2019 IL App (1st) 161596-U

No. 1-16-1596

Order filed February 22, 2019

Fifth 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. 11 CR 9530
	)	
ANTHONY FIGUEROA,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing defendant's *pro se* postconviction petition where defendant's claim that his trial counsel coerced him into pleading guilty, failed to admonish him of the correct sentence, and failed to file a motion to suppress was frivolous and patently without merit. Defendant's claim of actual innocence is also without merit because it is not freestanding and does not exonerate defendant.

¶ 2 Defendant Anthony Figueroa appeals the summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)).

He contends that the trial court erred in summarily dismissing his petition because he presented an arguable claim of ineffective assistance of trial counsel based on: (1) counsel's failure to file a meritorious motion to suppress his statement; (2) counsel wrongly advised him that he would only serve 50 percent of his sentence; and (3) counsel coerced him to plead guilty by threatening to withdraw from the case. Defendant also argues he presented a claim of actual innocence. We affirm.[1]

¶ 3 Defendant was charged by indictment with four counts of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)); one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)); four counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)); one count of unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8 (a)(1) (West 2010)); and three counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (a)(1)/(3) (West 2010)). The charges arose from a shooting incident that occurred on May 28, 2011, in Chicago. On June 13, 2012, the State advised the court that they had reached an agreement with defendant that in return for a guilty plea to aggravated battery with a firearm he would receive a sentence of 30 years' imprisonment.

¶ 4 Prior to entering his guilty plea, the court admonished defendant regarding the nature of the charge, the minimum and maximum penalties, his right to plead not guilty and demand trial. The court also admonished defendant of the consequences of pleading guilty, including that he would be waiving his right to trial of any kind, to confront witnesses, and present evidence on his behalf. Defendant acknowledged that he understood these admonishments. The court further established that defendant was pleading guilty of his own free will free from any threats or force.

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 5 The State provided a factual basis for the plea stating that on May 28, 2011, shortly before 1:20 a.m., the victim Lynette Couty, Jennifer Arroyo, Elizabeth Laboy and Alberto Quiones were in a liquor store located on Fullerton and Central. While in the store, a man approached Quiones and asked if he was a gang member. Quiones replied that he was not. The man was joined by another person. The two left the store, got into an Impala and drove off. Couty, Arroyo, Laboy and Quiones waited for the two men to leave before they left the store. The four got into a car driven by Arroyo, with Quiones in the front passenger seat, while Couty and Laboy were in the back seat. As they began driving westbound on Fullerton, the same Impala that they had seen from the liquor store drove next to their car. When Arroyo stopped for a red light at Fullerton and Laramie Avenue, the Impala sped up and drove through the red light. Arroyo proceeded west on Fullerton. At the intersection of Fullerton and Long, a blue truck pulled alongside Arroyo's car. Defendant who was in the blue truck, smirked at the occupants of Arroyo's car then fired a handgun at the occupants striking Couty in the head and hand. Couty was taken to the hospital, where she was intubated. Defendant was identified by numerous witnesses and gave an oral admission to Chicago police detectives investigating the case. The State advised the court that Couty was in on-going rehabilitation as a result of the injuries suffered from the shooting.

¶ 6 Defendant's private counsel stipulated to the factual basis proffered by the State and the court found the stipulation sufficient to prove defendant's guilt beyond a reasonable doubt. Defendant was admonished that he would have to serve 30 years' imprisonment followed by a three year MSR period. Defendant was admonished that he could withdraw his guilty plea within 30 days pursuant to a written motion asking to have the judgment vacated and his plea

withdrawn. Defendant was further admonished of his appeal rights should a motion to withdraw his guilty plea be denied. Defendant did not seek leave to withdraw his guilty plea nor did he appeal his conviction and sentence.

¶ 7 On January 26, 2016, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(West 2016)). In his petition, defendant alleged his trial counsel was ineffective for failing to: (a) pursue known impeachment evidence; (b) investigate or pursue exonerating evidence; (c) pursue or investigate the State's witnesses' motive to fabricate; (d) subpoena, investigate, interview, or dispatch investigators to interview witnesses to corroborate defendant's claim of innocence; (e) have defendant evaluated for fitness to plead guilty; (f) interview disinterested witnesses; (g) suppress his statements; and (h) conduct an investigation or review defendant's case file and/or discovery to determine defendant's guilt or innocence prior to coercing defendant to plead guilty against his will. Defendant submitted an affidavit from Angel Escobar who averred that he was questioned by the Chicago Police Department on the night of the shooting and witnessed the shooting but did not say anything for fear of retaliation. Escobar further averred that defendant did not shoot anyone. Defendant also alleged that counsel coerced him to plead guilty prior to interviewing any witnesses.

¶ 8 On April 20, 2016, the trial court denied defendant's *pro se* postconviction petition, finding "that the issues raised in defendant's petition are frivolous and patently without merit. Accordingly, the petition for post-conviction is hereby dismissed." The court found the affidavit from Escobar to be neither new nor of such a conclusive character it would have changed the result on trial.

