



No. 1-11-0586

This court affirmed that judgment on direct appeal. *People v. Coggs*, No. 1-07-3306 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On November 23, 2010, defendant filed the post-conviction petition at bar. In his petition, defendant alleged that the State knowingly used perjured testimony at trial, and that trial counsel provided ineffective assistance by failing to interview named witnesses and to object to certain testimony. He also alleged that his trial counsel told him that counsel would not continue to represent him unless he waived his right to a jury trial, and then promised him a favorable outcome if he chose a bench trial because of counsel's relationship with the judge. Finally, defendant asserted that the imposition of a three-year MSR term was unconstitutional.

¶ 5 In support of his petition, defendant attached the affidavit of his wife, Jamila Coggs, who asserted that she and defendant had hired an attorney, Todd Urban, to represent defendant. She then stated:

"Right up until shortly before the first trial date was set, my husband and I had our minds set on a jury trial until I had a phone conversation with Mr. Urban where he urged me to convince my husband to waive his jury trial [rights] and take a bench trial. Mr. Urban promised me that my husband would win because of the close, personal relationship he shared with the judge \*\*\* [and] that if we insisted on having a jury trial that he would have to excuse himself from my husband's defense. \*\*\* Mr. Urban explained to me that because of the time he'd already spent on the case that I would only receive a small percentage of my money back. I didn't have enough money to hire another lawyer so I told him I would talk to my husband about it."

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¶ 6 Defendant also attached his own signed, but unnotarized, statement in which he explained that, shortly after his arrest, he and his wife hired Mr. Urban to represent him in his case. When his first trial date was set, he called his wife, who told him about her conversation with Mr. Urban. He then talked to Mr. Urban who confirmed what his wife told him, and promised that if he took a bench trial, he would win because he "was close to the [j]udge."

Defendant added:

"At first, I was still reluctant and still wanted a jury trial. [Mr.] Urban told me that if I wanted a jury trial[, he] would drop my case and only refund a portion of the money he'd already been paid. [My wife and I] didn't have the money to hire a new attorney, [s]o I reluctantly agreed to take a bench trial."

Defendant contended that these "affidavits" and the record clearly showed that his representation by trial and appellate counsel fell below an objective standard of reasonableness and denied him a fair trial.

¶ 7 On January 14, 2011, the circuit court dismissed defendant's petition as frivolous and patently without merit. As pertinent to this appeal, the court found that defendant failed to provide evidence to support his contention that his decision to accept a bench trial was forced, noting that his claim was contradicted by the record. The court also found defendant's argument regarding the constitutionality of his MSR term to be meritless. On the same date, the court entered an order assessing defendant \$105 in fees for filing a frivolous post-conviction petition. See 735 ILCS 5/22-105 (West 2010). The State Appellate Defender was appointed to represent defendant, and this court granted defendant leave to file late a notice of appeal.

¶ 8 On appeal, defendant contends that his petition should not have been dismissed summarily because he raised arguably meritorious constitutional claims relating to his jury waiver and his MSR term. He also contends that the circuit court erred when it imposed fees

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against him for filing a frivolous petition. Because defendant has concentrated his arguments solely on the claims related to his jury waiver and MSR term, we initially find that he has abandoned the remaining arguments set forth in his post-conviction petition and forfeited them for appeal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 9 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). Post-conviction proceedings are commenced by the filing of a petition in the circuit court in which the original proceedings took place. *People v. Rivera*, 158 Ill. 2d 364, 368 (2001). Section 122-2 of the Act requires that defendant clearly set forth in the petition the respects in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting those allegations or explain their absence. *People v. Rogers*, 197 Ill. 2d 216, 221 (2001).

¶ 10 Although defendant need only set forth the “gist” of a constitutional claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), 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 2008); *Hodges*, 234 Ill. 2d 1, 10 (2009)). A petition is frivolous or patently without merit if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16. We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 11 In this case, defendant contends that he set forth an arguable claim that his right to effective assistance of counsel was violated because his trial counsel improperly coerced him into waiving his right to a jury trial. To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

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However, at the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel 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. *Hodges*, 234 Ill. 2d at 17.

¶ 12 As a preliminary matter, the State contends that defendant failed to comply with the requirements of the Act because his statement was not notarized, and his petition is therefore subject to summary dismissal. Although the State correctly points out that defendant's statement does not constitute a valid affidavit (*Roth v. Illinois Farmers Ins. Co.*, 202 Ill.2d 490, 494 (2002)), this court has held that an unnotarized affidavit is not an appropriate basis for first-stage dismissal of a petition (*People v. Henderson*, 2011 IL App (1st) 090923, ¶ 36).

¶ 13 Notwithstanding, we find that defendant's petition was subject to summary dismissal because his allegations are contradicted by the record from the original trial proceedings. *People v. Gale*, 376 Ill. App. 3d 344, 351 (2007) citing *People v. Rogers*, 197 Ill. 2d at 222. The trial record contains a lengthy colloquy between defendant and the trial court concerning his decision to waive his right to a jury trial, during which the court informed defendant, "On each of these charges, you are entitled to have a jury trial." The court then explained the responsibilities of a jury, and how it is chosen. The court asked defendant if he understood "what a jury trial is" and defendant stated affirmatively "yes, sir." The court then asked: "Do you have any questions you want to ask me about what a jury trial is?" and defendant answered "no, sir." The court then explained the meaning of a bench trial, and asked if defendant understood the difference between the two. Defendant responded "yes, sir."

¶ 14 The court then asked, "Which one do you want, jury or bench?" and defendant replied, "Bench." The court referred to defendant's written jury waiver and asked, "Do you understand by signing this piece of paper, you were giving up your right to a jury trial. You will have a bench trial?" Defendant answered "yes, sir[.]" and the conversation continued:

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"COURT: That's what you want to do?

