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SECOND DIVISION
MARCH 31, 2011

1-09-1951

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. 02 CR 16461
)	
CURTIS WARD,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: Where defendant's first stage petition for postconviction relief provided no detail or explanation as to how his constitutional rights were violated, his petition was properly dismissed by the trial court as frivolous and patently without merit.

Defendant Curtis Ward appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). Defendant contends his petition adequately alleged a claim of ineffective assistance of counsel based on his trial counsel's failure to file a request for a speedy trial. For the following reasons, we affirm the judgment of the circuit court of Cook County.

On June 26, 2002, defendant was charged by information, and a jury trial was held on March 8, 2005. Over this period of 33 months, defendant was represented by three different assistant public defenders. The actions of his second attorney, Mary Ann Spillane (Attorney Spillane), are at issue

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in this appeal.

Defendant was charged with two counts of aggravated criminal sexual assault, two counts of home invasion, and two counts of violation of an order of protection. On July 7, 2002, he was appointed his first assistant public defender, Lynn Conner, who requested that defendant be evaluated for his fitness to stand trial. On October 3, 2002, the trial court received a report indicating that defendant was fit to stand trial.

The case was then continued by agreement multiple times to April 14, 2003, at which time defendant was being represented by Attorney Spillane, another assistant public defender. Next, the trial court granted the State's request that defendant submit buccal swabs for purposes of DNA comparison. The case was continued by agreement several times while defendant waited for the completion of discovery, mostly due to the State's waiting for the lab to process the DNA evidence.

On November 14, 2003, Attorney Spillane told the trial court, on behalf of the State, that the lab said that the DNA testing would be done by the week of December 22, 2003. At this point, defendant stated:

"Sir, I have been *** I was arrested on June 9th of 2002. And they waited ten months after then to ask me for D.N.A.. [*sic*] and an additional, they took the D.N.A. in April and to me, I feel like they've been procrastinating. This will be the 9th month and each month it's just be [*sic*] continued."

Defendant then complained that Attorney Spillane did not communicate with him enough. The trial court explained that there was little to discuss before discovery was completed and the matter was dropped.

The case was continued three more times to February 26, 2004, when the report from the crime lab was tendered to Attorney Spillane. Subsequently, three more continuances were granted, once to allow Attorney Spillane to review the documents, once to give defendant a chance to meet

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Attorney Spillane's co-counsel, and once to complete a final fitness evaluation before a trial date was set.

On May 18, 2004, after defendant was found competent to stand trial, defendant asked to enter a *pro se* motion for a new attorney, complaining that "[w]e just don't communicate." When the trial court declined to appoint a new attorney, defendant requested to proceed *pro se*, but withdrew his request after the trial court admonished him. Trial was set for July 26, 2004.

On June 24, 2004, the trial court addressed a letter it had received from defendant demanding copies of discovery documents and requesting a new attorney. The trial court denied both requests, but Attorney Spillane informed the trial court that she was leaving the public defender's office, and a new attorney, Lisa Boughton (Boughton), was appointed to represent defendant.

On July 26, 2004, the trial court addressed a *pro se* motion which it had received in the mail from defendant on July 6, 2004, demanding copies of several documents and complaining about his attorney. The trial court assumed defendant was complaining about Attorney Spillane and denied the motions. After this status date, several continuances were granted to allow Boughton, defendant's new counsel, to familiarize herself with the case.

On December 13, 2004, the trial court heard the State's motions *in limine*. On January 31, 2005, a trial date was set. On March 8, 2005, the jury was selected and trial began.

At the trial's conclusion, the jury found defendant guilty of two counts of aggravated sexual assault and guilty of violation of the order of protection. The trial court sentenced defendant to a total of 16 years in prison.

Defendant appealed, and this court affirmed defendant's convictions. *People v. Ward*, No. 1-05-1779 (2008) (unpublished order under Supreme Court Rule 23).

On April 17, 2009, defendant filed a *pro se* petition for postconviction relief asserting that he received ineffective assistance of trial counsel because, among other reasons, Attorney Spillane failed to file a motion for speedy trial as defendant requested. The entire allegation provides:

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"Petitioner states for the record that his counsel Mary Anne Spillane failed to file the speedy-trial motion as requested.

