No. 1-09-0817

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).

THIRD DIVISION
March 23, 2011

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. 06 CR 11042
	)	
FRANCISCO CHAPAS-SANCHEZ,	)	The Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

O R D E R

Held: The circuit court's summary dismissal of defendant's postconviction petition as frivolous and patently without merit was proper where the record negated defendant's claim that his guilty plea was the product of misrepresentation by his trial counsel; and the imposition of fees and costs for filing a frivolous postconviction petition was authorized by statute.

Francisco Chapas-Sanchez, the defendant, appeals from the summary dismissal of his postconviction petition. On appeal,

defendant contends his petition stated the gist of a constitutional claim that his guilty plea was induced by his trial counsel's misrepresentation of the risk he faced if he went to trial and that the circuit court's characterization of his petition as frivolous and patently without merit was error. Defendant also alleges the circuit court erred in ordering him to pay $105 in fees and costs pursuant to section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2008)) for filing a frivolous petition. We affirm.

Defendant was charged in three separate multi-count indictments, each of which included a count of predatory criminal sexual assault. The victims in the respective indictments were three minor sisters, defendant's young cousins. Counsel appearing on defendant's behalf represented him on all three related cases. The parties reached a negotiated plea agreement whereby defendant would plead guilty to predatory criminal sexual assault, Count 1 of 10 counts in one of the indictments, and receive a sentence of 24 years in prison on that count, and the State would *nol pros* the remaining counts of that indictment and the remaining two indictments.

During a hearing on August 15, 2007, the court advised defendant that the charge to which he was entering a plea of guilty was a Class X felony providing for a possible prison sentence of 6

to 30 years, with defendant required to serve 85% of the sentence, and a fine of up to $25,000. The court noted that because the alleged victim was under 13 years old, the State could be seeking an extended term. Defendant acknowledged that he understood.

The State's factual basis for the plea included the proposed testimony of J.S., defendant's cousin, who was born in 1993 and lived in the same household as defendant during the period between 2000 to 2002 when on one occasion defendant rubbed his penis on J.S.'s vagina. The factual basis included the proffered testimony of Victoria M., J.S.'s mother, that J.S. had complained to her that defendant had made contact with his penis and her vagina. Additionally, defendant gave a handwritten inculpatory statement admitting the offense to an assistant State's Attorney and two detectives.

Upon accepting the guilty plea, the circuit court advised defendant of the necessity of filing a motion to withdraw his plea in order to appeal the judgment. The court also advised defendant that if he were successful in withdrawing his plea, all the charges against him would be reinstated. On the individual charge to which defendant pleaded guilty, he could be sentenced up to a maximum of 30 years. In addition, if he went to trial and were found guilty on all three cases, he would receive a sentence of life

imprisonment. There is no pleading or statement in the record indicating that defendant filed a motion to withdraw his guilty plea.

Subsequently, defendant filed a*pro se* petition for postconviction relief which raised a number of issues, including claims of actual innocence and newly discovered evidence, as well as allegations that his trial counsel was ineffective in that counsel coerced defendant to plead guilty, failed to request a fitness hearing, and failed to present a defense. Relevant to this appeal was the petition's allegation that his counsel coerced him into pleading guilty with the threat that if defendant did not do so, there was a possibility of a life sentence if he went to trial. After reviewing the petition and the record, the circuit court issued a written order summarily dismissing the petition after finding that the issues raised were frivolous and patently without merit. In a separate written order, the court assessed filing fees and costs in the amount of $105 pursuant to section 27.2(a) of the Clerks of Courts Act (705 ILCS 105/27.2(a) (West 2008)).

On appeal, defendant first contends the circuit court erred in summarily dismissing his petition where one of the several allegations stated the gist of a constitutional claim, namely, that defendant was coerced into pleading guilty by his trial counsel's

advice that if he went to trial and were found guilty, he would get life imprisonment. Defendant asserts this was a false representation that overstated the risk of going to trial because he could not have received more than a range of years in prison on the Class X felony to which he pleaded guilty.

A *pro se* petition seeking postconviction relief for a denial of constitutional rights may be dismissed summarily 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, 16 (2009). In resolving whether the petition is frivolous or patently without merit, the circuit court must construe as true all well-pleaded allegations, unless the allegations are positively rebutted by the record. *Hodges*, 234 Ill. 2d at 16; *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

A claim of ineffective assistance of counsel requires a showing that (1) trial counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) trial counsel's deficient performance so prejudiced the defendant that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A

petition alleging a *Strickland* claim of ineffective assistance of counsel may not be summarily dismissed at the first stage of postconviction proceedings if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

