2017 IL App (1st) 151310-U

No. 1-15-1310

Order filed: December 15, 2017

Sixth 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. 10 CR 15312
	)	
GARY DAVIS,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of the defendant's *pro se* postconviction petition is affirmed. The defendant's claim that he would have accepted the State's plea offer had trial counsel informed him that he had to serve his sentence at 85% was insufficient to state an arguable claim of prejudice under the second prong of the *Strickland* test, and thus did not set forth the gist of a constitutional claim.

¶ 2 The defendant, Gary Davis, appeals from the trial court's first stage summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.*

(West 2010)). On appeal, the defendant contends that his postconviction petition stated an arguable claim of ineffective assistance of counsel based on his trial counsel's failure to discuss his sentencing range, including the truth in sentencing consequences. He asserts that, had his counsel properly advised him, he would have accepted the State's plea offer. The defendant also contends that the trial court erred because it summarily dismissed his petition based on his failure to make a "substantial constitutional showing," a higher standard than the first stage standard. For the following reasons, we affirm.

¶ 3 Following a bench trial, the defendant was convicted of two counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)) and two counts of aggravated battery (720 ILCS 5/12-4(a) (West 2010)) for striking his girlfriend, Britt Camel, "about the body." Based on his background, the trial court sentenced him as a Class X offender to eight years in prison. We affirmed that judgment on direct appeal. *People v. Davis*, No. 1-12-1020 (2014) (unpublished order under Supreme Court Rule 23). We set out a full recitation of the trial evidence in that decision and repeat those facts only as necessary to our resolution here.

¶ 4 At trial, Camel testified that, at the time of trial, the defendant was her fiancé and she had been dating him for six years. On August 7, 2010, Camel was having drinks with her friends. At about 1:30 a.m., the defendant picked her up by car. They started arguing about keys and she accused him of cheating on her. Camel hit the defendant in the mouth and, when they were about 15 minutes away from home, she got out of the car. Camel testified that she had had a fifth of whiskey and was "a lot drunk."

¶ 5 When Camel got home, she locked her back door and went to bed. She lived with her five children, but no one was home at that time. Camel was awakened by the sound of a "boom" and

"the door being kicked in." The defendant walked into her bedroom. Camel was upset and angry at him for kicking the door in. The defendant apologized and told her he would fix it. Camel then walked into the kitchen and the defendant followed. Camel testified that she "got a knife," "turned around," and stabbed the defendant with a butcher knife in his mouth. The defendant then hit Camel in her left eye and she fell against the kitchen cabinet and passed out.

¶ 6 When Camel woke up, her head was bleeding and she cleaned herself up. At some point, she walked upstairs to her neighbor, "Ms. Coleman," to call the police because her telephone was dead. Coleman tried to stop the bleeding. Camel went to a hospital, but was later transferred to another hospital because she needed surgery on her eye. A metal plate was implanted because her bone was fractured.

¶ 7 At the hospital, Camel explained what had happened to police detectives and an Assistant State's Attorney (ASA). The ASA took a signed statement from Camel. Camel testified that she "didn't tell [the ASA] everything. Just like I didn't tell the police everything. Because I was scared." She did not tell the ASA that she "stabbed" the defendant. She realized from "the get go" that she did not include that information and "was just scared because [she] didn't want to go to jail." Camel testified that the defendant did not "deserve to go to jail because I am the one who provoked—who did this. I'm the reason why he's in here. So, he doesn't deserve to go to jail. Me and my kids need him out there with us."

¶ 8 Camel acknowledged that, at a preliminary hearing on August 16, 2010, she testified that, when the defendant approached her, she tried to run, and the defendant grabbed her and hit her in the left eye. She did not remember testifying that the defendant hit her with a closed fist or that

she "crawled" up the stairs, but remembered testifying that she blacked out and woke up in a puddle of blood.

¶ 9 Camel testified that she did not tell the police that she picked up the knife and stabbed the defendant because she was scared the police would arrest her. Camel had an order of protection entered against the defendant because she "was angry." At the time of trial, Camel talked to the defendant on the telephone twice a day, and decided in the middle of August 2010 that she did not want to pursue the case. No one had threatened her or promised her anything to change her version of what had happened.

