

NOTICE
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2011 IL App (4th) 100916-U

Filed 12/23/11

NO. 4-10-0916

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
CORNELIUS M. TAPSCOTT,)	No. 06CF212
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where any appeal in this case would be frivolous, we grant the motion to withdraw as counsel filed by the office of the State Appellate Defender (OSAD). We agreed any appeal would be frivolous because defendant's claims were barred by *res judicata* and failed to set forth a claim of ineffective assistance of counsel.

¶ 2 In May 2006, defendant, Cornelius M. Tapscott, pleaded guilty to criminal sexual assault, and the trial court sentenced him to 15 years in prison. This court affirmed his conviction and sentence on direct appeal. In October 2010, defendant filed a *pro se* postconviction petition, which the trial court dismissed as frivolous and patently without merit.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending an appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In February 2006, a grand jury indicted defendant on two counts of aggravated criminal sexual assault (counts I and II) (720 ILCS 5/12-14(a)(1), (a)(8) (West 2004)). In April 2006, the State charged defendant by information with the Class 1 felony of criminal sexual assault (count III) (720 ILCS 5/12-13(a)(2) (West 2004)).

¶ 6 In April 2006, defendant pleaded guilty to count III. In May 2006, the trial court sentenced defendant to 15 years in prison. Thereafter, the public defender filed a motion to reconsider sentence. In June 2006, defendant filed a *pro se* petition to withdraw his guilty plea and vacate his sentence. In August 2006, the court denied the motions. On appeal, this court remanded the cause based on counsel's failure to comply with Supreme Court Rule 604(d) (210 Ill. 2d R. 604(d)). *People v. Tapscott*, No. 4-06-0680 (July 30, 2007) (unpublished order under Supreme Court Rule 23).

¶ 7 In December 2007, defense counsel filed a certificate in compliance with Rule 604(d). In January 2008, the trial court denied defendant's motions. On direct appeal, defendant argued the court erred in not *sua sponte* ordering a fitness hearing after the presentence investigation report was issued and, in the alternative, defense counsel was ineffective for not requesting a fitness hearing. This court affirmed defendant's conviction and sentence. *People v. Tapscott*, 386 Ill. App. 3d 1064, 899 N.E.2d 597 (2008).

¶ 8 In October 2010, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2010)). Defendant alleged the appellate court erred in not finding error in the trial court's failure to *sua sponte* order a fitness hearing. He also alleged trial counsel was ineffective for failing to obtain medical reports of the assault victim.

¶ 9 The trial court dismissed the petition, finding it frivolous and patently without merit. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, OSAD has filed a motion to withdraw as counsel and has included a supporting memorandum pursuant to *Finley*. Proof of service has been shown on defendant. This court granted defendant leave to file additional points and authorities on or before November 25, 2011. None have been filed. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be frivolous.

¶ 12 The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed 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, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 13 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court

may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2010). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 14

A. Fitness Claims

¶ 15 In his postconviction petition, defendant argued this court erred in not finding error where the trial court did not *sua sponte* order a fitness hearing. Defendant also argued trial counsel was ineffective by not securing an independent psychological analysis. However, the issues regarding the trial court's ruling and counsel's effectiveness on these matters were addressed on direct appeal. See *Tapscott*, 386 Ill. App. 3d at 1078, 899 N.E.2d at 609-10. As "any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*" (*Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073), defendant's petition was appropriately found frivolous and patently without merit. See *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 616 (2005).

¶ 16

B. Ineffective-Assistance-of-Counsel Claim

¶ 17 Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In the petition, a defendant "must show counsel's performance was deficient and that prejudice resulted from the deficient performance." *Brown*, 236 Ill. 2d at 185, 923

N.E.2d at 754. A petition alleging ineffective assistance of counsel may not be dismissed at the first stage "if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754.

¶ 18 "It is well established that a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545, 809 N.E.2d 103, 104 (2004). "However, a defendant may attack the voluntary character of a plea by showing that it was based on ineffective assistance of counsel." *People v. Sharifpour*, 402 Ill. App. 3d 100, 115, 930 N.E.2d 529, 544 (2010).

¶ 19 In the case *sub judice*, defendant alleged trial counsel induced him to plead guilty and failed to obtain medical reports of the rape victim to show the sex act "was more consensual than [defendant] forcing himself on her." Defendant also argued counsel should have conducted an investigation into whether the victim suffered from rape trauma syndrome.

¶ 20 Here, the State alleged defendant committed an act of sexual penetration, knowing the victim was unable to give knowing consent. 720 ILCS 5/12-13(a)(2) (West 2004). The trial court noted neither force nor the threat of force was an element of the offense charged. Also, the court noted it had no authority to order a mental examination of the victim. See 725 ILCS 5/115-7.1 (West 2010). Defendant's petition failed to state the gist of a claim of ineffective assistance of counsel. Accordingly, as any appeal in this matter would be frivolous, we grant OSAD's motion to withdraw.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial

court's judgment.

¶ 23 Affirmed.