

2013 IL App (1st) 110179-U

SECOND DIVISION  
August 27, 2013

No. 1-11-0179

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
	)	Nos. 06 CR 25999
	)	06 CR 26000
	)	06 CR 26001
	)	06 CR 26002
v.	)	06 CR 26818
	)	06 CR 27481
	)	06 CR 27482
	)	06 CR 27483
	)	06 CR 27484
	)	06 CR 27485
	)	
DONELL ROSS,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Harris and Justice Quinn concurred in the judgment.

**ORDER**

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed where defendant failed to raise an arguable claim of ineffective assistance of counsel.

¶ 2 Defendant Donell Ross 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 2010)). He contends that he presented an arguable claim that his counsel was ineffective for advising him to plead guilty to five counts of armed robbery, and for failing to present a defense to those charges, where only a toy gun was used in the commission of the offenses. In the alternative, defendant contends that the circuit court failed to properly consider his petition before summarily dismissing it, and requests that we remand his cause for further proceedings under the Act.

¶ 3 The record shows that defendant was charged in 10 separate indictments for offenses he committed on 10 different days, from October 14, 2006 to November 3, 2006, at various Family Dollar stores in Chicago, Illinois. As pertinent to this appeal, defendant was charged with five counts of aggravated robbery and five counts of armed robbery.

¶ 4 On November 20, 2007, a Supreme Court Rule 402 conference was held, during which the State recited the factual basis for each of the relevant charges as follows:

"06-27481, charged with armed robbery. Defendant entered a Family Dollar, pointed a gun at the cashier. The defendant got 1,200 dollars. Cashier and eye witness identified the defendant in a lineup. The defendant gave a handwritten statement to that offense.

27482, charged with armed robbery, aggravated robbery, entered a Family Dollar Store, punched the manager in the head, took money from the registers and the lock box. The manager was struck in the head with what was believed to be a gun, and he opened the safe for the defendant. The defendant took the money

from the safe. Another employee was also struck in the head with what they believed was a gun. Injuries were bruises to the head.

06-27483, armed robbery, Family Dollar Store, pulled out a gun, money from the cashier. The cashier gave the defendant between a thousand and 1500. The cashier identified the defendant in a lineup. The defendant gave a handwritten statement on that incident. It's also recorded in a DVD.

06-27484, armed robbery, same MO, same modus operandi. He's identified by the cashier and an eye witness in a lineup.

27485, armed robbery. He shares this case with James Robinson. The defendant and Robinson entered a Family Dollar pointed a gun at the cashier. Robinson demands money. The cashier gave the codefendant the money. Two eye witnesses identified both defendants in the lineup. This defendant gave a handwritten statement."

Following this recitation of facts, defense counsel pointed out that no firearm was ever recovered and that when defendant was arrested on November 3, 2006, a toy gun was recovered. Defense counsel further stated that defendant made statements in 9 of the 10 cases and, in doing so, always maintained that he used a toy gun during the offenses. The trial court stated that, given his background, "the only incentive I can give to enter a plea on these is to knock off five years off the maximum," which would be a 25-year sentence.

¶ 5 Following the Rule 402 conference, the trial court explained to defendant that, due to his criminal history, he was Class X mandatory, and subject to a sentencing range of 6 to 30 years'

imprisonment on each separate charge, and thus, his aggravated robbery charges "would be treated the same" as the armed robbery charges, in spite of their different felony classifications. Defendant indicated that he understood the nature of the charges against him, the minimum and maximum sentences, the consequences of pleading guilty, and the rights he would be waiving in entering a guilty plea. Defendant further indicated that he was pleading guilty voluntarily and of his own free will. Defense counsel stipulated that "the facts that were presented during the [Rule 402] conference would be sufficient to support a finding of guilty."

¶ 6 Defendant then entered a negotiated guilty plea to five counts of aggravated robbery and five counts of armed robbery, and was sentenced to 25 years' imprisonment on each count, to be served concurrently. Although admonished of his appeal rights, defendant did not file a motion to withdraw his guilty plea or otherwise attempt to appeal from the judgment entered thereon.

¶ 7 On September 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) induced him to plead guilty to armed robbery based on her misapprehension of the law, (2) conceded guilt as to armed robbery without investigating the actual weapon that was used, (3) prevented the trial court from determining whether the toy gun at issue could qualify as a dangerous weapon, (4) failed to introduce the toy gun or the arresting officer's testimony into evidence during the plea, and (5) failed to object to the factual basis during the plea. Defendant also claimed that his guilty plea was not intelligent or voluntary due to counsel's erroneous advice, and that his due process rights were violated by the trial court's acceptance of a guilty plea with an insufficient factual basis.

