

No. 1-10-0328

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 17767
)	
HARRY MUSTARI,)	Honorable
)	Lawrence W. Terrell,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to set forth a claim of arguable merit in his postconviction petition that trial counsel was constitutionally ineffective for failing to request a fitness hearing for defendant. The summary dismissal of defendant's postconviction petition was affirmed.

¶ 2 Defendant Harry Mustari appeals from the first-stage dismissal of his petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends he stated a claim of arguable merit that his trial counsel was constitutionally ineffective for failing to request a fitness hearing prior to trial.

¶ 3 Defendant is currently serving a 60-year sentence on his jury conviction of attempted first-degree murder and aggravated battery with a firearm. Trial evidence showed that in July 2003, defendant, age 18, flashed a Latin Kings gang symbol, then fired gunshots at a group of men because they would not "get off the block." Injuries to the men from the gunshots included a fractured hip, paralyzation from the neck down, and a lumbar spinal injury. After the shooting, defendant gave an inculpatory statement to police and to an assistant State's Attorney, and the statement was presented at trial. The jury found defendant guilty, and he was sentenced to two consecutive 30-year terms, as well as two 30-year and two 25-year concurrent terms.

¶ 4 Defendant filed a direct appeal challenging a number of pretrial and trial defects, but not his fitness to stand trial. This court affirmed his conviction. *People v. Mustari*, No. 1-06-0015 (2008) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2009, defendant filed the present postconviction petition. Although the petition was labeled "*pro se*," the author of the petition was apparently a "jailhouse lawyer," an inmate named Fletcher. Fletcher stated that defendant was not medicated and as a result unable to aid in preparing his postconviction petition. Both Fletcher and defendant signed affidavits to that effect, attesting to the truth of the allegations.

¶ 6 In the petition, defendant argued, *inter alia*, that he was unfit to stand trial and that trial counsel was ineffective for failing to investigate and argue his unfitness. He argued that appellate counsel, in turn, was also ineffective for failing to raise the issue on appeal. In support, defendant alleged that he had a history of mental illness including attention deficit hyperactivity, explosive, and panic disorders, of which trial counsel was aware. Defendant acknowledged that trial counsel had set forth his mental illness as a defense during pretrial proceedings, but argued that counsel did not pursue the issue further. Defendant alleged that he was not medicated at trial and as such lacked understanding of the proceedings.

¶ 7 Defendant attached the following documents in support: a letter from the executive director of the special education program for behavior disorders verifying that defendant was enrolled in the program from 2000 to 2002; a medical record showing defendant was admitted to Riveredge hospital for "explosive disorder" in 2000; and affidavits from defendant's family members stating that he had a history of mental illness from childhood on, that trial counsel failed to subpoena medical records reflecting defendant's mental illness, that defendant could not comprehend trial proceedings, and that he essentially was not fit to stand trial.

¶ 8 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed.

¶ 9 The following facts, gleaned from the record on direct appeal, are relevant to defendant's postconviction claim. The record on direct appeal reveals that in January 2002, more than a year before the shootings and around age 17, defendant was committed to Spring Creek Lodge school for behavior disorders. Apparently, as part of that commitment, a licensed clinical psychologist evaluated defendant, who self-reported a history of gang involvement starting at age 12 and substance abuse. Based on the interview, testing, and historical data, the psychologist determined that defendant had an average intellectual range and diagnosed him with depression, not otherwise specified; cannabis dependency; alcohol abuse; conduct disorder; parent/child conflicts; and attention deficit hyperactivity disorder (ADHD). The psychologist noted that defendant presented "some ADHD symptomatology, primarily impulsive-hyperactive type," and stated that if this continued, it might necessitate an updated medical assessment with some "psychopharmacological consultation." The psychologist recommended therapeutic and structural services. Another evaluation, dated March 2002, by a licensed clinical professional counselor also appears in the record diagnosing defendant with anxiety disorder, disruptive behavior disorder, and family problems relating to the "interaction with [the] Legal System" and

recommending that defendant "work through symptoms of Disruptive Behavior Disorder."

Neither health professional recommended psychotropic medication at that time.

¶ 10 The record on direct appeal also reveals that a year before trial, and in support of a motion to suppress his inculpatory statement admitting to the shooting, defendant testified that he was first diagnosed with ADHD when he was committed to Riveredge hospital at age 13. Defendant testified that although he was placed on medication at 13, he had refused to take it, and he could not recall the name of the medication. The State on cross-examination questioned defendant, "[s]o the last time anybody even mentioned that [medicine] to you was when you were 13 years old, correct?" Defendant responded, "[y]es." Defendant stated that at some point, his family had sent him to Spring Creek Lodge for behavior disorders because of his substance abuse problem and "gang banging."

