

No. 1-10-1551

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.
)	
	)	Nos. 05 CR 26006
	)	05 CR 26007
	)	05 CR 26008
v.	)	05 CR 26009
	)	05 CR 26010
	)	05 CR 26011
	)	05 CR 26012
	)	05 CR 26013
	)	05 CR 26014
)	
BURNYSS PERRY,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed where defendant failed to accompany his allegation of ineffective assistance of trial counsel with either a claim of innocence or the articulation of a plausible defense, and also failed to provide adequate supporting documentation.

¶ 2 Defendant Burnyss Perry 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). He contends that the circuit court erred in dismissing his petition where he set forth cognizable claims of ineffective assistance of counsel.

¶ 3 The record shows, in relevant part, that defendant was charged in 13 separate cases with crimes stemming from a mortgage fraud scheme involving real property at 7852 South Bennett Avenue, in Chicago (South Bennett property). During a hearing on August 18, 2008, a Supreme Court Rule 402 conference was held which culminated in a plea offer of concurrent terms of seven years' imprisonment for all cases. Defendant initially rejected this offer and elected a bench trial; however, after a pause in the proceedings, he agreed to plead guilty to theft in nine cases based on the State's offer to dismiss the remaining four forgery cases. The court subsequently apprised defendant of the applicable sentencing range, then inquired as to whether he understood that his sentence would be seven years' imprisonment if he pleaded guilty, and stated, "You can plead today and surrender yourself two to three months from now. Fair enough?" Defendant responded, "Yes."

¶ 4 The State read into the record the factual bases for defendant's guilty plea which established that he had paid others to act as purchasers of condominium units in the South Bennett building he owned, then collected the mortgage proceeds from those transactions and let the units go into foreclosure. Counsel stipulated to the proposed facts, and the court entered judgment on the findings. The court then stated, "We have to talk about when sentencing will be," and, after a brief discussion, the court set a sentencing date of November 5, 2008.

¶ 5 When the sentencing hearing commenced on that date, the following exchange took place:

"THE COURT: Burnyss Perry.

THE DEFENDANT: Good morning, your Honor.

THE COURT: Burnyss Perry is here with his lawyer. He pled guilty on each of these indictments on the last court date. He had asked that the matter be put over so he can prepare for sentencing.

Are we ready to go to sentencing?

MR. ANDERSON [defense counsel]: We are, Judge.

MS. STRATTON [assistant State's Attorney]: Your Honor, I believe we had – for the record, Assistant State's Attorneys Karyn Stratton and Jean McGuire on behalf of the People.

Your Honor, you had already given him his sentence.

THE COURT: No.

MS. STRATTON: Yes. It was to turn in today. It was seven years.

THE COURT: The way I would always do it is to take a plea and not sentence him until they show up so they can –

MS. STRATTON: I meant you told him what the sentence would be.

THE COURT: Yes, I told him. He has not been sentenced is what I am saying."

¶ 6 Thereafter, the parties rested on the discussions had during the Rule 402 conference for purposes of aggravation and mitigation. Defendant made a brief statement on his own behalf, and the Bishop of his church made a plea for leniency. The court ultimately sentenced defendant to concurrent terms of seven years' imprisonment for theft of property exceeding \$100,000 in case nos. 05-CR-26006 through 05-CR-26014. The court also admonished defendant regarding his appeal rights; however, defendant did not file a motion to withdraw his plea or otherwise attempt to perfect a direct appeal from it.

¶ 7 On March 31, 2010, defendant filed a *pro se* petition for post-conviction relief alleging ineffective assistance of counsel. He claimed, as pertinent to this appeal, that counsel coerced him into pleading guilty in the above-cited cases by assuring him "that no new charges would follow the Defendant, that all charges would be satisfied with the plea agreement" even though counsel "knew of the pending investigation" which resulted in him being charged in a new 25 count indictment only 23 days later. Defendant stated that counsel had been "notified when [*sic*] the instant the Defendant became aware that the transactions were being investigated." Defendant further claimed that counsel refused to withdraw his guilty plea despite being instructed to do so by telephone and in writing within the applicable 30-day period.

¶ 8 In support of his petition, defendant attached a Chicago Police Department (Department) case supplementary report pertaining to an investigation into his mortgage fraud scheme involving the property at 7745 South Yates Boulevard (South Yates property). The report indicates that the Department began its investigation after learning of one that had been conducted by CitiMortgage, and lists the date and time of the incident as spanning from January 1, 2008, through October 3, 2008. The earliest Department action linked to a date in the report is October 15, 2008.

¶ 9 On April 13, 2010, the circuit court summarily dismissed defendant's post-conviction petition. The court noted that "[a]ll he's talking about is things that happened during the course of his lawyer's representation for the months leading up to the trial date of the plea," and that "[i]t's really an untimely petition to withdraw a plea." Defendant now appeals from that ruling.

¶ 10 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must

dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 11 Defendant maintains that he set forth claims of ineffective assistance of counsel warranting further proceedings under the Act. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), *i.e.*, a reasonable probability that, but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on proceeding to trial (*People v. Manning*, 227 Ill. 2d 403, 418 (2008)). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 12 With respect to the prejudice prong, the supreme court has noted that a bare assertion that defendant would have pleaded not guilty and insisted on a trial absent counsel's deficient performance is insufficient to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, defendant must accompany his assertion with a claim of innocence or articulate a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. The question of whether counsel's deficient performance caused defendant to plead guilty thus largely depends on predicting the likelihood of defendant succeeding at trial. *Hall*, 217 Ill. 2d at 336.

