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No. 3--09--0257

Order filed March 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14th Judicial Circuit,
)	Henry County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 07--CF--252
)	
LARRY GIRKIN,)	Honorable
)	Ted J. Hamer,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Wright concurred in the judgment.

ORDER

Held: The dismissal of the defendant's petition for postconviction relief as frivolous and patently without merit was affirmed on appeal because the defendant's conclusory allegation that he was not mentally competent when he pled guilty to two counts of predatory criminal sexual assault of a child was not supported by objective facts and was refuted by the record.

The defendant, Larry Girkin, pled guilty to two counts of predatory criminal sexual assault of a child (720 ILCS 5/12--14.1(a)(1) (West 2006)). The trial court sentenced the defendant

to 12 years' imprisonment on each count, to be served consecutively. The defendant did not file a direct appeal. Thereafter, the defendant filed a *pro se* petition for postconviction relief, which was dismissed by the trial court. The defendant appeals. We affirm.

The 17-year-old defendant confessed to sexually assaulting a 4-year-old girl while he was babysitting for her and her sister. He admitted placing the handle of butter knife in the child's vagina and anus. The transcript of the guilty plea shows that the defendant rejected the State's plea offer, and entered an open plea, because he wanted something different in terms of sentencing. When questioned regarding the plea, the defendant answered all of the trial court's questions. He denied taking, or that he was supposed to be taking, any psychotropic medication. The presentence investigation report indicates that the defendant described his mental health status as good and denied any depression. The report also notes that the defendant had threatened suicide three times within the three months preceding the sexual assault.

The trial court sentenced the defendant to two consecutive 12-year terms. The defendant did not appeal, and he did not file any timely postsentencing motions.

Eighteen months after sentencing, the defendant filed three *pro se* motions: a petition for postconviction relief, a motion to

suppress his confession, and a motion to withdraw his guilty plea. The postconviction petition alleged that the defendant was sentenced following a bench trial and that his constitutional rights were denied because he was not mentally competent. It further alleged that he began receiving medication to help with depression and suicidal thoughts after he was sentenced. The motion to withdraw the plea more specifically alleged that the defendant was not mentally competent to enter a plea. The trial court did not address the motion to suppress, denied the motion to withdraw as untimely, and denied the petition for postconviction relief. The trial court found that the petition stated the gist of a constitutional claim, but the facts in the record specifically refuted the defendant's claim. Thus, the trial court dismissed the petition as frivolous and patently without merit. The defendant appealed the dismissal.

The Post-Conviction Hearing Act (the Act) provides defendants with a means of challenging their convictions for constitutional violations. 725 ILCS 5/122--1 *et seq.* (West 2008); *People v. Coleman*, 183 Ill. 2d 366 (1998). At the first stage of the adjudication of a postconviction petition, the trial court determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122--2.1(a)(2) (West 2008). To survive dismissal at the first stage, the defendant need only present enough facts to make out a claim that is arguably

constitutional, *i.e.*, the gist of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1 (2009). However, this pleading threshold does not exempt the *pro se* defendant from providing any factual detail regarding the alleged constitutional violation. *Hodges*, 234 Ill. 2d 1. The Act requires that supporting affidavits, records, or other evidence either be attached to the petition, or their absence be explained. 725 ILCS 5/122--2 (West 2008). The defendant must set forth some facts that can be corroborated and are objective in nature. *Hodges*, 234 Ill. 2d 1. Keeping that pleading threshold in mind, a petition may be dismissed as frivolous or patently without merit only if it has no arguable basis either in law or in fact; that is, if it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. A legal theory that is completely contradicted by the record is meritless. *Hodges*, 234 Ill. 2d 1. We review a trial court's first stage dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239 (2001).

The petition alleges that the defendant was sentenced following a bench trial, that he was not mentally competent, and that he was started on medication in prison to help with depression and suicidal thoughts. The trial court found that this language stated the gist of a constitutional claim, but that the record specifically refuted the defendant's claim that he was

not mentally competent when he entered his guilty plea. We agree. Even if the petition arguably pleads enough facts to support a claim that the defendant was not mentally competent at the time he entered his plea, the record completely contradicts that claim. Although the record indicates that the defendant had some depression and suicidal thoughts in the few months leading up to the offense, there is no indication that anyone in the trial court questioned the defendant's mental competency. The transcript from the guilty plea belies the conclusion that the defendant was incapable of understanding the proceedings or was not capable of assisting in his own defense. See *People v. Herai*, 62 Ill. 2d 329 (1976) (a defendant is competent to plead guilty if he is capable of understanding the proceedings and assisting in his own defense). The transcript indicates that the defendant voluntarily rejected the State's plea offer because he did not like the sentence aspect of the offer. The defendant answered all of the trial court's questions appropriately. Since the conclusory allegation in the petition that the defendant was not mentally competent is not supported by any objective facts, and is refuted by the record, we affirm the dismissal of the petition.

For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed.

Affirmed.