2012 IL App (1st) 102407-U

THIRD DIVISION
May 16, 2012

No. 1-10-2407

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. 08 CR 14522
	)	
FARREN CARIDINE,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition is affirmed where defendant failed to attach any affidavits or other documentation to his petition in violation of the pleading requirements of the Post-Conviction Hearing Act, and defendant's allegations are belied by the record.

¶ 2 Farren Caridine, the defendant, appeals from an order of the circuit court summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the circuit court erred in dismissing his petition because it presented the gist of a meritorious claim that a prior uncounseled misdemeanor conviction that resulted in jail time was

improperly used to enhance his current offense, violating his constitutional rights. Defendant also contends that his petition presented an arguable claim that his plea agreement was violated when he was not released from jail within 7 to 10 days following his plea, as promised by the State, and that defense counsel rendered ineffective assistance for making that promise. We affirm.

¶ 3 Defendant was charged with three counts of aggravated driving while under the influence of alcohol (DUI) following a July 2008 automobile accident in which two people were injured. On September 29, 2009, defendant entered a fully negotiated guilty plea to Count 1 of the indictment, which indicated that the State was seeking to sentence defendant as a Class 2 offender pursuant to sections 11-501(c-1)(2) and (d)(1)(a) of the Illinois Vehicle Code (625 ILCS 5/11-501(c-1)(2), (d)(1)(a) (West 2008)) because he committed two previous violations of section 11-501. The trial court sentenced defendant to the agreed-upon term of three years' imprisonment, the minimum sentence for a Class 2 felony.

¶ 4 More than five months later, on March 5, 2010, defendant filed a *pro se* motion to withdraw his guilty plea. Defendant raised several allegations in his motion, including that he pled guilty because he had been promised that he would be released from jail within 7 to 10 days of his plea, but was not. Defendant also claimed that his previous uncounseled DUI convictions were used to enhance the DUI charge in this case and impose a longer term of imprisonment. The trial court found that defendant's motion to withdraw his guilty plea was untimely filed more than 30 days after his plea was entered and denied the motion.

¶ 5 On May 24, 2010, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) raising substantially the same allegations raised in his *pro se* motion to withdraw his guilty plea. Defendant alleged, *inter alia*, that the indictment violated statutory requirements because his prior uncounseled misdemeanor DUI convictions were used to enhance the DUI charge in this case and increase his term of imprisonment.

Defendant also alleged "[d]ue to ineffective assistance of counsel and misrepresentations made to the Defendant by the State, the Defendant was not released from custody in 7 to 10 days as promised. All efforts by the Defendant and his family for assistance by counsel were fruitless and ignored." Defendant asked that he be allowed to withdraw his guilty plea and have his case remanded to the trial court for further proceedings.

¶ 6 There are no attachments to defendant's postconviction petition. Specifically, defendant did not include his own affidavit attesting to the veracity of his allegations. Nor did he attach any affidavits or other documentation in support of his allegations. Defendant did not provide an explanation for the absence of supporting documentation.

¶ 7 The circuit court found that defendant failed to attach to his postconviction petition any affidavits, records or other evidence in support of his allegations, or otherwise explain their absence, in violation of section 122-2 of the Act. 725 ILCS 5/122-2 (West 2010). The court further found that defendant did not provide sufficient factual information to support his claims, and that his claims of ineffective assistance of counsel were broad and conclusory. Based on those findings, the circuit court summarily dismissed defendant's *pro se* postconviction petition as frivolous and patently without merit.

¶ 8 On appeal, defendant contends that the circuit court erred in dismissing his petition because he met the gist standard to advance his petition to second-stage proceedings under the Act by alleging that a prior uncounseled misdemeanor conviction was improperly used to enhance his current DUI offense, and that his guilty plea was induced by an unfulfilled promise that he would be released from custody within 7 to 10 days following his plea. Defendant argues that his failure to supply affidavits or documents in support of his claims should be excused because he cannot be expected to obtain an affidavit from his attorney averring to her own ineffectiveness regarding her explanation of the plea to defendant. He further argues that his failure to secure an affidavit from

the prosecutor should likewise be excused. Defendant asserts that this explanation for his failure to provide supporting affidavits should be inferred by the court from the nature of his claim.