¶ 10 On cross-examination, Camel testified that she did not tell the judge at the preliminary hearing that she had stabbed the defendant before he hit her. She testified that she was telling the truth at trial even though she knew that she could get into trouble.

¶ 11 Chicago police officer Luis Garcia testified that, on August 8, 2010, he and his partner went to Camel's apartment and observed that the front door to the building was wide open, the front door to the apartment unit was "kicked in," the apartment was in "disarray," and there was a blood trail from the kitchen to the second floor. On the second floor, Camel was "screaming hysterically." Camel had a large laceration on the top of her head that was bleeding profusely. Her neighbors were trying to stop the bleeding. Camel told Garcia that the defendant, her ex-boyfriend, had injured her. When Garcia spoke with Camel later at the hospital, Camel did not tell him that she stabbed the defendant, but that the defendant had struck her with a closed fist.

¶ 12 On cross-examination, Garcia testified that, when he subsequently placed the defendant under arrest, he did not observe any injuries on the defendant. Later at the police station, Garcia observed a "small cut" on the defendant's "chin area." The defendant refused medical attention.

¶ 13 Chicago police detective William Murawski testified that, on August 8, 2010, he met with Camel at the hospital and then went back to the hospital a second time to meet with Camel and an ASA. At these interviews, Camel gave substantially similar statements. Camel told him that she ran when she encountered the defendant, was punched, blacked out, and woke up bleeding. Camel never mentioned a knife. Murawski also went to Camel's apartment and observed broken glass, wiped-up blood, and the jamb section of the front door missing.

¶ 14 On August 8, 2010, Murawski met with the defendant at the police station. After giving the defendant his *Miranda* warnings, the defendant told Murawski that he and Camel were in an argument, he "grabbed or shoved her," and Camel fell onto the bed. The defendant speculated that Camel had hit her head on the headboard. Murawski noticed a small cut on the defendant's chin. The defendant told him it was caused during the arrest. Murawski was also present during the defendant's conversation with the same ASA who had spoken with Camel. The defendant's conversation with the ASA was a substantially similar interview as the one he had with Murawski.

¶ 15 On cross-examination, Murawski testified that he observed a knife "in the cabinet" at the apartment. He never asked the arresting officers if the defendant had sustained the cut during the arrest. He confirmed that he saw blood splattered on the defendant's clothing. He did not order any DNA tests on the clothes because he did not believe there was sufficient DNA.

¶ 16 The court denied the defendant's motion for a directed verdict, in which defense counsel argued that the defendant acted in self-defense.

¶ 17 The defendant called Regina Coleman, who lived in the second-floor apartment above Camel. Coleman testified that the defendant lived at Camel's apartment. On cross-examination,

Coleman testified that, on August 8, 2010, Camel came to her door. Camel was standing up and there was not "a whole lot" of blood on the stairs.

¶ 18 The defendant testified that, on August 7, 2010, he dropped off Camel at her friend's house. When the defendant picked her up, Camel was a "little angry" and "showing hostility" toward him for being late. On the way home, Camel's "mood changed from being angry to a little violent." Camel accused the defendant of "cheating on her," they argued about keys, and Camel hit him with an open hand in his mouth. At some point, Camel jumped out of the car. The defendant tried to look for her and, about 30 or 40 minutes later, went to Camel's apartment. Camel did not answer the door, which was unusual, so he was worried about her "well-being" and that someone could be "doing something to her." He pushed the door in with his shoulder because he did not have his keys.

¶ 19 When the defendant went to their bedroom, he apologized about the door and told Camel, "you're worried about the door and I'm worried about you." He walked to the kitchen to get a cigarette. He did not know Camel was behind him and, as he turned around, Camel "was coming at [him] with a knife." Camel was standing directly in front of him holding the knife to his face. The knife made contact with his chin. When he turned around and saw the knife, he hit Camel with an open hand on the left side of her eye. He hit her "real hard so she couldn't stab [him], further stab [him]." The defendant ran "so she couldn't continue [to] tackle [him]."