The parties agree that defendant could have received only a sentence of a term of years for the offense to which he pleaded guilty. Predatory criminal sexual assault is a Class X felony for which, at the time of the offense, defendant could have been sentenced to a prison term of 6 to 30 years. 720 ILCS 5/12-14.1(b)(1) (West 2008).[1] The State contends, however, that defense counsel was not mistaken in advising defendant that he could receive a sentence of natural life in prison, as defendant was charged with predatory criminal sexual assault against three separate victims and a natural life sentence is mandated for an accused found guilty of predatory criminal sexual assault against two or more persons. 720 ILCS 5/12-14.1(b)(1.2) (West 2008). Defendant replies that "there is nothing in these allegations to

[1] Subsequently, the General Assembly increased the sentencing range for predatory criminal sexual assault to 6 to 60 years in prison. Pub. Act 95-640 (eff. June 1, 2008)(amending 720 ILCS 5/12-14.1(b)(1)).

suggest, as the State does, that counsel referred to all three cases" because the charges against the three complainants were presented in three separate indictments. Defendant contends that the State's belief, that defendant's counsel was advising him of the maximum possible sentence on all three indictments, was "different than what [defendant's petition] alleged" and that the State's interpretation should be tested in an evidentiary hearing.

Defendant's argument fails because it is based on the presumption, not supported by the record, that his counsel told him if he did not plead guilty to one count of predatory criminal sexual assault, he would receive a life sentence after trial on that charge alone or on that indictment alone. Neither the postconviction petition nor the supporting affidavits of defendant and his mother asserted the claim that his counsel told him he could receive a life sentence on only that one count. At the time counsel advised defendant of the possible sentences, and until he entered his plea of guilty, there were three pending related multi-count indictments and defense counsel represented defendant on all three.

Defendant concedes that his counsel had a constitutional duty to properly advise him about the maximum possible sentence he faced, and that defense counsel who misinforms his client about the

consequences of pleading guilty or rejecting a plea offer does not provide effective assistance of counsel. On this point, we find instructive *People v. Curry*, 178 Ill 2d 509, 528 (1997), where our supreme court found that defense counsel was ineffective in failing to advise his client of the maximum possible sentence for multiple charges, one count of residential burglary and two counts of criminal sexual assault. The State had offered to dismiss two of the three charges and recommend a prison term of 4½ years if defendant pleaded guilty to one count of criminal sexual assault. In transmitting the plea offer, the defendant's counsel told him in error that if he went to trial, he would face concurrent prison terms of only four years if convicted of more than one charge. In fact, the defendant faced mandatory consecutive sentencing if he went to trial and were convicted on one count of criminal sexual assault and one or more of the remaining two counts. Upon counsel's recommendation, defendant rejected the plea offer, went to trial, was found guilty on all counts, and was sentenced to three consecutive four-year prison terms. The appellate court affirmed defendant's convictions and sentences, but the supreme court re*vers*ed, holding that "a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which

the defendant is charged." *Curry*, 178 Ill. 2d at 528.

Here, the offenses with which defendant was charged included multiple counts in three related indictments. Unless defendant agreed to the guilty plea terms, he could face trial on all three indictments, each of which charged defendant with predatory criminal sexual assault. A sentence of natural life imprisonment would have been mandated if defendant had been found guilty of predatory criminal sexual assault on two of the indictments pending against him. We believe defendant's trial counsel would have been derelict in his duty to his client if he had not advised defendant of the maximum sentence he could receive, namely, that he would be subject to a sentence of natural life in prison if he were found guilty on two or more of the three indictments.

Moreover, the circuit court's subsequent remarks at the hearing clarified that he could receive a term of years, including a possible extended term, if found guilty on the count to which he was pleading guilty. Defendant stated that he understood. After accepting the plea, the court correctly advised defendant that if he chose to file a motion to withdraw his guilty plea and were successful in doing so, went to trial, and were found guilty on the three cases, he "would receive a sentence of life imprisonment." Defendant responded that he understood. Defendant's claim of

ineffective assistance of counsel was rebutted by the record from the hearing and we conclude that his claim is not creditable. See *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007).

Defendant contends, however, that "[t]he fear of a life sentence was not dispelled when the trial judge told [defendant] he could receive an 'extended term,' without explanation." Defendant does not explain how the possibility of an extended term of years could be construed as a mandatory sentence of life in prison. Moreover, defendant's petition never claimed that his trial counsel's alleged misstatement of the possible sentence was compounded by a statement by the circuit court during his guilty plea and that he thought "extended term" meant a life sentence. A claim not included in a defendant’s postconviction petition cannot be raised on review. *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010).

Defendant's claim has no arguable basis in law where it is based on a meritless legal theory which is contradicted by the record. See *Hodges*, 234 Ill. 2d at 16. The report of proceedings from the hearing demonstrates defendant was correctly advised that he faced a term of years in prison for the count to which he pleaded guilty and a sentence of natural life in prison if he went to trial on all charges and were found guilty. Defendant's claim

has no arguable basis in fact where it is based on the fanciful factual allegation that his guilty plea to Count 1 of a 10-count indictment, one of three pending related indictments, was coerced by his trial counsel's advice that he would be exposing himself to life in prison if he went to trial and were convicted. This allegation is fanciful because his postconviction petition never alleged what he now contends on appeal, that his trial counsel advised him he could receive a life sentence if he were found guilty only on Count 1.

