

NOTICE
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2011 IL App (4th) 100508-U
NOS. 4-10-0508, 4-11-0140 cons.

Filed 10/18/11

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
KENNETH Z. ALLEN,)	No. 09CF818
Defendant-Appellant.)	
)	Honorable
)	Harry E. Clem,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant's postconviction petition was frivolous and patently without merit, the trial court did not err in summarily dismissing it.

¶ 2 In February 2010, defendant, Kenneth Z. Allen, pleaded guilty to one count of second degree murder, and the trial court sentenced him to 18 years in prison. In May 2010, defendant filed an amended motion to withdraw guilty plea and vacate sentence, which the court denied. In October 2010, defendant filed a postconviction petition, which the court dismissed as frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2009, the State charged defendant by information with two counts of first

degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), alleging he, without legal justification and with the intent to kill or do great bodily harm to Kenneth Nolan, personally discharged a firearm in Nolan's direction, thereby causing his death. The State later charged defendant with one count of second degree murder (720 ILCS 5/9-2(a)(2) (West 2008)), alleging he knowingly killed Nolan by shooting him with a gun, and at the time of the killing he unreasonably believed the circumstances to be such that, if they existed, would justify the killing.

¶ 6 In February 2010, defendant pleaded guilty to second degree murder. At the guilty-plea hearing, defendant indicated he understood the sentencing range was between 4 and 20 years for the Class 1 felony. As part of the plea agreement, the State agreed to dismiss the two counts of first degree murder and recommend an 18-year sentence. Defendant indicated that was his understanding of the agreement. He also stated he had an opportunity to discuss his plea with his attorney and he was not threatened, intimidated, or forced to plead guilty.

¶ 7 According to the State's factual basis, defendant approached the victim at an intersection in Urbana. He then shot Nolan, causing his death. The State indicated defendant believed he was acting in self-defense at the time of the shooting but his belief was unreasonable.

¶ 8 The trial court found defendant's guilty plea to be knowing and voluntary. The court concurred in the State's sentencing recommendation and sentenced defendant to 18 years in prison. The court also dismissed the first-degree-murder counts.

¶ 9 In March 2010, defendant sent a letter to the trial court, indicating he would like to appeal his sentence. The court treated the letter as a motion to withdraw guilty plea and appointed counsel to represent defendant.

¶ 10 In May 2010, appointed counsel filed an amended motion to withdraw guilty plea and vacate sentence. Therein, defendant claimed his prior attorney led him to believe the maximum penalty for second degree murder was 15 years, counsel did not properly investigate potential defenses and interview witnesses, and defendant did not knowingly and voluntarily enter his plea.

¶ 11 In June 2010, defendant filed two *pro se* letters with the trial court. In one letter, he claimed he was not aware of what was going on at the plea hearing or the consequences of his actions. He stated he had a learning disability and "a mental disturbed problem."

¶ 12 In July 2010, the trial court conducted a hearing on the amended motion to withdraw guilty plea and vacate sentence. Defendant testified he has a learning disability. At some point in time, he had a psychological evaluation and had been involuntarily committed for wanting to hurt himself. He was prescribed Paxil, then Haldol, and then a drug he could not remember. He claimed to have been placed on medication in the seventh grade, but he stated he was not current on his medications when he pleaded guilty. On cross-examination, defendant stated he was not on any medication in prison for any diagnosed mental disorders, although a doctor at a Chicago hospital prescribed him medication in 2008.

¶ 13 George Vargas, defendant's attorney at the guilty-plea hearing, testified he met with defendant periodically before trial and never had any reason to believe he did not understand what was being discussed. Defendant did not mention receiving any mental-health treatment in the past or that he was taking medication for his mental health. Vargas stated plea negotiations picked up near the time of trial, and defendant asked him to request a 15-year sentence for a plea to second degree murder. The State responded with a counteroffer of 20

years. Immediately prior to jury selection, the State offered an 18-year-sentence recommendation. Defendant talked to his family on the phone and then agreed to accept the State's offer.

¶ 14 The trial court denied the motion. The court found defense counsel explored possible defenses and interviewed witnesses. Further, the court stated the evidence did not indicate Vargas demanded defendant to accept the plea. The court also stated nothing at the guilty-plea hearing led the court to believe defendant did not understand what he was doing or the consequences of his actions. A timely notice of appeal was filed.

¶ 15 In October 2010, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2010)). Defendant alleged his due-process rights were violated at the hearing on the motion to withdraw guilty plea when improper impeachment evidence was introduced through the testimony of Attorney Vargas and when Vargas violated the attorney/client privilege. Defendant also claimed due process was denied during the hearing when appointed counsel failed to call witnesses who could have testified to his medical condition and to how his prescribed medication affected his ability to comprehend.