¶ 9 On appeal, defendant first contends that the trial court erred in summarily dismissing his petition because he presented an arguable claim that his guilty plea was not voluntary due to his trial counsel's ineffectiveness for: failing to file a motion to suppress his confession; wrongfully advising him that he would only serve 50 percent of his sentence; and coercing him to plead guilty by threatening to withdraw from the case if he did not plead guilty.

¶ 10 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides that the circuit court adjudicates a petition for postconviction relief in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, a trial court may dismiss a petition only if it is " ' frivolous or is patently without merit. ' " *People v Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is frivolous or patently without merit if it " 'has no arguable basis *** in law or fact.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17) (2009)). A postconviction petition may be summarily dismissed as frivolous and patently without merit based on both forfeiture and *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28; *Hodges*, 234 Ill. 2d at 9.

¶ 11 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and

that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The *Strickland* standard has been adapted for postconviction proceedings. *People v. Tate*, 2012 IL 112214, ¶ 19. At the first stage of postconviction proceedings, a petition that alleges ineffective assistance of counsel "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." *People v. Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. 2d at 17. The failure to establish either prong of the *Strickland* test defeats a claim of ineffectiveness. *People v. Henderson*, 2013 IL 114040, ¶ 11. If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 38.

¶ 12 In the context of a guilty plea, 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 going to trial is not enough to establish prejudice. *Hughes*, 2012 IL 112617 & 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: *People v. McCoy*, 2014 IL App (2d) 100424-B, ¶ 16. 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.

¶ 13 Defendant contends that his trial counsel was ineffective for failing to file a motion to suppress his statement to the police. Determining whether or not to file a motion to suppress is a matter of trial strategy, and thus, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004).

¶ 14 Defendant alleges that his trial counsel should have filed a motion to suppress his statement where he was only 17 years of age at the time of the questioning, he suffered from Attention Deficit Hyperactivity Disorder (ADHD), he was denied a phone call to his attorney, threatened by the police to charge him with unrelated crimes, and claims there have been investigations regarding the conduct of officers at the police district coercing defendants into statements. However, defendant has provided no documentation for his ADHD or the allegation of police misconduct. *People v. Smith*, 352 Ill. App. 3d 1095, 1105 (2004). Defendant has also failed to explain the absence of these supporting materials. 725 ILCS 5/122-2 (West 2012). The failure to attach supporting documentation or explain their absence is fatal to defendant's petition. *People v. Delton*, 227 Ill.2d 247, 255 (2008) (citing *People v. Collins*, 202 Ill.2d 59, 66 (2002)).

¶ 15 Moreover, defendant was not prejudiced by counsel's failure to file the motion to suppress because even if counsel had filed the motion and prevailed, we cannot find that defendant would have pled not guilty and insisted on going to trial. Defendant stipulated to the summary of the evidence that was presented as the factual basis for his plea. "A stipulation is conclusive as to all matters necessarily included in it," (34 Ill. L. & Prac. *Stipulations* § 8 (2001)), and "[n]o proof of stipulated facts is necessary, since the stipulation is substituted for

proof and dispenses with the need for evidence (34 Ill. L. & Prac. *Stipulations* § 9 (2001)). Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated." *People v. Woods*, 214 Ill. 2d 455, 469 (2005). Here, the stipulated evidence was that numerous witnesses observed defendant fire shots into Arroyo's car striking Couty in the head and hand. In light of this evidence, defendant cannot show that he was prejudiced by counsel's failure to file the motion such that he would have pled not guilty and insisted on going to trial.

¶ 16 Next, defendant maintains his trial counsel was ineffective for failing to inform him that he had to serve 85 percent of his sentence leading him to believe that he was to serve 50 percent of his sentence. Defendant pled guilty to aggravated battery with a firearm, a Class X offense punishable by 15 years to 60 years imprisonment. 720 ILCS 5/12-4.2(b)(West 2010). The State *nolle prosequi* the four counts of attempt first degree murder, also a Class X offense, but one that would subject defendant to a firearm enhancement of 25 years to life to be added to his sentence. 720 ILCS 5/8-4(c)(1)(D) (West 2010). Had defendant rejected the plea offer and gone to trial and been unsuccessful, he most likely would have received a sentence on the higher end of that range. See *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958, 1966 (explaining that a defendant's decision to plead guilty "involves assessing the respective consequences of a conviction after trial and by plea"); *People v. Brown*, 2017 IL 121681, ¶ 50. Hence, defendant cannot establish prejudice because he has not shown that the "decision to reject his plea bargain would have been rational under the circumstances of his case." *Brown*, 2017 IL 121681, ¶ 52; *People v. Valdez*, 2016 IL 119860, ¶ 29; *People v. Hughes*, 2012, IL 112817, ¶¶ 65-66.

¶ 17 Defendant also argues that his plea was involuntary because trial counsel coerced him into pleading guilty by threatening to withdraw from the case and leaving defendant to be represented by a public defender at trial.

