidavits, records, or other evidence" which supports the allegations in the petition or explains the absence of such documentation. 725 ILCS 5/122-2 (West 2014). The purpose of this requirement is "to establish that a petition's allegations are capable of 'objective or independent corroboration.' " *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (quoting *Hall*, 217 Ill. 2d at 333). The failure to attach the necessary documentation under section 122-2 or explain its absence is fatal to a postconviction petition and by itself justifies the petition's summary dismissal. *Id.* at 255; *People v. Collins*, 202 Ill. 2d 59, 68 (2002). However, failure to attach independent corroborating documentation or explain its absence may be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney. See *Hall*, 217 Ill. 2d at 333; *Collins*, 202 Ill. 2d at 68.

¶ 22 Here, the defendant's explanation for the absence of documentation can be inferred from the allegations of his petition. In his petition, the defendant alleges error during consultation with his attorney. Thus, the only affidavit defendant could have

furnished to support his allegations, other than his own, was that of his attorney. We thus excuse the defendant's failure to attach independent corroborating documentation or explain its absence. See *id.*

¶ 23 On appeal, the defendant argues that his *pro se* postconviction petition, when liberally construed, alleged that plea counsel had advised him that he would be convicted of both possession charges and would receive consecutive sentences unless he accepted the State's plea offer. The defendant argues that because a defendant may only receive a single conviction and sentence when he simultaneously possesses the same type of drug (*People v. Carter*, 213 Ill. 2d 295, 303 (2004)), counsel's advice may have been unreasonable. Ostensibly acknowledging that his claim is tenuous, the defendant nevertheless asserts that he has stated the gist of a constitutional claim. We disagree.

¶ 24 The defendant recognizes that on February 27, 2014, in a memorandum in support of a motion to exclude testimony, he stated that in addition to the cannabis found on his person, Officer Ital also discovered in the vehicle a clear zip lock bag and four glass jars containing cannabis. Additionally, on May 5, 2014, the State asserted in a pretrial submission that "[a] search of the vehicle ultimately yielded approximately 330 grams of cannabis, which the defendant subsequently admitted was his." Thus, even if counsel had advised the defendant that he faced convictions for both charges of possession, the defendant concedes that counsel may not have misadvised him because he was arguably found in actual possession of the cannabis in his pocket and in constructive possession of the other cannabis found in the vehicle. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 37 (defendant committed two separate acts of possession: (1) the exercise of actual

possession over first set of drugs and (2) the exercise of constructive control over the second set of drugs).

¶ 25 Likewise, the defendant faced consecutive sentencing because the defendant committed possession of cannabis while his previous felony charges were pending in 12-CF-321. In fact, the State sought and the circuit court entered the defendant's sentence in this case to run consecutively with the defendant's sentence in 12-CF-321. See 730 ILCS 5/5-8-4(d)(8) (West 2014) (court shall impose consecutive sentences when a person charged with a felony commits a separate felony while on pretrial release). As a result, the defendant's claim that defense counsel improperly informed him that the State would seek consecutive sentences is not a basis for relief under the Act.

¶ 26 Moreover, as noted by the State, the defendant's argument on appeal is not consistent with the language in his postconviction petition. In his petition, the defendant alleged that counsel stated "if [he] did not take the 1 year offer that the State would seek consecutive terms and would win, is what he said, but that was a threat." The defendant did not allege that plea counsel had advised him that he would be convicted of and would receive consecutive sentences on both acts of possession charged in the information. The defendant stated that "the State would seek consecutive terms and would win."

¶ 27 Furthermore, the defendant's claim that this was a threat is contradicted by the record, which includes a written, signed guilty plea stating that the defendant entered the plea of guilty "voluntarily, knowingly, and understandingly" and that "[n]o threats ha[d] been made to get [him] to plead guilty." This claim has no arguable basis in law or fact.

¶ 28 The defendant also alleges that the circuit court erred in summarily dismissing his claim that his plea counsel was ineffective for advising him to abandon his right to a direct appeal. The defendant argues that, when liberally construed, he alleged in his *pro se* postconviction petition that plea counsel had advised him that any appeal challenging the legality of the State's search would lack merit. The defendant alleges this on appeal on the basis of his statement in his postconviction petition that his plea counsel advised him to accept the plea agreement because the State would seek consecutive terms and "would win."

¶ 29 Again, as noted by the State, the defendant did not allege this claim in his *pro se* postconviction petition. Even when construed liberally, the defendant's interpretation of his contentions in his *pro se* postconviction petition is not supported by its language. Nowhere in the defendant's petition did he allege that he requested a direct appeal or that his counsel advised him that a direct appeal would lack merit. In his petition, the defendant did not reference an appeal at all. *Cf. Edwards*, 197 Ill. 2d at 245 (circuit court erred in dismissing defendant's petition at the first stage of postconviction proceedings where defendant alleged that he told his trial counsel to file a motion to withdraw his guilty plea and that counsel was constitutionally ineffective for failing to do so). Moreover, the defendant failed to allege prejudice in his petition. He failed to allege that there was a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial.

¶ 30 The defendant's claims have no arguable basis either in law or in fact (*Hodges*, 234 Ill. 2d at 16) and are contradicted by the record (*Brown*, 236 Ill. 2d at 185). Because

the defendant's claims are frivolous and patently without merit, his petition fails to state the gist of a constitutional claim, and the circuit court properly dismissed it.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we hereby affirm the circuit court's judgment summarily dismissing the defendant's petition for postconviction relief as frivolous and patently without merit.

¶ 33 Affirmed.