¶ 11 Defendant now contends that these facts combined with those presented in his postconviction petition establish an arguable claim that he was unfit to stand trial and therefore that his trial counsel was ineffective for failing to raise the issue.

¶ 12 The Act provides a method by which persons under criminal sentence in this State can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of proceedings, the circuit court must timely review the petition, taking the allegations as true, and determine whether it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. A *pro se* petition may be summarily dismissed as frivolous or patently without merit if the allegations have no arguable basis in law or fact, *i.e.* if it is based on an indisputably meritless legal theory or a fanciful factual allegation. 725 ILCS 5/122-2.1 (West 2008); *Hodges*, 234 Ill. 2d at 11-12, 16. A petition based on an indisputably meritless legal theory, for example, is one that is completely contradicted by the record; a

fanciful factual allegation is one that is fantastic or delusional. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Our review of such a dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 13 To determine whether the circuit court properly dismissed defendant's postconviction petition in this case, we are guided by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that defendant show both deficient performance by counsel and resultant prejudice. *People v. Coleman*, 168 Ill. 2d 509, 523 (1995). To prevail at this stage, a defendant must set forth an arguable claim regarding both the performance and prejudice prongs of the *Strickland* test and overcome a strong presumption that his attorney's performance was a product of sound trial strategy and professional judgment. *People v. Harris*, 206 Ill. 2d 293, 303-304 (2002). If this court concludes that defendant did not suffer prejudice, it need not determine whether counsel's performance was constitutionally deficient. *Harris*, 206 Ill. 2d at 304.

¶ 14 The crux of defendant's postconviction claim is that he could not understand the trial proceedings because he was not taking medication for his attention deficit disorder and other attendant mental illnesses. Defendant argues that he was thereby prejudiced.

¶ 15 To establish *Strickland* prejudice from an attorney's failure to request a fitness hearing, a defendant must show that, at trial, facts existed that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings against him or to assist in his defense because of his mental or physical condition. 725 ILCS 5/104-10 (West 2008); *Harris*, 206 Ill. 2d at 304. A defendant is entitled to relief only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered. *Harris*, 206 Ill. 2d at 304. To determine whether there exists a *bona fide* doubt of defendant's fitness, a court may consider the defendant's irrational behavior, the defendant's demeanor at trial, and any prior medical opinion on defendant's competence. *Id.*

at 304-305.

¶ 16 Although the inquiry regarding fitness is necessarily fact-specific (*People v. Williams*, 364 Ill. App. 3d 1017, 1026 (2006)), we are guided by the facts and standard established in *Harris*, 206 Ill. 2d at 305. There, the supreme court determined that counsel was not ineffective for failing to request a fitness hearing for defendant because the record clearly showed that the defendant understood the nature and purpose of the proceedings. The defendant participated in his own defense; communicated and conferred with his trial counsel; and expressed to the court his understanding of the proceedings.

¶ 17 Here, as in *Harris*, even taking defendant's allegations as true, we conclude that defendant has not established that his mental illness made him unfit. Although defendant contends he was in need of psychotropic medication to understand the trial proceedings, his express disavowal of the need for medication and his competent ability to testify for a lengthy period during his pretrial motion, contradict defendant's postconviction claim. The pretrial proceedings demonstrate that defendant, then age 19, had not been medicated since age 13, yet he clearly understood the nature and purpose of the proceedings and was able to cooperate with counsel. See *Harris*, 206 Ill. 2d at 305. The record shows that defendant participated in his own defense by testifying cogently and coherently, absent any expression of confusion, over some 89 pages of transcript that he was beaten and bribed by police officers to the point where he inculpated himself in the offense. While defendant's subsequent interactions with the court at his trial and sentencing were short, defendant responded to the court's questions and the proceedings competently.

¶ 18 In addition, although the clinical psychologist who evaluated defendant about a year prior to his offense observed "some ADHD symptomatology, primarily impulsive-hyperactive type," neither he nor the other evaluating mental health counselor recommended a course of

medication. The clinical psychologist in fact described defendant as "oriented to person, place, and time" and stated that defendant did not display "signs of psychotic symptomatology, including delusions, hallucinations, obsessions or phobias." Given the evidence as a whole, we conclude defendant's contention that he was unfit to stand trial absent psychotropic medication is contradicted by the record.

¶ 19 Defendant has failed to show the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered. The trial court was well aware of defendant's mental health history, but did not *sua sponte* order a fitness hearing. See *People v. Tolefree*, 2011 IL App. (1st) 100689, ¶ 56. Thus, even if defendant's attorney had requested one, there is no arguable basis for concluding that the trial court would have granted defendant a fitness hearing on the facts defendant has presented. Defense counsel therefore was not ineffective for failing to request one. Defendant has failed to show *Strickland* prejudice.

¶ 20 We affirm the summary dismissal of defendant's postconviction petition.

¶ 21 Affirmed.