

No. 1-10-1182

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	Nos. 06 C4 41101
v.)	08 CR 18288
)	08 CR 18289
)	08 CR 18326
)	
HARRY POWELL,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 **Held:** Where defendant's *pro se* postconviction petition presented no facts to support his claim that the trial court's participation in plea negotiations rendered his plea involuntary, the trial court did not err in summarily dismissing his petition; and, where the trial court did not violate Supreme Court Rule 402(d), defendant's plea was not void.

¶ 2 Defendant Harry Powell 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 2010). On appeal, defendant contends that his petition sufficiently alleged an arguable claim that the trial court improperly injected itself into defendant's plea negotiations and failed to maintain a neutral

stance, thereby coercing defendant to plead guilty. In the alternative, defendant asserts that his plea was void. We affirm.

¶ 3 Defendant was charged with four crimes based on separate incidents, including three burglaries, one from 2006 (06 C4 41101) and two from 2008 (08 CR 18288 and 08 CR 18289), and a 2008 residential burglary (08 CR 18326). On August 6, 2009, the court told defendant that his attorney had indicated defendant wanted the trial court to participate in a conference pursuant to Supreme Court Rule 402(d) (eff. July 1, 1997). The court explained that it would participate in the conference with the State and defense counsel. It then said, "I next will offer you a penalty in exchange for a plea of guilty, except if you refuse to accept the penalty, that will not be a good reason for you to get another judge." Defendant said he understood. After the conference, defense counsel informed the trial court that he had conveyed the offer to defendant.

¶ 4 On September 14, 2009, the State remarked on the record that the trial court "offered [defendant] 10 plus 20." On September 18, 2009, defendant asked the court whether he could have a TASC evaluation. The trial court replied:

"No. No. Now, here is the deal. I spoke at a 402 conference. I heard from the government. I heard from your attorney. I weighed the mitigation and aggravating factors. On all of these cases your penalty will be 20 years.

You are going to do 20 years on these three recent cases, and you are going to do a ten-year sentence on the old case. They are going to run at the same time. The offer will never be less. It will be more, if certain things happen other than your acceptance of this offer. Or we can go to trial as soon as Monday if you don't want to accept the offer on any one of these cases that the government elects on."

Defendant asked to go to trial on one of the cases and the trial court set the trial for September 21, 2009.

¶ 5 On September 21, 2009, defense counsel informed the trial court that defendant wished to take the offer. The State explained that, due to his criminal background, defendant was Class X mandatory for all four cases. The court admonished defendant about the possible penalties for each offense, after which defendant pled guilty in all four cases. The court also ensured that defendant was pleading guilty with an understanding of the rights he was giving up, and that his plea was voluntary and free of force or threat. After factual bases for each plea were presented by the State, the court accepted defendant's guilty pleas.

¶ 6 At the sentencing hearing, the State presented in aggravation defendant's extensive criminal history and in mitigation, defense counsel rested on the mitigating factors presented at the Rule 402 conference. The State recommended 30 plus 25 years. The trial court sentenced defendant to 10 years for his 2006 case to run consecutive to three concurrent 20-year terms for each of the 2008 cases.

¶ 7 Defendant did not file postplea motions or pursue a direct appeal.

¶ 8 In February 2010, defendant filed this *pro se* postconviction petition. In his petition, he alleged, *inter alia*, the trial court abused its discretion by: (1) violating defendant's due process rights by denying him a TASC evaluation; (2) giving defense counsel only three days to prepare for trial; and (3) imposing an excessive sentence.

¶ 9 In support of his petition, defendant attached his own affidavit in which he averred that the court offered him 10 years after the Rule 402 conference, then denied defendant's request for a drug evaluation. He also averred that:

"Later the State [offered] 25yrs, [defense counsel] then insisted on a 402 conference, where [the trial court] then [offered] 30 years. ***

[The trial court] asked me on September 18th 2009 what was my decision going to be, 30yrs or go to trial? Then I was left to make decision in a short time, and I asked him which case can I go to trial and my attorney picked.

Then my attorney told me if I don't take 30yrs I'll get 50yrs. He said if I agree to take 30yrs, he would go back up to court and tell the court that I would accept plea instead of going to trial ***. So then I agreed to plea."

¶ 10 Nine days after defendant filed his petition, the trial court dismissed it as frivolous.

¶ 11 In March 2010, defendant filed a "Motion for Reconsideration" of the denial of his *pro se* postconviction petition which the trial court denied in April 2010. Defendant has appealed.

¶ 12 On appeal, defendant first contends that his plea was involuntary because the trial court became improperly involved in the plea proceedings. Specifically, defendant argues that he was coerced into pleading guilty because the plea offer came from the trial court instead of the State and because the court told him if he did not accept the plea offer, his sentence would be greater.

¶ 13 Initially, the State asserts that defendant has forfeited his claim on appeal because it was not raised in his original postconviction petition. See *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (holding that a claim not raised in the postconviction petition could not be raised for the first time on appeal). We acknowledge defendant did not specifically allege in his petition that he was coerced to plead guilty due to the trial court's involvement in the plea proceedings. However, in addition to expressing discontent with the trial court's actions, defendant also averred in his supporting affidavit that the trial court made him the offer of a 30-year prison sentence in exchange for his guilty plea, part of the basis for his claim on appeal. We find that, liberally construed, defendant's *pro se* petition alleged sufficient facts to support his argument on appeal. See *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (*pro se* petitions should be liberally construed in favor of the defendant). Therefore, we will consider defendant's claim.