¶ 13 Defendant first claims that trial counsel was ineffective because he "wrongly advised him that his guilty plea encompassed both his 2005 and 2008 cases and that no additional charges regarding the theft of mortgage proceeds would follow," thereby inducing him to enter an

unknowing and involuntary plea which he would not have otherwise entered. The State responds that defendant has not provided proper documentary support for his claim, and that his allegations are directly rebutted by the record.

¶ 14 We initially agree with the State that defendant has failed to provide adequate documentary support for his claim. Under the Act, defendant is required to provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). The purpose for requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 15 Here, defendant provided a police report pertaining to the Department's investigation of his mortgage fraud involving the South Yates property as the sole documentary support for his claim that a police investigation was pending at the time counsel advised him on his guilty plea to the South Bennett charges. However, the earliest Department action linked to a date in that report occurred on October 15, 2008, nearly two months after defendant entered his plea of guilty on August 18, 2008. Defendant attempts to avoid this inconvenience by arguing that he actually pleaded guilty on the date of his sentencing, citing cases that discuss when judgment on a plea becomes final, but the record clearly shows that defendant entered his plea of guilty on August 18, 2008, was given time thereafter to get his affairs in order, and was sentenced on that plea on November 5, 2008. Accordingly, we find that the police report attached to defendant's petition fails to corroborate his claim that a police investigation into his other mortgage fraud scheme was pending at the time counsel advised him "that no new charges would follow" if he pleaded guilty in his earlier cases. *Collins*, 202 Ill. 2d at 67.

¶ 16 Notwithstanding, defendant currently points out that the failure to attach independent corroborating documentation or explain its absence may be excused where the petition allows an

inference that the only affidavit defendant could have furnished, other than his own, was that of his attorney. *Hall*, 217 Ill. 2d at 333. Here, however, defendant could have obtained and provided relevant documentation other than an affidavit from his attorney to establish whether a police investigation was pending on the date he entered his guilty plea, and he has also failed to provide a copy of the charging instrument that was allegedly filed 23 days later and underlies his claim.

¶ 17 In addition, defendant's claim that he was coerced into pleading guilty by counsel's assurance that no additional charges would be filed if he pleaded guilty is rebutted by the record, which shows that he entered his plea on a factual basis that was limited solely to his mortgage fraud involving the South Bennett property. We thus conclude that defendant has failed to meet his burden of providing adequate evidentiary support for his claim (725 ILCS 5/122-2 (West 2010)), and that his claim has no arguable basis in fact (*Hodges*, 234 Ill. 2d at 16).

¶ 18 That said, defendant has also failed to establish that he suffered prejudice as a result of counsel's alleged advice. Although defendant claims that he suffered prejudice where his "petition expressly stated that he would not have accepted a plea agreement if he had known that the State would bring new charges pertaining to the theft of mortgage proceeds," his bare assertion that he would have pleaded not guilty is, alone, insufficient to establish prejudice under *Strickland*. *Hall*, 217 Ill. 2d at 335. As a consequence, defendant's first claim of ineffective assistance of counsel fails. *Flores*, 153 Ill. 2d at 283. In reaching this conclusion, we find this case is distinguishable from *People v. Young*, 355 Ill. App. 3d 317 (2005), cited by defendant, as in that case, unlike here, defendant's claim that his guilty plea was involuntary was substantiated by the record of proceedings. Also, *Young* was decided prior to our supreme court's decision in *Hall*.

¶ 19 Defendant next claims that plea counsel was ineffective for refusing to file a motion to withdraw his guilty plea despite telephonic and written requests for him to do so within the relevant 30-day period. Defendant claims that his allegation that counsel refused to file the motion must be taken as true at this stage of proceedings, and that prejudice is presumed "in this context." The State responds that defendant has not provided any documentary support for his claim, and that he has failed to establish prejudice where he does not explain the grounds on which such a motion could have been brought. We review an allegation that plea counsel was ineffective for failing to file a motion to withdraw a guilty plea under the familiar two-prong test set forth in *Strickland*. *People v. Wilk*, 124 Ill. 2d 93, 108 (1988).

¶ 20 At the outset, we find that our determination of this claim is controlled by the supreme court's decision in *Collins*. In that case, defendant filed a post-conviction petition alleging that counsel failed to file an appeal and motion to reduce sentence upon his request, and attached only his sworn verification to the petition. *Collins*, 202 Ill. 2d at 62. The supreme court held that summary dismissal of this petition was proper because defendant failed to attach affidavits, records, or other evidence, and offered no explanation for the absence of such documentation as required by section 122-2 of the Act. *Collins*, 202 Ill. 2d at 66. In doing so, the supreme court observed that defendant was requesting to be excused from the evidentiary requirements of section 122-2 as well as the pleading requirements of that section, and that nothing in the Act authorized such a comprehensive departure. *Collins*, 202 Ill. 2d at 68.

¶ 21 In the same case, the supreme court noted its decision in *People v. Edwards*, 197 Ill. 2d 239 (2001), and found that, although it was factually similar, it had no application to *Collins* because in *Edwards*, the supreme court did not assess the sufficiency of the petition's supporting documentation, nor even describe what, if any, supporting documentation was filed. *Collins*, 202 Ill. 2d at 69. Here, likewise, defendant filed a post-conviction petition alleging that counsel did

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not file a motion to withdraw his guilty plea upon his request. Defendant specifically alleged that the request to withdraw the plea was made by both telephone and in writing. However, he attached no affidavits, records, or other evidence to his petition in support of this claim, nor did he offer any explanation for why he failed to attach such documentation. Although defendant claims that his allegations must be taken as true at this stage, citing *Edwards*, the supreme court made clear that defendant is not excused under *Edwards* from the supporting documentation requirements of section 122-2 of the Act. We thus find that the summary dismissal of defendant's petition was warranted for lack of supporting documentation. *Collins*, 202 Ill. 2d at 66.

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.