

NOTICE

Decision filed 04/19/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0690

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 07-CF-270
	)	
DOUGLAS McELROY,	)	Honorable
	)	Patrick J. Hitpas,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE SPOMER delivered the judgment of the court.  
Justices Welch and Wexstten concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held:* Where the defendant's allegations are contradicted by the record, the postconviction petition is without an arguable basis in law or fact and the circuit court's dismissal of the postconviction petition is affirmed.

The defendant, Douglas McElroy, appeals the circuit court's dismissal of his postconviction petition. He requests that this court reverse the circuit court's dismissal and remand the cause for the appointment of counsel and other further proceedings. For the following reasons, we affirm the circuit court's dismissal of the defendant's postconviction petition.

BACKGROUND

On January 9, 2008, the defendant pled guilty to criminal sexual assault in exchange for the State dismissing two other counts and recommending a 10-year sentence of imprisonment. At the plea hearing, the court accepted the terms of the negotiated plea agreement.

On November 6, 2009, the defendant filed a *pro se* postconviction petition. In the

petition, the defendant argued that he was not adequately represented by counsel. He alleged *inter alia* (1) that the public defender told him that he would get better healthcare in prison, (2) that the public defender told him that an investigator would come speak to his family and friend and the investigator never appeared, (3) that the public defender told him he could not get probation and then he was later told he was eligible for up to four years of probation, (4) that the public defender did not allow his daughter to be present at meetings and told her that he could not receive a transcript without an attorney, and (5) that he told the public defender during the plea hearing that he did not want to plead guilty. The defendant also alleged in his petition that the county jail and prison had not administered his medicine to him and that officials at the prison had questioned him about other cases that he was not involved in. The defendant asked that the court lower the charge against him and reduce his sentence. The postconviction petition was supported by affidavits of family and friends that asserted that the investigator did not speak with them. The court dismissed the petition, stating that "the petition was frivolous and patently without merit." The defendant filed this timely appeal.

#### ANALYSIS

We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). "[A] *pro se* petition seeking postconviction relief under the [Post-Conviction Hearing] 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 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. An example of this is an allegation that is completely contradicted by the record. *Id.* The Illinois Supreme Court has stated, "[U]se of the term 'gist' describes what the defendant must allege at the first stage; it is not the legal standard used by the circuit court to evaluate the petition."

*Id.* at 11. The postconviction petition must also have attached affidavits, records, or other supporting evidence, or it must state an explanation for the absence of the supporting documents. 725 ILCS 5/122-2 (West 2006).

In the defendant's postconviction petition, he asks the court to lower his charge and reduce his sentence. However, where a plea is negotiated, the defendant cannot simply ask for a reconsideration of the sentence. *People v. Linder*, 186 Ill. 2d 67 (1999). Instead, he must file a motion to withdraw his guilty plea and vacate the judgment. *Id.* Therefore, to ultimately obtain the requested relief, the defendant must have his guilty plea withdrawn. The general rule as stated by the Illinois Supreme Court long ago is as follows:

"Where it appears that the plea of guilty was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel or the State's Attorney or someone else in authority, or the case is one where there is doubt of the guilt of the accused, or where the accused has a defense worthy of consideration by a jury, or where the ends of justice will be better served by submitting the case to a jury, the court should permit the withdrawal of the plea of guilty and allow the accused to plead not guilty." *People v. Morreale*, 412 Ill. 528, 531-32 (1952).

Here, the defendant claims he is entitled to relief because plea counsel did not stop to acknowledge the defendant's alleged claim that he did not want to plead guilty, resulting in ineffective assistance of counsel and "implications of the voluntariness of the guilty plea."

We review claims of ineffective assistance under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To determine whether a defendant has been given ineffective assistance of counsel, the defendant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that deficient performance prejudiced the defense. *Id.* at 687. The defendant bears the burden of overcoming a strong presumption in favor of finding that counsel's advocacy was effective. *People v. Richardson*,

401 Ill. App. 3d 45, 47 (2010). In order to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

On appeal, the defendant solely focuses on the allegation that he told his counsel at the plea hearing that he did not want to plead guilty. We note that in the defendant's postconviction petition there were several other factual scenarios in which he asserted that he did not receive effective assistance of counsel. Those claims have been abandoned on appeal and are thus forfeited. See *Bunting v. Progressive Corp.*, 348 Ill. App. 3d 575, 581 (2004).

In the instant case, we find that the defendant has failed to provide support to establish the second prong of the *Strickland* test. Even assuming that the defendant's allegations are true, the record as a whole shows that the defendant voluntarily continued in pleading guilty to the judge. The defendant continued to answer affirmatively to all the questions asked by the judge and continued throughout the admonishments to answer that he understood the rights he was relinquishing. He had ample opportunity to relay to the judge the same concern that he allegedly relayed to his plea counsel. Therefore, the record contradicts the defendant's claim that the ineffective assistance of counsel "implicates whether his plea was entered knowingly and intelligently."

Moreover, the defendant did not file a motion to withdraw his guilty plea or attempt to file a direct appeal. Furthermore, the defendant's brief fails to provide any authority to support his claim that this factual scenario should be considered ineffective assistance of counsel. For the court to assume that the outcome would have been different had the defendant's plea counsel stopped and consulted with the defendant would be mere speculation, while the *Strickland* test requires a more concrete analysis that there would be a reasonable probability of a different outcome. Thus, even if we assume for the purposes

of argument that plea counsel did commit error during the plea hearing by not stopping and consulting with his client, we conclude that the defendant has not established a reasonable probability that the outcome of the plea hearing would have been different.

#### CONCLUSION

We conclude that the defendant's postconviction petition had no arguable basis in law or fact and was correctly found by the circuit court to be frivolous and patently without merit.

For the foregoing reasons, we affirm the circuit court's dismissal of the defendant's postconviction petition.

Affirmed.