¶ 20 The defendant went to his sister's house, who gave him something to stop the bleeding. He then went back to Camel's apartment to see if she had "calmed down" and was told that Camel went to the hospital. He went to the hospital, but "they would not let him in," and he "didn't understand why." He went back to Camel's apartment and the police arrested him. He

was later taken to the hospital to be treated for lacerations on his face because "it wouldn't stop bleeding." At the hospital, he received stitches on his face "because the knife went all the way through [his] gum." He testified that he was not concerned about himself, but was concerned about Camel. He never told Murawski about Camel stabbing him because he did not want her to get in trouble.

¶ 21 On cross-examination, the defendant testified that he lied to the police because he wanted to protect Camel. He admitted he told the police that he pushed Camel on the bed, but denied telling them that Camel hit her head on the headboard. He told the police that he sustained a cut on his chin from the arrest because he did not want "to implicate [Camel] stabbing [him]."

¶ 22 The State called Murawski as a rebuttal witness. Murawski testified that, in his first conversation with the defendant on August 8, 2010, the defendant told Murawski that he pushed Camel on the bed and he thought she hit her head on the headboard. In this interview, the defendant also denied that he punched Camel, but acknowledged that he grabbed her. The defendant stated that he did not call the ambulance because Camel only had a "small cut."

¶ 23 At closing argument, the defendant argued self-defense. The trial court found him not guilty of home invasion, but guilty of two counts of aggravated domestic battery and two counts aggravated battery. The court denied the defendant's motion for new trial, merged all counts, and sentenced him to eight years' imprisonment. We affirmed the judgment in an unpublished order on direct appeal. *People v. Davis*, No. 1-12-1020 (2014) (unpublished order under Supreme Court Rule 23).

¶ 24 On December 5, 2014, the defendant mailed from prison a *pro se* postconviction petition. He alleged that his trial counsel provided ineffective assistance of counsel because she, in

relevant part, "fail[ed] to discuss the time the case carried, I have proof with a letter head [*sic*] from her after trial stating she didn't know what the case carried and fail[ed] to discuss [the] matter with me." He alleged that, if he had known "what the case carried[,]" he "would have accepted [the State's] offer." To support his petition, the defendant attached a letter from his trial counsel dated March 15, 2012, about one month after sentencing. Counsel informed the defendant: "I just want to let you know that after we spoke last I looked at the truth in sentencing act and you only get 4.5 days of credit when convicted of aggravated domestic battery." The defendant claimed the letter showed that his counsel "wasn't aware of what the case carried. I could have took [*sic*] [the State's] offer."

¶ 25 On March 6, 2015, the trial court summarily dismissed the defendant's postconviction petition, finding, as relevant here:

> "I'm not clear if there was an offer from the State, but it's clear throughout that the strategy of this defendant was not to plead guilty, but in fact, go to trial because, in fact, he had control over the complaining witness and demanded trial. All he wanted to do was get this thing going because he believed that his—the victim, the complaining witness's recantations would be sufficient for him to be founded [*sic*] not guilty. There was never any intention to plead guilty."

The court concluded that the "issues raised and presented by the petitioner are frivolous and patently without merit" and that he "has failed to make a substantial showing that his [c]onstitutional [r]ights were violated[.]" This appeal followed.

¶ 26 On appeal, the defendant first contends that his postconviction petition raised an arguable claim of ineffective assistance of counsel based on his trial counsel's failure to advise

him of his "sentencing exposure," including that, under the Truth in Sentencing statute (730 ILCS 5/3-6-3(a)(2)(vii) (West 2010)), he had to serve 85% of his sentence, if convicted. The defendant claims that, under *Padilla v. Kentucky*, 559, U.S. 356 (2010), it is at least arguable that counsel has a duty to discuss the consequences of Truth in Sentencing statutes with clients. According to the defendant, had his counsel advised him that he was required to serve 85% of his sentence, he might have pled guilty. He contends that the court erred when it summarily dismissed his postconviction petition and requests that we remand for second-stage proceedings.

¶ 27 Under the Post-Conviction Hearing Act, a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is not a direct appeal from a conviction but is a collateral attack on the judgment. *Id.* In noncapital cases, the postconviction petition process involves three stages. *Id.* ¶ 9.