See cite as: *Strickland v. Washington* 466 U.S. 668"

In a written order, the court summarily dismissed defendant's petition, finding that his claim was waived because it was premised on the trial record, was merely a bald, conclusory allegation, and was frivolous and patently without merit.

On appeal, defendant contends that his petition adequately presented a claim of ineffective assistance of counsel based on trial counsel's failure to file a speedy trial motion as requested by defendant. Specifically, defendant argues that the record shows that 33 months passed from the date of his arrest to the commencement of jury selection, and that he disagreed with the perpetual continuances. We review the summary dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

As a threshold matter, the State contends that defendant forfeited review of this issue because his claim is premised entirely on the record and could have been raised on direct appeal. See *People v. Scott*, 194 Ill. 2d 268, 282-83 (2000). Here, however, defendant based his claim in his petition on his alleged request that Attorney Spillane file a motion for speedy trial. This allegation would not be forfeited for review because a client's communication with or request of his attorney may inherently be off the record and thus, not proper on direct appeal. *People v. Taylor*, 237 Ill. 2d 356, 372-73 (2010) (information outside the trial record cannot be considered on direct review and is proper in postconviction proceedings).

At the first-stage of proceedings, a postconviction petition will only be dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2002); *Brown*, 236 Ill. 2d at 184. A petition is considered frivolous or without merit only if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. At this stage, defendant's

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petition need only demonstrate the "gist" of a constitutional claim, which requires only a limited amount of detail. *Brown*, 236 Ill. 2d at 184. However, defendant is not excused "from providing any factual detail whatsoever on the alleged constitutional deprivation." *Id.*

A first stage petition claiming ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17.

Section 103-5(a) of the Code of Criminal Procedure of 1963 provides that "every person in custody for an alleged offense shall be tried *** within 120 days from the date he was taken into custody unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2002). A defendant has the burden to show a delay was not attributable to him. *People v. Kliner*, 185 Ill. 2d 81, 114 (1998). However, when defense counsel expressly agrees to a continuance, the delay generally may be attributed to the defendant and the speedy trial period will be tolled. *Id.* A defendant cannot succeed on an ineffective assistance of counsel claim based on his right to a speedy trial if there is no legal basis for arguing a speedy trial violation. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006).

Here, we find that defendant's petition lacked sufficient detail. Defendant bases his entire appeal on the allegation "that his counsel Mary Anne Spillane failed to file the speedy-trial motion as requested." He fails to provide any further detail explaining how Attorney Spillane's performance was deficient or how he was prejudiced. Most importantly, the petition does not state when defendant allegedly asked Attorney Spillane to file a speedy trial motion during the approximately 14 months she represented him. Without any supporting detail, defendant's petition fails to present the gist of a constitutional claim.

Moreover, defendant's petition was patently without merit. The record itself provides no factual basis to conclude that defendant would have prevailed on a speedy trial motion had one been filed. The majority of the continuances over the 33-month period were agreed to by defendant's

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various attorneys. Attorney Spillane agreed to continuances while DNA evidence was being processed, in order to read over discovery documents, to have defendant's fitness evaluated, and to allow defendant to meet her co-attorney. These delays can be reasonably attributed to defendant and, on their own, provide no factual or legal basis for defendant to have succeeded on a motion for speedy trial.

Defendant argues that his statement in open court on November 14, 2003, demonstrated that he did not agree to the continuances and therefore no subsequent continuances are attributable to him, relying on *People v. Pearson*, 88 Ill. 2d 210 (1981). However, in *Pearson*, the court found that defendant "clearly and convincingly" asserted his readiness and desire to go to trial when he directly objected to continuances stating "[f]orget the motion" and "I'm ready for trial." *Pearson*, 88 Ill. 2d at 215. In contrast to *Pearson*, here, defendant never requested to go to trial or directly objected to a continuance on the record, though he was present for all but one. Defendant's statements did not rise to the level of a speedy trial demand. *People v. Phipps*, 238 Ill. 2d 54, 66 (2010) (a speedy trial demand requires a defendant to make an affirmative statement on the trial record asking for trial). Based on the petition and the record, we find that the trial court properly dismissed defendant's petition.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.