¶ 18 Due process requires that all pleas be knowing and voluntary. *People v. Whitfield*, 217 Ill.2d 177, 200 (2005). Illinois Supreme Court Rule 402 requires that before accepting the plea, the court must admonish defendant regarding the nature of the charge, the minimum and maximum sentence, the right to plead not guilty, and the waiver of his right to a trial. Ill. S. Ct. R.402 (a) (eff. July 1, 2012). *People v. Marshall*, 381 Ill.App.3d 724, 732 (2008). The court must also determine that the plea is voluntary by stating the terms of the plea agreement and defendant must accept those terms in open court. Ill. S. Ct. R. 402(b) (eff. July 1, 2012). *Marshall*, 381 Ill. App. 3d at 732. "Where the record refutes [a] defendant's assertions that his plea was not knowingly and voluntarily entered, courts may properly dismiss or deny a defendant's [postconviction] petition. *Marshall*, 381 Ill. App. 3d at 732 (quoting *People v. Fern*, 240 Ill. App. 3d 1031, 1041 (1993)). When a defendant challenges a guilty plea alleging that he received ineffective assistance of trial counsel, an attorney's conduct is considered deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *People v. Hall*, 217 Ill.2d 324, 335 (2005).

¶ 19 Here, however, the record shows that the trial court properly admonished defendant as required by Rule 402 and there is nothing in the record to indicate defendant's plea was not voluntarily given. The trial court informed defendant of the nature of the charge and the minimum and maximum penalty. The court also informed defendant that he had the right to plead not guilty, and that by pleading guilty he was waiving his right to a trial of any kind.

Regarding whether defendant's plea was voluntary, the court informed defendant of the terms of the plea agreement and confirmed that defendant was accepting the plea freely and voluntarily. Most notably, defendant answered "No, sir" when asked if anyone had promised him anything to get him to plead guilty or threatened him to plead guilty. Defendant also answered "Yes sir" when asked if he was pleading guilty of his own free will. The court further clarified that defendant was voluntarily entering a guilty plea inquiring of defendant "[M]eaning this is something you want to do?" To which defendant answered "Yes". The court confirmed defendant's understanding of each of its admonishments and found that defendant's plea had been made freely and voluntarily. Thus, the record clearly rebuts defendant's contention that his plea was involuntary. *Marshall*, 381 Ill. App. 3d at 732.

¶ 20 Lastly, in his postconviction petition, defendant submits an affidavit purportedly from Angel Escobar, who averred that he was taken into custody on May 28, 2011, regarding a shooting in the location of Fullerton and Central Avenue. Escobar further avers that several others were also questioned including defendant and Oscar Delgado but only defendant and Delgado were charged. Escobar averred that defendant did not shoot anyone on May 28, 2011, and that he saw who did the shooting. Escobar does not identify the shooter. Escobar avers that he did not tell the police anything for fear of retaliation but is now a "changed man and only fears God." Defendant argues this affidavit is new evidence and that his attorney was ineffective for failing to pursue this exonerating evidence and coercing defendant to plead guilty.

¶ 21 Claims of actual innocence must be free standing claims and cannot be used to supplement an assertion of a constitutional violation. *People v. Washington*, 171 Ill. 2d 475, 479. At the first stage, a defendant claiming actual innocence must show that this evidence is

"arguably 'new, material, noncumulative***(and) so conclusive it would probably change the result on retrial.' " *People v. White*, 2014 IL App (1st) 130007, ¶ 18 (quoting *People v. Coleman*, 2013 IL 113307, ¶ 96). Evidence is not newly discovered "when it presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable, or uncooperative." *People v. Collier*, 367 Ill. App. 3d 630, 637 (2008). To be conclusive evidence of innocence, the newly discovered evidence, when taken as true, must exonerate the defendant by directly negating the evidence of guilt presented at trial. *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010). Mere impeachment evidence is not conclusive evidence of innocence. *People v. Collier*, 367 Ill. App. 3d 630, 637 (2008).

¶ 22 In this case, defendant did not raise a freestanding claim of actual innocence. Rather, defendant presented the affidavit from Escobar to support his claim of ineffective assistance of counsel *i.e.* counsel's failure to investigate witnesses. As such, defendant has not presented a freestanding claim of actual innocence. Moreover, Escobar does not aver that defendant was not present for the shooting and does not name the actual shooter. The factual basis for defendant's plea refutes Escobar's affidavit. The stipulated facts shows that numerous witnesses identified defendant as the shooter. Thus, the factual basis in the record directly contradicts Escobar's affidavit. Accordingly, even assuming arguendo that defendant raised a freestanding claim of actual innocence, we cannot say that Escobar's affidavit was exonerating such that his claim would prevail.

¶ 23 In sum, we find that defendant's claim of ineffective assistance of counsel is positively rebutted by the record and his claim of actual innocence is not free standing. Accordingly, the

court did not err in finding that defendant's postconviction petition is frivolous and patently without merit. *Hodges*, 234 Ill. 2d at 11; 725 ILCS 5/122-2.1(b) (West 2014).

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

¶ 25 Affirmed.