

No. 10-3280

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.)	Nos. 97 CR 3248
)	07 CR 24762
)	
TYRONE TOLLIVER,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal of defendant's post-conviction petition affirmed where the record refuted claim of ineffective assistance of plea counsel based on counsel's alleged misrepresentation regarding the charge of aggravated criminal sexual assault with a firearm.

¶ 2 Defendant Tyrone Tolliver appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he presented an arguable claim that his counsel was ineffective for misrepresenting the nature of the offense to which he pled guilty.

¶ 3 The record shows that defendant was charged in two separate cases. The first stemmed from his failure to return to the correctional center at which he was an inmate, after leaving to participate in a work program on October 21, 1996. In the second case, defendant was charged with three counts of aggravated criminal sexual assault, one of which involved the use of a firearm, two counts of aggravated kidnaping, one count of robbery, one count of aggravated unlawful restraint, and one count of unlawful restraint. These charges stemmed from an incident that occurred on March 4, 2007.

¶ 4 The record further shows that defendant was arrested on the aggravated sexual assault charge on November 5, 2007, and after two Supreme Court Rule 402 conferences, entered a negotiated plea of guilty to escape and aggravated criminal sexual assault for which he was sentenced to concurrent, respective terms of 2 and 30 years in prison. Although admonished of his appeal rights, defendant did not file a motion to withdraw his guilty pleas or otherwise attempt to appeal from the judgment entered thereon.

¶ 5 On June 29, 2010, defendant filed a *pro se* post-conviction petition, alleging that he was deprived of his right to effective assistance of counsel where counsel (1) failed to investigate possible defenses, (2) failed to file a pre-trial motion to quash arrest, (3) advised him to plead guilty to a crime that he was not guilty of committing, and (4) failed to present DNA evidence.

¶ 6 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found, *inter alia*, that defendant's ineffective assistance claim relating to counsel's advice to plead guilty did not meet either prong of the *Strickland* test, to wit:

"It was not unreasonable for counsel to advise petitioner to plead guilty since the evidence against him was overwhelming. Not only did the victim recognize petitioner as her attacker, but

DNA evidence confirmed him as such with the odds of 1 in 1.1 quintillion. Based on this overwhelming evidence, petitioner has obviously suffered no prejudice as a result of counsel's advice as there is little to no chance he would have been found not guilty had he proceeded to trial."

The trial court then quoted the colloquy that took place after defendant was fully admonished in compliance with Supreme Court Rule 402, in which defendant stated that, aside from the terms of the plea offer, *i.e.*, 30 years for aggravated criminal sexual assault concurrent with 2 years for escape, no promises had been made to him and that he was pleading guilty of his own free will.

¶ 7 Defendant now challenges the propriety of the dismissal order and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Because we review the judgment, and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 8 At the first stage of a post-conviction proceeding, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *Hodges*, 234 Ill. 2d at 11-12, 16.

¶ 9 A challenge to a guilty plea alleging ineffective assistance of counsel is reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Jones*, 144 Ill. 2d 242, 254 (1991). Under the two-prong *Strickland* test, a defendant must show that counsel's performance was deficient and that defendant suffered prejudice as a result. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*).

¶ 10 In his petition, defendant alleged that counsel led him to believe that he was pleading guilty to criminal sexual assault, a Class 1 felony, and, due to this misrepresentation, he did not

know that the count to which he was pleading guilty included an allegation that he used a firearm. Defendant further alleged that had he received proper counsel, he would not have pleaded guilty to aggravated criminal sexual assault with a firearm because there was no evidence that he used a gun in the commission of the offense.

¶ 11 As support for his claim, defendant cites his confusion regarding the charges pending against him throughout the proceedings, which confusion was compounded by the use of general terms by defense counsel and the trial court in referring to the count to which he was pleading guilty. The record shows, however, that defendant initially expressed confusion regarding the nature of the charges against him, but was then given ample opportunity to familiarize himself with those charges. On January 6, 2009, the trial court read each charge aloud for him, including Count 3 where the State alleged that he committed aggravated criminal sexual assault while armed with a firearm. Defense counsel stated that she provided defendant with a copy of the charging document, thus giving defendant further opportunity to review the charges against him.

¶ 12 When counsel informed the trial court of defendant's desire to plead guilty after a second Rule 402 conference, defense counsel referred to the offense as "Count 3 on 07CR24762," which was clarified shortly thereafter. In admonishing defendant, the trial court stated that defendant was charged with "aggravated criminal sexual assault," and defendant stated that he understood the charge. The trial court then admonished defendant that aggravated criminal sexual assault is "a Class X felony" with a sentencing range of "6 years minimum to 30 years maximum," which defendant also stated that he understood. The record thus reflects that, prior to entering his plea, defendant was aware that he was not pleading guilty to the Class 1 felony of criminal sexual assault, but rather to the Class X felony of aggravated criminal sexual assault.

¶ 13 The record also reflects that defendant was aware that the offense to which he was pleading guilty contained the allegation that he used a firearm. At the plea hearing, the factual

basis for the plea was read aloud, including that the victim would testify that defendant committed the offense while armed with a gun. After the factual basis was read, the trial court asked defendant if he still wished to plead guilty "knowing the nature of the charges and the possible penalties," to which defendant responded "yes."

¶ 14 After entering the guilty plea, and prior to sentencing, a discussion was had focusing on the breakdown of defendant's 30-year sentence, clarifying that the sentence was based on a 15-year term for aggravated sexual assault, along with a 15-year enhancement for the use of a firearm. This discussion further highlighted the nature of the charge to which defendant pled guilty, including the allegation that he used a firearm in committing that offense. Immediately after this discussion, the trial court asked defendant if he wished to say anything, and defendant said that he did not. Defendant also indicated his understanding of the trial court's admonishments and stated that he was pleading guilty of his own free will. The record, therefore, contradicts defendant's assertion that he was misled by his attorney regarding the charge to which he was pleading guilty and supports the dismissal of his petition. *People v. Rogers*, 197 Ill. 2d 216, 222, (2001).

¶ 15 Although defendant asserted in his petition that counsel was deficient in advising him to plead guilty to an offense which included the use of a firearm instead of a lesser charge which did not include that allegation because there was no gun in evidence, the record shows otherwise. The factual basis that was read into the record included the victim's proposed testimony that defendant ordered her into his car while displaying a blue steel handgun and after she entered the car, defendant placed the gun on the car seat and proceeded with the sexual assault. The parties also stipulated that an expert would testify that the DNA analysis that was conducted on vaginal swabs taken from the victim on the night of the incident matched defendant's DNA profile and that such a match would occur in approximately 1 in 1.1 quintillion black individuals. Given this

overwhelming evidence, it was not unreasonable for counsel to advise defendant to plead guilty to aggravated criminal sexual assault with a firearm. See *People v. Jones*, 144 Ill. 2d 242, 268-71 (1991). We thus conclude that defendant failed to establish the deficient performance prong of the *Strickland* test.

¶ 16 Further, as discussed above, and contrary to his allegations, the record shows that defendant was aware that he was pleading guilty to the Class X felony of aggravated criminal sexual assault with a firearm. The evidence of his awareness belies his argument that he was prejudiced because the result of his plea agreement would have been different were it not for counsel's misrepresentations.

¶ 17 In sum, defendant failed to set forth an arguable claim of ineffective assistance of counsel, subjecting his petition to summary dismissal (*Hodges*, 234 Ill. 2d at 16-17; see also *People v. Anderson*, 375 Ill. App. 3d 121, 142-44 (2007)), and we affirm the order of the circuit court of Cook County to that effect.

¶ 18 Affirmed.