¶ 8 In an affidavit filed in support of his petition, defendant averred, *inter alia*, that he told defense counsel that he used a toy gun during each incident, and that she told him that it did not matter because "as long as the victim(s) thought that the toy pistol was real then it's armed

robbery." Defendant averred that due to this advice from counsel, he was convinced that he had no defense against the armed robbery charges against him. Throughout his affidavit, defendant refers to numerous police reports which he states are attached to his petition, but which are not included in the record on appeal.

¶ 9 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court stated that "all but one of [defendant's] claims are barred from review since they allegedly occurred prior to the entry of his guilty plea," then found that defendant's remaining claim was frivolous and patently without merit, and dismissed his post-conviction petition. In doing so, the circuit court stated that defendant "was not charged and did not plead guilty to armed robbery, but to aggravated robbery."

¶ 10 Defendant now challenges the propriety of that 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).

¶ 11 We first address defendant's contention that we must vacate the dismissal of his petition and remand for further proceedings because the circuit court failed to properly consider his petition within the 90-day time-frame mandated by the Act. Although he does not contest that the trial court issued its order within this specified time-frame, he maintains that the trial court's erroneous assertion that he was neither charged with nor pled guilty to armed robbery shows that it did not fully examine his petition or comply with the Act before dismissing it. Defendant thus contends that the trial court's actions were akin to a partial summary dismissal, which is prohibited under *People v. Rivera*, 198 Ill. 2d 364 (2001).

¶ 12 The State responds that defendant is mistaken when he attempts to compare the circuit court's action in this case to a partial summary dismissal. We agree. The record shows that the

circuit court specified in its written order that the "issues" raised by defendant are frivolous and patently without merit, and that "the petition" is dismissed. Through this wording, the court did not advance any of defendant's claims to second stage proceedings or appoint counsel to assist defendant. Accordingly, it is clear that the circuit court dismissed defendant's petition in its entirety (*People v. Lee*, 344 Ill. App. 3d 851, 854-55 (2003), and did not, as defendant maintains, engage in an improper partial summary dismissal. Although the trial court may have incorporated a misapprehension of the factual circumstances surrounding defendant's case into its reasoning, as noted above, we review the judgment and not the trial court's reasoning (*Anderson*, 401 Ill. App. 3d at 138), and find no cause for reversal.

¶ 13 Defendant substantively maintains that he set forth an arguable claim of ineffective assistance of counsel based on counsel's failure to present a defense to his armed robbery charges when the evidence showed that only a toy gun was used, and in advising him to plead guilty to those charges despite the lack of a factual basis to support the convictions thereon. We note that because defendant has concentrated solely on these two claims, he has abandoned the remaining claims raised in his petition and forfeited them for appeal. Ill S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 14 At the first stage of post-conviction proceedings, 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.

¶ 15 To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, at the first stage of post-conviction proceedings where defendant alleges ineffective

assistance of counsel, the petition may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. 2d at 17. To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 16 It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including those that are constitutional in nature. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). As noted by the Supreme Court, a guilty plea represents "a break in the chain of events which has preceded it in the criminal process," and thereafter a defendant "may only attack the voluntary and intelligent character of the guilty plea \*\*\*." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

¶ 17 Although defendant raised the voluntariness of his plea as one of numerous claims in his petition, on appeal he does not overtly challenge his guilty plea as being either "involuntary" or "unknowing." As such, it would appear that defendant has waived review of such argument by focusing instead on claims of ineffective assistance of counsel which hinge on whether there was a sufficient factual basis to support his convictions. *Townsell*, 209 Ill. 2d at 545; Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). In any event, we find for the following reasons that the factual basis in this case was sufficient to support defendant's armed robbery convictions, and, accordingly, that defendant has not presented an arguable claim that counsel's performance was deficient.

¶ 18 Defendant's claims of ineffective assistance of counsel are based on his contention that he used a toy gun, rather than an actual firearm, during each incident in question. According to defendant, his guilty plea was entered in violation of Illinois Supreme Court Rule 402(c) in that

the factual basis was insufficient to support his convictions for armed robbery because the record was devoid of any evidence from which one could conclude that he was armed with a firearm.

¶ 19 Illinois Supreme Court Rule 402(c) provides that prior to entering final judgment on a guilty plea, the trial court must first determine that a factual basis exists for the plea. Ill. S. Ct. R. 402(c) (eff. July 1, 1997). Substantial compliance with Rule 402 is sufficient (*People v. Dougherty*, 394 Ill. App. 3d 134, 138 (2009), and subsection (c) of Rule 402 can be satisfied if there is a basis anywhere in the record from which the judge could reasonably conclude that defendant committed the acts to which he is pleading guilty. *People v. Vinson*, 287 Ill. App. 3d 819, 821 (1997).

