

No. 1-11-1541

**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. 03 CR 18823
	)	
WALTER BROWN,	)	Honorable
	)	Hyman I. Riebman,
Defendant-Appellant.	)	Judge Presiding.

---

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

**ORDER**

- ¶ 1 *Held:* Defendant's *pro se* post-conviction petition was properly dismissed at the first stage of proceedings for lack of an arguable basis in law and fact.
- ¶ 2 Defendant Walter Brown 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 the circuit court erred in summarily dismissing his petition as frivolous and patently without merit because he presented an arguable constitutional claim that his open or "blind" guilty plea to aggravated driving under the influence (aggravated DUI) (625 ILCS 5/11-501(d)(1)(F) (West 2010)) was not knowingly and voluntarily

1-11-1541

made because plea counsel led him to believe that he was actually entering a negotiated guilty plea.

¶ 3 The record shows that in August 2003, a grand jury indicted defendant on three counts each of aggravated DUI and reckless homicide, and one count of aggravated reckless driving. This followed an incident that took place on July 29, 2003, in which defendant struck and killed construction worker Deborah Wead while he was driving under the influence of alcohol.

¶ 4 On November 16, 2004, the date set for jury trial, defendant appeared with private counsel, Raymond Prusak, who informed the court that defendant was prepared to enter an open guilty plea to all counts. Following a recess, the trial court acknowledged defendant's wish to enter a plea of guilty and addressed defendant personally in open court, informing him of and determining his understanding of the nature of the charges, the minimum and maximum sentences, and the mandatory supervised release term upon his release from the penitentiary. The trial court also ascertained defendant's understanding that by pleading guilty, he was giving up his right to a trial, to confront and cross-examine witnesses, and to require the State to prove him guilty beyond a reasonable doubt. When asked if anyone forced, threatened, or promised him anything to obtain his guilty plea, defendant replied, "No, sir." The State then presented a factual basis for the plea, which showed that defendant, who had a blood alcohol content of 0.273 nearly three hours after he left an Elk Grove Village bar that stopped serving him alcohol, lost control of his vehicle entering the on-ramp from Higgins Road to southbound Interstate 290, and killed construction worker Deborah Wead. Defendant's attorney stipulated to those facts, except for the proposed testimony of a special agent with the Illinois State Police regarding defendant's custodial statement, "When news of this gets out it's going to really hurt my business." After defendant again indicated his understanding of the rights he would be waiving by entering his guilty plea, the trial court addressed him personally, in pertinent part, as follows:

"Knowing the nature of the charge and the possible penalty  
do you have any questions about the possible penalties, the

maximum being between three and fourteen years in the Illinois Department of Corrections with the mandatory period of two years parole, the minimum being a type of probation, and the maximum fine being \$25,000[?]"

¶ 5 Defendant replied, "No, sir," and that he still wished to plead guilty. The trial court then accepted defendant's pleas of guilty to the charges and continued the matter for sentencing.

¶ 6 At the sentencing hearing on December 9, 2004, the trial court stated that it had considered the facts of the case, the results of the presentence investigation, the testimony offered in aggravation and mitigation, the statutory factors in aggravation and mitigation, and defendant's expression of remorse. In light of the aggravating circumstances, the trial court believed that a 10-year penitentiary sentence was a necessary deterrent to others. The trial court then imposed that sentence on one count of aggravated DUI, merged the remaining counts, and admonished defendant of his appeal rights pursuant to Supreme Court Rule 605(b) (eff. Oct. 1, 2001).

¶ 7 On January 6, 2005, attorney Prusak filed a motion to reconsider that sentence as excessive. However, on March 2, 2005, Prusak filed a motion for leave to withdraw as counsel citing, *inter alia*, defendant's disinterest and unwillingness to cooperate, making it impossible to continue representing him. The circuit court granted Prusak leave to withdraw as counsel, and new private counsel, Brian Telander, filed an appearance on defendant's behalf. On August 22, 2005, Telander argued defendant's motion to reconsider his sentence, which was denied.