¶ 28 At the first stage, which applies here, the trial court independently reviews the petition and takes all allegations as true (*People v. Hodges*, 234 Ill. 2d 1, 10 (2009)), "so long as those allegations are not affirmatively rebutted by the record" (*People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47). At the first stage, the petition need only present "the gist of a constitutional claim." *People v. Quigley*, 365 Ill. App. 3d 617, 618 (2006). Nevertheless, the trial court may summarily dismiss the petition as "frivolous or patently without merit" if it "has no arguable basis either in law or in fact," *i.e.*, it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 11, 16. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record" and a fanciful

factual allegation is one that is "fantastic or delusional." *Id.* at 16. Our review of the trial court's dismissal of a postconviction petition is *de novo. Id.* at 9.

¶ 29 Under *Strickland v. Washington*, 466 U.S. 668 (1984), to establish a claim for ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In the first-stage postconviction context, the court may not summarily dismiss a petition that alleges ineffective assistance of counsel if: "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Scott*, 2011 IL App (1st) 100122, ¶ 29. Because a defendant must prove both elements, we may review the prejudice prong first. *People v. Gray*, 2012 IL App (4th) 110455, ¶ 25. Thus, we will proceed directly to the prejudice prong. We find the defendant's petition insufficient to show that he was arguably prejudiced by counsel's alleged deficient performance.

¶ 30 To establish the prejudice prong, a defendant must show that there was a " 'reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.' " *People v. Miller*, 393 Ill. App. 3d 629, 632-33 (2009) (quoting *People v. Paleologos*, 345 Ill. App. 3d 700, 706 (2003). To prove prejudice here, the defendant:

> "must demonstrate a reasonable probability that (1) he would have accepted the earlier plea offer had he received the effective assistance of counsel; and (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *People v. La Pointe*, 2015 IL App (2d) 130451, ¶ 71.

¶ 31 In his petition, the defendant does not allege that, at the time he rejected his plea offer, his attorney provided erroneous information about the minimum and maximum sentencing ranges that he faced if found guilty or about the percentage of his sentence he would have to serve. Rather, reading the petition broadly, he asserts that counsel did not inform him that, under the Truth in Sentencing statute, he must serve 85% of his sentence and, had he been so informed, he would have accepted the State's plea offer. However, the record rebuts the defendant's assertion that he would have pled guilty had he known that he had to serve his sentence at 85% and, therefore, the defendant has failed to show that he suffered arguable prejudice.

¶ 32 The record demonstrates that the defendant chose to proceed to trial based on considerations other than his possible sentences. He asserted a theory of self-defense throughout the trial and the victim, who regularly spoke with the defendant on the telephone and was, at the time of trial, his fiancé who wanted him home, and who was uncooperative as a witness for the State. The record shows that, even before trial, Camel was uncooperative as a State witness. On August 9, 2011, she did not appear in court and the State informed the judge that a detective was looking for her. When Camel was not present in court again on September 15, 2011, the date the case was set for trial, the State extended an "offer," which was apparently rejected as the defendant renewed his demand for trial and a new trial date was set. On September 26, 2011, the first day of trial, there was no discussion of the "offer" and the State informed the court that, although Camel was present in court, it had not been able to verify her identity, "[t]here [had] been some less than cooperation," and she "refused to accept" the subpoena.

¶ 33 At trial, the defendant asserted a theory of self-defense based on Camel being the aggressor. Camel's testimony, which differed from the statements she gave to the ASA and

police after the incident, supported his theory. Camel testified that she stabbed the defendant because she was angry at him and he hit her after she stabbed him. She testified that she did not tell the police she stabbed the defendant because she was scared she would be arrested. Arguing for a directed verdict, defense counsel argued self-defense: "The victim testified my client acted in self defense. I think this Court would find it is reasonable for a person being attacked with a knife to then hit the person attacking him with the knife."

¶ 34 The defendant then testified and his testimony supported his self-defense theory, as he testified that Camel came at him with a knife, the knife made contact with him, and he hit her when he saw the knife. He claimed that he did not tell the police that Camel stabbed him because he wanted to protect her. During closing arguments, defense counsel continued to argue self-defense, contending, *inter alia*:

> "[Camel] failed to tell the [p]olice that she was initially the aggressor. She failed to tell them that she initially attacked my client with a deadly weapon, a very large kitchen knife that she made contact with my client's face with that knife and because of that my client acted in self-defense striking her one time and leaving the scene."

¶ 35 Based on the foregoing, the only reasonable inference that can be drawn from the record is that the defendant rejected the plea offer because he wanted to pursue his self-defense theory. The record conveys that he never intended to plead guilty, knowing that the victim and his fiancée would confirm that he acted in self-defense because she attacked him with a knife. See *Miller*, 393 Ill. App. 3d at 636-37 (affirming the trial court's summary dismissal, the court stated that the "only reasonable inference to be drawn from the defendant's rejection [of the plea offer] *** is that [he] desired to *** assert his claim of self-defense" and he "lost his gamble" when he

went to trial to avoid serving the minimum sentence). Therefore, the defendant's ineffective-assistance-of-counsel claim fails as he suffered no arguable prejudice from counsel's alleged failure to inform him that, at the time the State offered a plea deal, he had to serve his sentence at 85%. See *People v. Hale*, 2013 IL 113140, ¶ 28 (concluding on direct appeal that the defendant rejected the plea offer not based on counsel's alleged erroneous advice, but other considerations).

¶ 36 Accordingly, because the defendant has not presented an arguable claim for ineffective assistance of counsel, he has not presented the gist of a constitutional claim, and the court properly dismissed his petition as frivolous and patently without merit. See *Miller*, 393 Ill. App. 3d at 631, 637, 640 (the defendant's allegations that he would have pled guilty had he known about a 25-year sentencing enhancement was considered "conclusory," insufficient to state the gist of a constitutional claim, and "without more," did not persuade the court that "he would have acted differently.").

¶ 37 The defendant also contends that the court erred because it dismissed his petition at the first stage using the standard applicable at the second stage. As previously stated, the trial court may dismiss a petition at the first stage if it finds the petition to be "frivolous or patently without merit." *People v. Snow*, 2012 IL App (4th) ¶ 14. At the second stage, the trial court may dismiss a petition "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *Id.* ¶ 15.

¶ 38 In dismissing the defendant's petition, the trial court stated both the first and second stage standards when it concluded: "[the] issues raised and presented by the petitioner are frivolous and patently without merit. Petitioner has failed to make a substantial showing that his [c]onstitutional [r]ights were violated[.]" The defendant asserts that the court dismissed the

petition based on his failure to make a "substantial constitutional showing," which is a higher standard than the "frivolous or patently without merit" standard applicable at the first stage. The defendant thus requests that we remand for second-stage proceedings.

¶ 39 We do not find that the court's pronouncement demonstrates that it applied the wrong standard merely because it used the terminology for both standards. Moreover, even if we assume that the trial court did apply the wrong standard, we apply a *de novo* review to the court's first-stage dismissal of a postconviction petition and, therefore, "may affirm, on any proper ground, a procedurally proper summary dismissal that was based on an improper ground." See *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006). 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.

¶ 40 As explained in *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006), when the trial court dismisses a postconviction petition within 90 days and without input of any party, the dismissal is procedurally proper. Based on the record before us, we find no indication that the court's dismissal was procedurally improper and the defendant does not argue otherwise. Because the trial court's dismissal was procedurally proper, we "may apply the proper standard in the first instance and affirm if, in accordance with that standard, the summary dismissal is justified." See *Dominguez*, 366 Ill. App. 3d at 473; see also *Snow*, 2012 IL App (4th) ¶¶ 16-17 (applying *Dominguez* to a second-stage dismissal, concluding that "the use of an improper standard in analyzing a postconviction petition at the second stage does not itself serve as a basis for reversal"). Based on the reasons explained above, we find the defendant's ineffective-assistance-of-counsel claim frivolous and patently without merit. Accordingly, having applied

the proper first-stage standard during our review, we affirm the trial court's summary dismissal of the defendant's petition.

¶ 41 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 42 Affirmed.