¶ 16 In December 2010, the trial court dismissed the petition as frivolous and patently without merit. The court noted, in part, that defendant did not identify any witnesses who could testify to his medical condition or medications and did not attach any exhibits to his petition that would substantiate the existence of any witness or the testimony that witness might have to offer. This court granted defendant leave to file a late notice of appeal and consolidated the appeals.

¶ 17 **II. ANALYSIS**

¶ 18 Defendant argues the trial court erred in summarily dismissing his postconviction

petition. We disagree.

¶ 19 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 20 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. 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.

¶ 21 "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).

¶ 22 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.

¶ 23 Although defendant raised three issues in his *pro se* petition, he only raises one issue now on appeal. Defendant argues he stated the gist of a claim that counsel was ineffective at the hearing on the motion to withdraw for failing to call witnesses to describe how his psychiatric condition and absence of medication affected his ability to understand the nature and consequences of his guilty plea.

¶ 24 In *Brown*, 236 Ill. 2d at 180, 923 N.E.2d at 751, the defendant was found guilty of attempted first degree murder of a peace officer. During the sentencing hearing, the defendant read a statement that he had intended suicide by police and was taking psychotropic medication.

Brown, 236 Ill. 2d at 180, 923 N.E.2d at 751. Defense counsel informed the trial court that he was unaware of the defendant taking medication. *Brown*, 236 Ill. 2d at 180, 923 N.E.2d at 752. The court found nothing indicated a *bona fide* doubt of the defendant's fitness to stand trial, and treatment with psychotropic medication, standing alone, did not raise a presumption of unfitness. *Brown*, 236 Ill. 2d at 180, 923 N.E.2d at 752.

¶ 25 In his postconviction petition, the defendant alleged trial counsel was ineffective for failing to request a fitness hearing. *Brown*, 236 Ill. 2d at 181, 923 N.E.2d at 752. He claimed he told his attorney that he was taking psychotropic medication before and after his arrest to treat bipolar disorder and depression. *Brown*, 236 Ill. 2d at 181, 923 N.E.2d at 752. He also alleged medication he was taking during the trial affected his ability to comprehend what was happening. *Brown*, 236 Ill. 2d at 181, 923 N.E.2d at 752. The defendant attached medical records to his petition and provided affidavits from his mother and aunt attesting that his mother informed counsel that the defendant was taking medication to treat his bipolar disorder. *Brown*, 236 Ill. 2d at 181, 923 N.E.2d at 752. The trial court summarily dismissed the petition.

¶ 26 In considering whether the allegations in the defendant's petition set forth an arguable basis in fact for his claim of ineffective assistance of counsel, the supreme court focused on the allegations of his use of psychotropic medications, his suicide attempts, and lack of understanding of the proceedings, as well as the attached medical records and affidavits that corroborated the allegations. *Brown*, 236 Ill. 2d at 185-86, 923 N.E.2d at 755. The court found the allegations could not be characterized as fantastic or delusional and sufficiently stated a claim of a constitutional violation. *Brown*, 236 Ill. 2d at 186, 923 N.E.2d at 755.

¶ 27 In the case *sub judice*, we consider whether the allegation in the petition set forth

an arguable basis in fact for defendant's constitutional claim of ineffective assistance of counsel. In his petition, defendant's only support for the claim was his testimony at the hearing on the motion to withdraw, where he stated he had previously had a psychological evaluation, had taken Paxil and Haldol, and was unable to work because of a disability. However, defendant's testimony does not specify the time period when he had psychological problems or when or how long he took Paxil and Haldol. In contrast to the defendant in *Brown*, he did not attach any affidavits of witnesses he might have called to testify to his condition or include any of his medical records. He also did not explain the absence of any documents that could have corroborated his allegations. Defendant did not allege any of these circumstances impacted the validity of his plea.

¶ 28 Even taking the allegations of the petition as true and liberally construing them (*Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754), defendant must still plead specific facts to support his claim (*People v. Hill*, 308 Ill. App. 3d 691, 699, 732 N.E.2d 578, 585 (1999)). Here, however, defendant's unsupported and speculative allegations require too great a leap to find he asserted a constitutional claim. Nothing indicates defendant was on psychotropic medication, to his detriment, at the time of the plea hearing or that he needed the medication, for his benefit, to understand the proceedings. Thus, he failed to clearly set forth the respects in which his constitutional rights were violated. We conclude the petition was properly found to be frivolous and patently without merit for the lack of an arguable factual basis.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed.