

No. 1-10-1246

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 CR 9041
)	
JESUS GONZALEZ,)	The Honorable
)	Diane Cannon Gordon,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Where trial counsel was not unreasonable for allegedly failing to inform defendant that deportation may be a potential collateral consequence of a conviction following a trial, we affirm the circuit court's judgment summarily dismissing his post-conviction petition.

¶ 2 Defendant Jesus Gonzalez appeals from the summary dismissal of his 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 trial counsel was ineffective for failing to inform him of the deportation consequences of a conviction. We affirm.

¶ 3 The record shows that defendant was charged with numerous counts of sexual assault and kidnaping based on allegations of sexual contact with the victim, B.G., an 11-year-old boy. Prior

to trial, defendant waived his right to a jury trial, and, following a bench trial, he was found guilty of two counts of predatory criminal sexual assault, and one count of aggravated criminal sexual assault. He was sentenced to an aggregate term of 45 years' imprisonment. Defendant did not file a direct appeal.

¶ 4 On January 13, 2010, defendant, through counsel, filed a post-conviction petition alleging, in pertinent part, that trial counsel failed to advise him that he could face deportation from the United States upon being convicted of the alleged charges. Defendant maintained that had he understood the deportation consequences of a conviction, he would not have waived his right to a jury trial. He further explained that his failure to attach corroborating documentation of his allegations should be excused because the only affidavit he could provide, other than his own statement, was that of his trial attorney. Defendant subsequently filed, through counsel, his first amended petition for post-conviction relief. Defendant alleged the same grounds for relief as his initial petition, and also attached his sworn affidavit stating that he read the petition and that the allegations contained therein were true. We note that throughout both petitions, defendant mistakenly indicates that he pled guilty.

¶ 5 On March 26, 2010, the circuit court dismissed defendant's petition holding that his ineffective assistance of counsel claims were without merit. The court specifically held that there is no requirement to advise a defendant concerning potential deportation proceedings, where the defendant chooses to proceed to trial instead of pleading guilty.

¶ 6 As a threshold matter, the State observes, and defendant concedes, that he did not submit an affidavit other than his own verification affidavit. Although the State recognizes that defendant is excused from providing an affidavit from his trial attorney attesting to his own ineffectiveness, it nevertheless maintains that defendant was not excused from providing his own

sworn affidavit, and his verification affidavit attached to the petition was not a sufficient substitute. Therefore, the State, relying on *People v. Collins*, 202 Ill. 2d 59 (2002), appears to be contending that defendant was required to both explain the lack of his attorney's affidavit and provide his own affidavit. The court in *Collins*, however, never made such a holding. Instead, *Collins* recognized the distinction between a sworn verification under section 122-1 of the Act (725 ILCS 5/122-1 (West 2010)), and independent corroboration under section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). *Collins* held that section 122-2 requires the defendant to attach affidavits, records, or other evidence to his petition, or explain their absence. *Collins*, 202 Ill. 2d at 66. Because defendant explained that he could not obtain an affidavit from trial counsel admitting to his own ineffectiveness, he complied with section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). See *People v. Hall*, 217 Ill. 2d 324, 333 (2005) (stating that defendant's failure to attach an affidavit from trial counsel attesting to his own incompetence is not dispositive).

¶ 7 We review the dismissal of defendant's petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10.

¶ 8 On appeal, defendant asserts that his petition alleges that his trial counsel was ineffective for failing to advise him of the immigration consequences of a conviction and that had he known

he could be deported he would not have waived his right to a jury trial. To prevail on such a claim, a defendant at the first stage of post-conviction proceedings must show that "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. Although the parties primarily advance arguments regarding the prejudice prong, we need not reach it because defendant cannot even arguably prevail on the first prong. *People v. Magallanes*, 409 Ill. App. 3d 720, 748 (2011). Defendant's claim that his counsel's performance was objectively unreasonable fails for two reasons: defendant's factual allegations are contradicted by the record, and his legal theory improperly merges the two independent concepts of a guilty plea and a jury waiver.

