

No. 1-11-1238

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. 05 CR 19507
)	
ROY MILLER,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's *pro se* postconviction petition was properly dismissed when it lacked an arguable basis in law and fact.
- ¶ 2 Defendant Roy Miller 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)). On appeal, defendant contends the circuit court erred in dismissing his petition because his claims had arguable bases in law and fact. Specifically, defendant claims that he was denied effective assistance of counsel by counsel's erroneous statement that defendant would receive day-for-day credit on his sentence if he entered a guilty plea, and that the trial court did not adequately inform

him that he would have to serve two years of mandatory supervised release (MSR) upon his release from prison. We affirm.

¶ 3 In October 2006, defendant entered a negotiated plea of guilty to aggravated driving under the influence arising from a 2005 car accident which resulted in the death of a young woman. At the plea hearing, the court admonished defendant that possible penalties for this offense included that he "could get" between 3 and 14 years in prison, a fine of up to \$25,000, and MSR for a period of two years after his release from prison. Defendant answered in the affirmative when the court asked whether he understood the possible penalties and the charge to which he was pleading. Ultimately, defendant was sentenced to 12 years in prison.

¶ 4 The next month, defendant wrote a letter to defense counsel stating that he had learned that he would be required to serve 85% of his sentence and that counsel had previously told him that he would only have to serve 50%, *i.e.*, six years. Defendant indicated that if there was a "problem" with calculating his sentence at 50%, he wanted to withdraw the plea.

¶ 5 At a February 2007 hearing, the trial court noted that defendant had not filed a motion to withdraw the guilty plea within 30 days of sentencing. After defendant indicated that he wrote a letter to defense counsel to "get the motion started," the court concluded that the letter served as notice that defendant wished to withdraw his plea, permitted counsel to file a motion to withdraw the plea, and treated the motion as timely filed. Defense counsel then argued that defendant's plea was not freely and voluntarily entered into because counsel misinformed defendant about the available good time credit for his offense, and defendant relied on that erroneous information in making his plea. Ultimately, the trial court denied the motion.

¶ 6 On appeal, defendant contended, *inter alia*, that his plea must be vacated because he was denied effective assistance of counsel by counsel's failure to inform him of the amount of good conduct credit he would receive on his 12-year sentence. This court dismissed the appeal

because, although defendant had been properly admonished pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001), he did not file a timely motion to withdraw the plea. *People v. Miller*, No. 1-07-0660 (2009), Order at 5-6 (unpublished order under Supreme Court Rule 23).

¶ 7 In 2010, defendant filed a *pro se* petition for postconviction relief alleging that he was coerced into making a plea by defense counsel's erroneous advice that defendant would only have to serve 6 years of his 12-year sentence and that this error rendered his plea involuntary. The petition further contended that counsel's error denied defendant effective assistance of counsel and that counsel admitted this error at the hearing on defendant's motion to withdraw the guilty plea. The petition finally alleged that the court failed to properly admonish defendant regarding the term of MSR he must serve upon his release from prison. The circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 8 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In *People v. Tate*, 2012 IL 112214, our supreme court stated that first-stage review permits the circuit court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *Tate*, 2012 IL 112214, ¶ 9, quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12; see also *Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16.

Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 9 Defendant first contends his claim that he was denied effective assistance of counsel had an arguable basis in law and fact. Specifically, he argues that his guilty plea was rendered involuntary and unknowing because he made it after being erroneously told by counsel that he would receive day-for-day credit on his 12-year prison sentence.

¶ 10 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. In order to establish ineffective assistance of counsel in the context of a guilty plea, a defendant must show that counsel failed to ensure that he entered the guilty plea voluntarily and intelligently, and, that absent counsel's errors he would not have pled guilty and would have instead chosen to proceed to trial. *People v. Rissley*, 206 Ill. 2d 403, 457-58 (2003). Our supreme court has determined that a "bare allegation" that a defendant would have refused the plea and insisted upon going to trial, absent counsel's deficient performance, is not enough to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, a defendant's claim must be accompanied by either a claim of actual innocence or the articulation of a plausible defense that he could have raised at trial. *Hall*, 217 Ill. 2d at 335-36.

¶ 11 Initially, the State argues that defense counsel's erroneous advice cannot support a claim of ineffective assistance of counsel because it addressed a collateral consequence of the guilty plea. The State relies on *People v. Huante*, 143 Ill. 2d 61, 69-70 (1991), to argue that an attorney is not ineffective merely because he failed to inform a defendant of a collateral consequence of a conviction. Although the State concedes that counsel in the instant case gave defendant incorrect information, the State asserts that because the erroneous advice dealt with a collateral consequence of the guilty plea, the outcome remains the same, *i.e.*, defendant has not raised a cognizable claim of ineffective assistance. See *People v. Maury*, 287 Ill. App. 3d 77, 82-83 (1997) (the distinction between counsel's affirmative misleading of a defendant about a collateral consequence of a plea and counsel's failure to tell him about a collateral consequence of a plea was "irrelevant"). Defendant responds that *Maury* was wrongly decided because it did not consider the difference, as explained in *People v. Correa*, 108 Ill. 2d 541, 551-52 (1985), between counsel's "passive conduct" in failing to discuss the collateral consequences of a guilty plea with a defendant and counsel's erroneous and misleading statements made in response to a defendant's questions.