¶ 14 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). At the first stage of proceedings, a petition will be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West

2010); *Brown*, 236 Ill. 2d at 184. Frivolous or patently without merit means the petition 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, a defendant's petition need only demonstrate the "gist" of a constitutional claim. *Brown*, 236 Ill. 2d at 184.

¶ 15 Under Rule 402, a trial court may not initiate plea negotiations. Ill. S. Ct. R. 402(d) (eff. July 1, 1997). However, the rule does contemplate the trial court's limited participation in negotiations. *Id.*; *People v. Smith*, 406 Ill. App. 3d 879, 888 (2010). Whether the trial court's participation in the plea negotiations rendered a plea involuntary must be decided on a case-by-case basis. *Smith*, 406 Ill. App. 3d at 888. To show that a plea was rendered involuntary due to the trial court's actions, a defendant must show facts that reasonably demonstrate either the court departed from its judicial function and that its participation in negotiations improperly influenced the defendant to plead guilty or the defendant reasonably believed he could not receive an impartial trial and therefore had no choice but to accept the plea. *Id.*

¶ 16 Here, defendant has failed to show that the trial court arguably coerced his plea by its participation in plea negotiations. Rule 402 does not prohibit the trial court from suggesting a sentence it would impose if the defendant were to plead guilty, and we see nothing inherently coercive about a court doing so.¹ The record shows that defendant initiated the plea conference and was aware the trial court would be participating. Notably, a defendant may plead guilty without any promises from the State, in which case the trial court has full discretion to determine an appropriate sentence after conducting a sentencing hearing. *People v. Linder*, 186 Ill. 2d 67,

¹ We observe that Rule 402 recently has been amended, effective July 1, 2012. As amended, the rule explicitly states that "at the end of the conference, the judge may make a recommendation as to what an appropriate sentence would be" and "the defendant or the prosecutor is free to accept or reject the judge's recommendation." Ill. S. Ct. R. 402(d)(1) (eff. July 1, 2012).

77 (1999) (Freeman, C.J., specially concurring); see also *People v. Absher*, 242 Ill. 2d 77, 87 n.3 (2011) (noting that an "open" plea consists of a defendant pleading guilty without having received any promises from the State). In the present case, as the sentence ultimately came from the trial court, it is clear the State and defendant failed to reach an agreement as to the sentence but instead agreed only that defendant would plead guilty to his crimes. In addition, despite language that the trial court made an "offer" of 10 plus 20 years, the record indicates that the trial court simply articulated its position that if defendant accepted the plea offer from the State, it would impose a sentence of 10 plus 20 years, which, at best, was information for defendant to consider when deciding whether to plead guilty. This inference is further supported by the State's recommendation for 30 plus 25 years after the sentencing hearing.

¶ 17 There is nothing coercive about the trial court telling a defendant he may receive a greater sentence if he did not accept the guilty plea. This court has observed:

"Should petitioner persist in being tried on his plea of not guilty he must necessarily expect the potential of a more severe sentence than the sentence independently recommended by the trial judge, because the recommended sentence was in consideration of his plea of guilty and, should petitioner persist in his plea of not guilty, the consideration for the recommended sentence has failed; were a more severe sentence not potentially involved, the so-called plea bargain would be illusory, because petitioner would have received no consideration for the entry of his plea of guilty." *People v. Bannister*, 18 Ill. App. 3d 154, 158 (1974).

Nothing in the trial court's statement suggested that defendant would receive a greater sentence as punishment for declining the plea and therefore we read the court's statement as merely factual in nature and not at all coercive. *Cf. People v. Greene*, 102 Ill. App. 3d 933, 937 (1981) (the "[m]ere fact" that defendant received a greater sentence after trial than the sentence he was offered before trial if he were to plead guilty did not indicate he was punished for insisting on

going to trial). Even after the trial court informed defendant he could receive a greater sentence if he did not accept the guilty plea, defendant indicated his desire to go to trial on one of his cases and a trial date was set. According to his affidavit, defendant changed his mind and ultimately chose to plead guilty based on the advice of *his own attorney*.

¶ 18 To the extent that defendant relies on *People v. Garibay*, 366 Ill. App. 3d 1103 (2006), we note that in *Garibay*, the court was determining whether the defendant had complied with Supreme Court Rule 604(d) (eff. July 1, 2006). *Garibay*, 366 Ill. App. 3d at 1106-07. Thus, we find *Garibay* to be inapposite to the case at hand. Accordingly, under the present circumstances, we find defendant failed to present an arguable claim that his guilty plea was coerced by the trial court. The trial court properly dismissed his petition.

¶ 19 Defendant next contends that, in the alternative, his guilty plea was void because the trial court lacked the authority to make a plea offer.

¶ 20 A judgment is void instead of voidable where the court entering the judgment either lacked jurisdiction over the parties or subject matter, or the court exceeded its statutory authority. *Smith*, 406 Ill. App. 3d at 887. A violation of Rule 402 does not render the plea void. *Id.* Specifically, this court has held, "a violation of Rule 402, a procedural rule, does not defeat the trial court's jurisdiction to enter convictions based on a defendant's pleas and such violation, even if constitutional in dimension, renders a conviction merely voidable." *Id.* Furthermore, contrary to defendant's assertion that "the trial court has no authority to extend an offer of an agreed sentence to a defendant" under Rule 402(d), there is nothing in the language of Rule 402(d) that prohibits the trial court from suggesting a sentence during a properly commenced plea conference. Therefore, defendant's assertion is unpersuasive.

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

¶ 22 Affirmed.