To prevail on his claim of ineffective assistance of trial counsel, defendant was required to show both that his counsel's performance fell below an objective standard of reasonableness and that the allegedly deficient performance prejudiced defendant. *Strickland*, 466 U.S. at 687-88. Here, it was not arguable that counsel's performance fell below that objective standard where counsel properly advised defendant of the maximum possible sentence he could receive if he went to trial on the charges. It was not arguable that defendant was prejudiced given the trial court's accurate statements concerning the possible sentences. Because defendant's petition failed to state the gist of a constitutional claim, we conclude that the petition, containing only issues having no arguable basis in law or in fact, was properly summarily

dismissed and the circuit court correctly found that the issues raised were frivolous and patently without merit.

Our conclusion compels us to reject defendant's second issue, his claim that the circuit court erred in finding his postconviction petition frivolous for purposes of assessing fees pursuant to section 22-105. Defendant contends the imposition of fees was inapplicable to him because his petition was not frivolous as that term is used in the statute.

The record reveals the circuit court assessed fees totaling $105 against defendant pursuant to section 27.2a of the Clerks of Courts Act, which authorizes court clerks to charge a court costs fee of up to $90 for filing a petition to vacate or modify a final court judgment (705 ILCS 105/27.2a(g)(2) (West 2008)) and a mailing fee of up to $15 (705 ILCS 105/27.2a(h) (West 2008)). The imposition of those assessments is authorized by section 22-105, which provides specifically for a mandatory assessment of court costs against a confined prisoner who files a postconviction petition which the court specifically finds to be "frivolous." Section 22-105(b) of the Code defines "frivolous" as meeting any or all of five criteria, one of which being that the petition lacks an arguable basis either in law or in fact. 735 ILCS 5/22-105(b)(1) (West 2008). The postconviction petition raised a number of

claims, which the circuit court carefully and thoroughly addressed and rejected as lacking an arguable basis in law or in fact and having no evidentiary support. The one claim defendant raises on appeal--that his trial counsel was ineffective in coercing defendant's guilty plea through misrepresentation of the possible sentences--we have found to be devoid of an arguable basis in law or in fact. Consequently, the court did not err in ordering payment of fees for the filing of a frivolous lawsuit.

Next, defendant argues that section 22-105 is unconstitutional in that it denied defendant's right to due process and violated his right to equal protection. The State responds, and defendant concedes, that this double challenge to the statute has been rejected in prior decisions of this court, specifically, in: *People v. Smith*, 383 Ill. App. 3d 1078, 1090-93 (2008); *People v. Carter*, 377 Ill. App. 3d 91, 98-106 (2007); *People v. Hunter*, 376 Ill. App. 3d 639, 646-48 (2007); and *People v. Gale*, 376 Ill. App. 3d 344, 358-63 (2007); see also *People v. Jarrett*, 399 Ill. App. 3d 715, 729 (2010). Defendant contends, however, that those cases were wrongly decided and he represents that the constitutionality of section 22-105 will be addressed by our supreme court in *People v. Alcozer*, No. 1-07-2092 (2009) (unpublished order under Supreme Court Rule 23), *appeal allowed*, 236 Ill. 2d 509 (2010), No. 108109

(oral argument held on January 11, 2011). At the time of this order, *Alcozer* is under advisement in the supreme court. Until such time as our supreme court declares section 22-105 unconstitutional, we decline to depart from the well-reasoned decisions of this court that have held that statutory provision constitutional. We conclude that the circuit court did not err by imposing fees on defendant for filing a frivolous postconviction petition.

Finally, defendant contends that the circuit court erred in imposing the $90 fee for filing a frivolous petition because section 22-105 allows the Department of Corrections to remove only court costs, not filing fees, from an inmate's trust account. This argument fails because the applicable statutes mandate that filing fees assessed after the filing of a frivolous petition be withdrawn from the prisoner's trust account. Section 22-105(a) specifically provides that where a prisoner files a court petition found by the court to be frivolous, "the prisoner is responsible for the full payment of filing fees and actual court costs." 735 ILCS 5/22-105(a) (West 2008). The Department of Corrections is authorized by section 3-12-5 of the Unified Code of Corrections (730 ILCS 5/3-12-5 (West 2008)) to disburse such court-ordered payments. "If the committed person files a lawsuit determined frivolous under Article

XXII of the Code of Civil Procedure, 50% of the compensation shall be used to offset the filing fees and costs of the lawsuit as provided in that Article until all fees and costs are paid in full." 730 ILCS 5/3-12-5 (West 2008). Consequently, the circuit court did not err in ordering the $90 filing fee to be removed from defendant's prison trust fund account.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.