¶ 9 As to the factual record, we consider defendant's post-conviction petition, which was drafted by an attorney. In his petition, defendant alleges that before "entering said plea of guilty Trial Counsel for the Petitioner failed to advise the Petitioner that he could face deportation/removal from the United States upon the outcome of his case based upon his plea of guilty to the offense." This allegation is clearly "fanciful" under *Hodges* because defendant did not plead guilty but, rather, went to trial.

¶ 10 Defendant next alleges that his trial counsel "failed to adequately explain to him the consequences of waiving his right to a jury trial." The record shows that defendant did waive his right to a jury trial. Regardless of whether trial counsel advised defendant regarding the consequences of his jury trial waiver, the record clearly establishes that the trial court explained the consequences of waiving a jury trial to the defendant:

"THE COURT: Mr. Gonzalez, you understand you
have a right to trial by jury?"

DEFENDANT: Yes.

THE COURT: Do you know what a jury trial is, sir?

DEFENDANT: Yes.

THE COURT: Twelve persons would be selected from the community, listen to the evidence, receive the law, deliberate, and they would sign a jury form of guilty or not guilty. Do you have any questions what a jury trial is, sir?

DEFENDANT: No.

THE COURT: Did you sign this jury waiver?

DEFENDANT: Yes.

THE COURT: Is this your signature?

DEFENDANT: Yes.

THE COURT: Do you understand by signing this jury waiver, that means you are not having a jury trial?

DEFENDANT: Yes.

THE COURT: And you do not want a jury trial, sir, is that correct?

DEFENDANT: Yes.

THE COURT: Jury waiver will be accepted."

Accordingly, the record irrefutably rebuts any suggestion by defendant that he plead guilty or that the consequences of waiving a jury trial were not explained to him.

¶ 11 Defendant nevertheless alleged in his post-conviction petition that if he had "understood the immigration consequences of a finding of guilty he would not have waived his right to a jury

trial." Defendant conflates two independent concepts: a guilty plea and a jury waiver. The consequence of waiving a jury trial is simply having a judge as the decision-maker and has nothing to do with the consequences that may obtain *if* a finding of guilt results from the trial. A defendant's goal at trial, whether before a jury or a judge, is identical: to be found not guilty so that no subsequent consequences obtain. In *People v. Bannister*, 232 Ill. 2d 52 (2008), our supreme court explained that defendant's sentence—the result of his conviction— was not relevant to his decision to waive his right to a jury trial:

"Defendant does not even suggest how the completeness or correctness of the sentencing information related by the trial court would have caused him to make a different jury waiver decision. We fail to see how such information could have had any bearing on his jury waiver. *** Regardless of who serves as the trier of fact, the defendant's possible sentences would be the same. *** When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand-with its attendant consequences-is that the facts of the case will be determined by a judge and not a jury." *Id.*

¶ 12 On appeal, defendant acknowledges that the deportation consequences are the same with either a bench or a jury trial, but he argues that a reasonable counsel would have made sure his client was aware that he could be deported if found guilty when deciding who should be responsible for determining his guilt. Defendant cites no authority in his opening brief on this point, and in his reply brief, defendant relies on *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 176 L.Ed. 2d 284 (2010). The flaw in defendant's position, however, is that the *Padilla*

case involved a guilty plea, not a jury waiver. Defendant does not even suggest, let alone cite, any legal authority holding that trial counsel has a duty to advise defendant of potential deportation consequences where defendant proceeds to trial after pleading not guilty.

¶ 13 In advising defendant whether to proceed to trial before the bench or a jury, counsel cannot be considered, even arguably, to have been objectively unreasonable for allegedly failing to inform defendant that deportation may be a potential collateral consequence of a conviction following a trial. Under the relevant law, therefore, defendant cannot demonstrate that trial counsel acted unreasonably in failing to discuss defendant's immigration status when advising defendant of his decision to elect a bench or a jury trial.

¶ 14 For all the foregoing reasons, we affirm the summary dismissal of defendant's post-conviction petition.

¶ 15 Affirmed.