¶ 12 Although *Huante* did not extend the holding of *Correa*, neither did it overrule *Correa*. See *People v. Young*, 355 Ill. App. 3d 317, 323 (2005) (rejecting *Maury*'s holding that there was no distinction between counsel's passive failure to inform a defendant of the collateral consequences of a guilty plea and the affirmative misrepresentation of those consequences). Here, although defense counsel's advice related to a collateral consequence of the plea, because it was erroneous (*Correa*, 108 Ill. 2d at 551-52), it is at least arguable that counsel's performance fell below an objective standard of reasonableness. *Hodges*, 234 Ill. 2d at 17.

¶ 13 However, even if defense counsel's performance was arguably deficient, in order to succeed on his claim of ineffective assistance at this stage of proceedings under the Act,

defendant must also show that he was arguably prejudiced by counsel's error. *Hodges*, 234 Ill. 2d at 17. Here, defendant cannot make such a showing as he has not articulated either a claim of actual innocence or a plausible defense that he could have raised at trial. See *Hall*, 217 Ill. 2d at 335-36 (a bare allegation that a defendant would have refused the plea and insisted upon going to trial absent counsel's error is not enough to establish prejudice). Although defendant argues that he would not have entered a guilty plea if he had known that he was required to serve 85% of his sentence rather than 50%, such a claim does not amount to a claim of actual innocence or a plausible defense that could have been raised at trial. See *People v. Hughes*, 2012 IL 112817, ¶¶ 64-66 (relying on *Hall* and characterizing defendant's articulation of prejudice, his statement that if he had known of the possibility of civil commitment he would not have pled guilty because "he thought it would resolve the matter," as insufficient). While defendant is certainly correct that he need not establish prejudice at the first stage of proceedings under the Act, the lack of facts supporting his allegation that he would have refused to enter a guilty plea if he had known that counsel's advice was incorrect is insufficient to establish arguable prejudice (*Tate*, 2012 IL 112214, ¶¶ 19, 20), and this claim was properly dismissed as frivolous and patently without merit (*Hodges*, 237 Ill. 2d at 11-12).

¶ 14 Defendant next contends that the circuit court erred in dismissing his petition because his claim that the trial court failed to link the two-year term of MSR he must serve upon his release from prison to his actual sentence had an arguable basis in law and fact.

¶ 15 In *People v. Whitfield*, 217 Ill. 2d 177 (2005), our supreme court held that when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to admonish him, before accepting the plea, that a MSR term would be added to the sentence, the sentence imposed is more onerous than the one agreed to by the defendant, which breaches the plea agreement and violates due process. *Whitfield*, 217 Ill. 2d at 195. The court then determined that

in such cases either the promise must be fulfilled or the defendant must be permitted to withdraw his guilty plea. *Whitfield*, 217 Ill. 2d at 202. Subsequently, in *People v. Morris*, 236 Ill. 2d 345 (2010), our supreme court clarified that "MSR admonishments need not be perfect" but strongly encouraged trial courts to "explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea." *Morris*, 236 Ill. 2d at 367. Admonishments must " 'in a practical and realistic sense' " inform a defendant of the actual consequences of his plea, *i.e.*, a term of MSR will be added to the actual prison term agreed upon in exchange for his guilty plea to the charged offense. *Morris*, 236 Ill. 2d at 366-67, quoting *People v. Williams*, 97 Ill. 2d 252, 269 (1983).

¶ 16 *People v. Davis*, 403 Ill. App. 3d 461 (2010), is instructive. There, this court determined that under *Whitfield* a constitutional violation occurs only when there is "absolutely no mention" to a defendant, prior to his guilty plea, that he must serve a term of MSR in addition to the agreed upon sentence that he will receive in exchange for his plea. *Davis*, 403 Ill. App. 3d at 466, but see *People v. Burns*, 405 Ill. App. 3d 40, 43-44 (2d Dist. 2010) (admonishments were insufficient when the MSR term was not linked to the actual sentences the defendant would receive under the plea agreement and did not convey unconditionally that MSR would be added to those sentences).

¶ 17 This case is not an instance where there was no mention of MSR before the defendant actually entered a guilty plea. See *Davis*, 403 Ill. App. 3d at 466. Here, defendant was informed, prior to entering his plea, that aggravated driving under the influence was an offense punishable with between 3 to 14 years in prison, a fine of up to \$25,000 and MSR for a period of two years following his release from prison. Thus, defendant was put "on notice" that the punishment for the crime he had admitted to committing encompassed more than completing a sentence in the penitentiary (*Davis*, 403 Ill. App. 3d at 466), and the trial court satisfied the requirements of due

process by advising him prior to imposing sentence that he would have to serve a term of MSR upon his release from prison.

¶ 18 Although defendant acknowledges *Davis*, he urges this court to follow the reasoning of *Burns* instead. However, this court's decision in *People v. Hunter*, 2011 IL App (1st) 093023, ¶¶ 18-19, considered, and rejected a similar argument. Thus, we continue to adhere to the court's decision in *Davis*.

¶ 19 Accordingly, as the record reveals that defendant was adequately admonished regarding the term of MSR he must serve upon his release from prison, the circuit court did not err in finding that defendant's claim challenging the trial court's admonishments was frivolous and patently without merit and dismissing defendant's petition on that basis. See *Hodges*, 234 Ill. 2d at 11-12.

¶ 20 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.