¶ 9 The State argues that defendant's failure to provide any affidavits, including his own, justified the summary dismissal of his postconviction petition. Alternatively, the State argues that defendant's claims have no arguable basis in law or fact. The State contends that the enhancement of the DUI charge in this case was not based on defendant's prior conviction, but instead, was based upon his prior commission of a DUI. In addition, the State argues that defendant's claim that he was promised release from custody in 7 to 10 days is contradicted by the record from his guilty plea hearing where he confirmed that no promises were made to him in exchange for his plea.

¶ 10 We review the circuit court's summary dismissal of defendant's *pro se* postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *Coleman*, 183 Ill. 2d at 378-79. A *pro se* postconviction petition need only state the gist of a constitutional claim to survive summary dismissal. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Hodges*, 234 Ill. 2d at 16. A legal theory that is completely contradicted by the record is indisputably meritless. *Hodges*, 234 Ill. 2d at 16 .

¶ 11 Section 122-1(b) of the Act provides that a postconviction proceeding is commenced when a prisoner files a petition that is "verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). The defendant's affidavit verifies that the allegations in his petition are being brought truthfully and in good faith. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Where a postconviction petition does not

comply with the pleading requirements of the Act, summary dismissal of the petition by the circuit court is proper. *People v. Delton*, 227 Ill. 2d 247, 258 (2008); *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011).

¶ 12 In addition, section 122-2 of the Act requires defendant to support the allegations in his *pro se* postconviction petition by either attaching factual documentation to the petition, or otherwise explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2010); *Delton*, 227 Ill. 2d at 253. The purpose of this requirement is to show that the allegations in the petition are capable of independent or objective corroboration. *Id*. at 254. Defendant's failure to attach the affidavits or documentation required by the Act, or otherwise explain their absence, is "fatal" to his postconviction petition and alone justifies summary dismissal of that petition. *Delton*, 227 Ill. 2d at 255, citing *Collins*, 202 Ill. 2d at 66. If a postconviction petition is not properly supported with attachments as required by section 122-2, the court need not reach the question of whether or not it states the gist of a constitutional claim to survive summary dismissal. *Delton*, 227 Ill. 2d at 255.

¶ 13 Here, we find that the circuit court's summary dismissal of defendant's *pro se* postconviction petition was proper. The record reveals that defendant did not provide an affidavit of his own verifying the truthfulness of his allegations as required by section 122-1(b) of the Act. Furthermore, contrary to the requirements of section 122-2 of the Act, defendant did not support his petition with any affidavits, records or other evidence, nor did he explain the absence of those documents. Defendant's failure to meet the pleading requirements of sections 122-1(b) and 122-2 of the Act was "fatal" to his postconviction petition and alone justified the circuit court's summary dismissal of his petition. *Delton*, 227 Ill. 2d at 255; *Collins*, 202 Ill. 2d at 66.

¶ 14 We reject defendant's contention that his failure to provide any affidavits should be excused because the court should have inferred from his claim that the only affidavits he could have furnished were from counsel and the prosecutor, which he could not have been expected to obtain. Our

supreme court has found that a defendant's failure to attach supporting documentation or otherwise explain its absence may be excused "where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *People v. Hall*, 217 Ill. 2d 324, 333 (2005); see also *Collins*, 202 Ill. 2d at 68. In *Hall*, the defendant's allegations in his petition and his own affidavit described his discussions with his attorney in great detail, specifying that only he and his counsel were present during these consultations. *Hall*, 217 Ill. 2d at 333. The court concluded that, based on the detail provided by the defendant, it could reasonably infer that the only people present during the consultations were the defendant and his attorney, and therefore, the only affidavit the defendant could have provided, other than his own, was that of his attorney. Accordingly, the court found that the documentation attached to Hall's petition, which included his own affidavit, was sufficient to comply with section 122-2 of the Act, even without an affidavit from counsel. *Hall*, 217 Ill. 2d at 333-34.

¶ 15 In stark contrast, in this case, defendant's postconviction petition does not provide sufficient factual detail to allow a reasonable inference that affidavits from counsel and the prosecutor are the only documentation he could have provided. Defendant's petition alleged "[d]ue to ineffective assistance of counsel and misrepresentations made to the Defendant by the State, the Defendant was not released from custody in 7 to 10 days as promised. All efforts by the Defendant and his family for assistance by counsel were fruitless and ignored." This allegation does not explain when defendant spoke with counsel or the prosecutor, who was present, who made the promise to him, what that promise was, or how it affected his guilty plea. Defendant's allegation amounts to a broad, conclusory claim of ineffective assistance of counsel, which is not allowed under the Act. *Delton*, 227 Ill. 2d at 258. The allegation also states that efforts by defendant's family for assistance from counsel were ignored. This leads to an inference that defendant's family was present for some discussions with counsel. Thus, defendant could have provided affidavits from family members

describing those discussions. We further note that, unlike the defendant in *Hall*, here, defendant did not provide his own affidavit with additional factual detail. Accordingly, defendant's failure to comply with the supporting documentation requirements of section 122-2 cannot be excused.