¶ 20 Here, defendant pleaded guilty, in relevant part, to five counts of armed robbery.<sup>1</sup> A person commits armed robbery when he takes property from another by the use of force or by threatening the use of force, and, while doing so, carries on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-1(a), 18-2(a)(2) (West 2006). Defendant solely contests the element requiring that he be armed with a firearm.

¶ 21 The record shows that the factual bases recited by the State during the Rule 402 conference for the five counts of armed robbery included, *inter alia*, that: (Case No. 06-27481) defendant pointed a gun at a cashier at Family Dollar, from whom he received \$1,200; (Case No. 06-27482) defendant struck a Family Dollar manager in the head with what was believed to be a gun and took money from a safe; (Case 06-27483) defendant pulled out a gun at a Family Dollar store and received between \$1,000 and \$1,500 from the cashier; (Case No. 06-27484) "same modus operandi"; (Case No. 06-27485) defendant entered a Family Dollar store with James

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<sup>1</sup> Defendant points out that the indictments for two of the five armed robbery charges are not included in the record on appeal. However, defendant does not argue that those indictments did not include the allegation that he carried a firearm during the commission of the offense.

Robinson and pointed a gun at the cashier. Robinson demanded and received money from the cashier.

¶ 22 It is thus clear that the factual basis provided for each of the five counts of armed robbery included the fact that defendant used a gun in the commission of the offense. During the plea hearing, defense counsel stipulated that the facts presented at the Rule 402 conference would support the charges against defendant. Not only did defendant agree to this factual basis to receive the bargain of his negotiated guilty plea, but by pleading guilty, he admitted every material fact alleged in the indictments and all the elements of the crimes with which he was charged. *People v. Peeples*, 155 Ill. 2d 422, 494 (1993).

¶ 23 As defendant acknowledges, the quantum of proof necessary for the factual basis for a guilty plea is less than that necessary to sustain a conviction at trial. *People v. Barker*, 83 Ill. 2d 319, 327-29 (1980). Here, based on the contents of the indictments and the factual bases agreed to by defendant, we find that the trial court could reasonably conclude that defendant was armed with a firearm during each incident for which he was charged with armed robbery, and thus there was substantial compliance with Rule 402(c). *Vinson*, 287 Ill. App. 3d at 821; see also *People v. Johnson*, 66 Ill. App. 3d 84, 91-93 (1978). Because defendant's claim that counsel was ineffective for advising him to plead guilty to armed robbery is based on his contention that no factual basis existed to support such a conviction, he has failed to establish that counsel's performance arguably fell below an objective standard of reasonableness. *Tate*, 2012 IL 112214, ¶ 19.

¶ 24 Defendant, nevertheless, contends that the court could not have reasonably so concluded because no gun was recovered, and he was found in possession of a toy gun at the time of his arrest. We fail to see how defendant's verified use of a toy gun in connection with 1 of 10

separate incidents forecloses the possibility that he used a firearm in connection with the incidents in which he was charged with armed robbery.

¶ 25 Further, dismissal of a post-conviction petition is appropriate where the record contradicts defendant's claim. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Here, the transcript of the Rule 402 conference reflects that counsel advised the trial court that defendant maintained that he used a toy gun in connection with all 10 offenses, and pointed out that only a toy gun was ever recovered. Accordingly, defendant's claim that counsel was ineffective for failing to present a defense to armed robbery fails as it is rebutted by the record. *Rogers*, 197 Ill. 2d at 222.

¶ 26 Moreover, even if defendant's armed robbery convictions were reduced to aggravated robbery convictions, there would be no change in the applicable sentencing range. Due to his criminal history, defendant was Class X mandatory, thereby subjecting him to a sentencing range of 6 to 30 years' imprisonment for an aggravated robbery conviction; the same sentencing range that is applicable to an armed robbery conviction. The trial court advised defendant of this during the plea proceedings, and told him that his aggravated robbery charges "would be treated the same" as his armed robbery charges. Accordingly, defendant has failed to establish that it is arguable that he suffered prejudice due to counsel's performance, and his claim of ineffective assistance of counsel fails. *Tate*, 2012 IL 112214, ¶ 19; *Hodges*, 234 Ill. 2d at 16-17.

¶ 27 We therefore affirm the order of the circuit court of Cook County summarily dismissing defendant's petition for post-conviction relief.

¶ 28 Affirmed.