DEFENDANT: Yes, sir.

COURT: Okay. Anyone promise you anything in order to get you to do this?

DEFENDANT: No, sir.

COURT: I don't know anything about the facts of your case at all and I haven't decided what I am going to do with your case. I might find you guilty of what you are charged with. I might find you guilty of a lesser offense. I might find you not guilty.

DEFENDANT: Yes, sir.

COURT: I don't know. Okay. You understand.

DEFENDANT: Yes, sir.

COURT: I haven't intimated in any way shape or form that I would rule a certain way in your case; do you understand that?

DEFENDANT: Yes, sir.

COURT: Okay. Is that what you—still want a bench trial?

DEFENDANT: Yes, sir.

COURT: All right. Jury waiver will be accepted."

This colloquy positively rebuts defendant's post-conviction contention that his attorney's promise that he would win a bench trial convinced him to waive his right to a jury trial.

¶ 15 Our conclusion finds further support in the letter defendant submitted to the trial court as part of his pre-sentence investigation report in which he stated, "My lawyer told me I would not be found guilty by you with this evidence against me because the lies were obvious." This statement shows that counsel's advice and defendant's choice to have a bench trial were based on the perceived incredibility of the evidence against him, thereby contradicting defendant's post-

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conviction claim that counsel coerced him into electing a bench trial through improper financial threats and claims of a personal relationship with the judge that guaranteed success. Because the record directly rebuts defendant's claims of coercion and misrepresentation, we find that defendant failed to provide an arguable basis for concluding that counsel's performance fell below an objective standard of reasonableness to require further proceedings under the Act.

¶ 16 In so holding, we have considered *People v. Smith*, 326 Ill. App. 3d 831 (2001), cited by defendant, and find it inapposite to the case at bar. In *Smith*, defendant alleged that his trial counsel was ineffective because he advised him to take a bench trial because "the judge owed him a favor and would have information not available to the jury." This court reversed the summary dismissal of defendant's post-conviction petition, holding that he had alleged sufficient facts to allow his claim to advance to second-stage proceedings. However, unlike here, where the record positively rebuts defendant's allegations, there was no evidence in *Smith* that the trial court had asked defendant whether he had been promised anything in exchange for giving up his right to a jury trial, leading this court to conclude that the trial court's admonishments and the waiver did not rebut the allegations in defendant's petition. *Smith*, 326 Ill. App. 3d at 848. Accordingly, we find defendant's reliance on *Smith* misplaced.

¶ 17 Defendant also contends that he raised an arguable claim that his three year MSR term is unconstitutional and void, and he requests that his sentence be modified from his current 50 year term of imprisonment, to a 47 year term of imprisonment followed by a three year term of MSR. He asserts that it was the Department of Corrections, not the trial court, which imposed the MSR term, and that by doing so, the Department violated both his right to due process and the constitutional separation-of-powers doctrine of the Illinois Constitution. Ill. Const. 1970, art. II, § 1; art. IV, § 1. In support of his argument, defendant cites the second circuit case of *Earley v. Murray*, 462 F.3d 147 (2d Cir. 2006). Defendant's MSR arguments, however, have been previously addressed and rejected by this court in *People v. Hunter*, 2011 IL App (1st) 093023, ¶

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23, where we held that imposing a MSR term does not violate either the due process or separation of powers clauses of the Illinois Constitution. We find no reason to depart from that ruling in this case.

¶ 18 In reaching that conclusion, we find defendant's reliance on *Earley* unavailing. We note that *Earley* is a lower federal court decision, and as such, it is not binding on this court. *People v. Stansberry*, 47 Ill. 2d 541, 433. Moreover, its applicability was recently criticized by the Illinois Supreme Court in *People v. Evans*, 2013 IL 113471, ¶ 15, where the court held that "even assuming *Earley* was correctly decided, that decision has absolutely no consequence in Illinois unless and until a court of this state endorses its analysis and then applies that analysis to section 5–8–1(d)(1), a contingency that has yet to occur." In *Evans*, the supreme court also reiterated the well-settled principle that, in Illinois, MSR is imposed by operation of law. *Evans*, 2013 IL 113471, ¶ 13. Thus, when defendant was sentenced by the trial court, his sentence necessarily and automatically included the three-year term of MSR. Therefore, that term is not void and defendant's claim must fail. For these reasons, we affirm the summary dismissal of defendant's post-conviction petition.

¶ 19 Defendant finally asserts that the trial court erred in imposing \$105 in fees and costs because his petition was not frivolous. Because this issue involves a question of statutory construction, we apply *de novo* review. *People v. Alcozer*, 241 Ill.2d 248, 254 (2011).

¶ 20 Pursuant to Section 22-105(a) of the Code of Civil Procedure (Code) (735 ILCS 5/22-105(a) (West 2010)), a trial court has the authority to impose fees and costs against a prisoner for filing a petition in a post-conviction case if the court makes a specific finding that the petition is frivolous. Section 22-105(b) defines a petition as frivolous if, *inter alia*, it lacks an arguable basis in fact or in law; is presented for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation; or does not have evidentiary support. 735 ILCS 5/22-105(b)(1), (2), (4) (West 2010).

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¶ 21 Here, we have found that defendant's claims of his counsel's coercion and misrepresentation in relation to his jury waiver were belied by the record, and that his MSR claim was contrary to well-settled law. Under these circumstances, we find no error by the court assessing defendant court costs and fees for filing a frivolous petition.

¶ 22 For the reasons stated, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.