¶ 16 In addition, we reject defendant's claim that our supreme court held that a defendant "merely had to allege his ineffective assistance claims in his postconviction petition to receive the appointment of counsel." See *People v. Ligon*, 239 Ill. 2d 94, 117 (2010). Defendant has disingenuously taken this quote out of context to assert that a factual finding specific to *Ligon* is a rule of law that allows conclusory claims of ineffective assistance to advance to second-stage postconviction proceedings. In *Ligon*, the defendant raised two ineffective assistance of counsel claims on direct appeal which this court found were more appropriate for a postconviction proceeding. *Ligon*, 239 Ill. 2d at 101. However, when Ligon filed his *pro se* postconviction petition, he did not raise these two claims. *Ligon*, 239 Ill. 2d at 101. Ligon's petition was summarily dismissed, and on appeal, he argued that because this court advised him to raise his claims in a postconviction petition, he should have been appointed counsel to assist him with preparing that petition. *Id.* This ultimately led to our supreme court's finding above that Ligon merely had to re-allege the claims he raised on direct appeal in his *pro se* postconviction petition. Moreover, the interpretation advanced by defendant is in direct contradiction with the pleading requirements of the Act and years of our supreme court's precedents which holds that broad, conclusory allegations of ineffective assistance of counsel are not allowed under the Act. See *Delton*, 227 Ill. 2d at 258 (and cases cited therein). For the above reasons, we find that the circuit court's summary dismissal of defendant's postconviction petition for failure to comply with section 122-2 of the Act was proper.

¶ 17 Furthermore, not only has defendant failed to provide the supporting documentation required by the Act, we also find that defendant's allegations are directly contradicted by the record. Defendant claims that a 1994 uncounseled misdemeanor DUI conviction that resulted in jail time

was improperly used to enhance his current offense. This court recently allowed defendant to supplement the record on appeal with the transcript from the 1994 hearing where he pled guilty to the DUI charge and was sentenced to eight days in jail, time considered served. The transcript expressly shows that defendant was represented at that hearing by assistant Cook County public defender Mike Fannella. The record reveals that Fannella advised the court that defendant had previously received supervision for a 1990 DUI violation, then informed the court that defendant was going to "[t]ake the deal."

¶ 18 In addition, as discussed above, defendant claims that he was promised by the State and/or defense counsel that he would be released from jail in 7 to 10 days following his guilty plea. However, the transcript from his guilty plea hearing contradicts that allegation. The following colloquy occurred:

> "THE COURT: Is anyone forcing you in any way to get you to enter this plea of guilty?
>
> DEFENDANT CARIDINE: No, your Honor.
>
> THE COURT: Other than my promise that I would go along with the agreement that I would sentence you to three years in the Illinois Department of Corrections with two years of mandatory supervised release, a day-for-day sentence with credit for 436 days in return to the State dismissing Counts 2 and 3, *** has anyone made any other guarantees or promises to get you to enter the plea of guilty?
>
> DEFENDANT CARIDINE: No, your Honor.
>
> THE COURT: And you have had the opportunity to speak to your lawyer and did she tell you what I would sentence you to?

DEFENDANT CARIDINE: Yes, your Honor.

THE COURT: And do you have any questions at this time, Mr. Caridine?

DEFENDANT CARIDINE: No, your Honor. Can I see my Mom before I go?"

¶ 19 The record thus shows that defendant expressly denied that anyone made any other promise, such as an early release, to persuade him to enter a guilty plea, and that his counsel told him that he would be sentenced to three years' imprisonment. Defendant denied having any questions about his sentence, but did not hesitate to ask the court for permission to see his mother.

¶ 20 Here, we find that defendant's allegations are completely contradicted by the record, and thus, are indisputably meritless. *Hodges*, 234 Ill. 2d at 16. Accordingly, defendant's *pro se* postconviction petition lacked an arguable basis in law and fact, and the circuit court's summary dismissal of the petition was proper.

¶ 21 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* postconviction petition.

¶ 22 Affirmed.