¶ 8 Defendant appealed, and this court remanded the cause to the trial court because defendant's attorneys had failed to file the mandatory certificate of compliance pursuant to Supreme Court Rule 604(d) (Feb. 6, 2013). *People v. Brown*, No. 1-05-2378 (2007) (unpublished order under Supreme Court Rule 23). The scope of remand was limited to the opportunity to file a new motion to reconsider sentence and a new motion hearing because defendant did not file a motion to withdraw his guilty plea and thus failed to preserve the issue for review. *Brown*, No. 1-05-2378, order at 5-6. Defendant then filed a petition for rehearing in

1-11-1541

the appellate court and a petition for leave to appeal to the supreme court, both of which were denied.

¶ 9 On remand, the public defender was appointed to represent defendant, and filed a new motion to reconsider sentence and a Rule 604(d) certificate. In support of the motion, defendant stated that attorney Prusak "advised him he should expect a four year sentence and not ten years" and that "he would serve only half of his sentence and not be subject to truth-in-sentencing."

¶ 10 At the motion hearing on February 20, 2008, defendant addressed the trial court and explained that Prusak told him and his parents that he had participated in a plea conference with the State, which resulted in an agreement whereby "the Judge would sentence me at the least to probation or at the maximum to four years in prison at 50 percent," in exchange for his guilty plea. Defendant stated that he felt his only option was "to blind plea guilty with no choice of a successful trial" because prior to this information, he was under the impression that Prusak was preparing and focusing on going to trial. Defendant further stated that on November 16, 2004, a date prior to entering his guilty plea, Prusak advised him to answer "no" when the judge asks if he was coerced or promised anything in connection with his decision to plead guilty. Defendant claimed that he only learned he was required to serve 85% of his sentence, rather than 50%, on January 18, 2005, 40 days after his sentence was imposed. In his words, "If I knew that what Mr. Prusak promised me, probation or at most four years at 50 percent was not going to be honored, I would never have blind pled guilty," and would have, instead, filed a timely motion to withdraw his guilty plea. In denying defendant's motion to reconsider sentence, the trial court explained to him that the percentage of his sentence to be served is controlled by statute and not the sentencing court or defense counsel.

¶ 11 Defendant appealed the denial of his motion to reconsider sentence, contending that (1) he should be allowed an additional opportunity to withdraw his plea because the trial court failed to admonish him of his appeal rights pursuant to Rule 605(b) at sentencing; (2) the "unusual" circumstances of this case, that plea counsel misled him regarding the application of the truth-in-

1-11-1541

sentencing statute, warranted an exception to Rule 604(d)'s waiver rule; (3) this court erred when it limited his remedy on remand to the filing of a new motion to reconsider sentence; and (4) postplea counsel (attorney Telander) was ineffective for failing to "amend" defendant's motion to reconsider sentence into a motion to withdraw his guilty plea. *People v. Brown*, No. 1-08-0801, order at 4-5 (2010) (unpublished order under Supreme Court Rule 23). This court found that the law of the case doctrine precluded defendant's second and third contentions because they were already decided by this court in his first appeal (*Brown*, No. 1-05-2378, order at 5-6). *Brown*, No. 1-08-0801, order at 5-6. This court found defendant's remaining contentions insufficient to avoid the application of forfeiture because the underlying bases were nonmeritorious, and we thus could not say that defendant was prejudiced by appellate counsel's failure to raise them. *Brown*, No. 1-08-0801, order at 11, 15.

¶ 12 Thereafter, on January 4, 2011, defendant filed the subject *pro se* post-conviction petition alleging, in pertinent part, that plea counsel (attorney Prusak) was ineffective for failing to advise him of the applicable truth-in-sentencing provision which required that he serve 85% of his sentence, and for stating that he would earn good time credit at the rate of 50% of his sentence. As a result, defendant claimed that his guilty plea was involuntary. In support of his allegations, defendant attached his own affidavit attesting to his conversation with Prusak, who stated "if I pleaded guilty the judge would sentence me, at the least, to probation or at the maximum to 4 years in prison at 50%" and he had a plea conference with the State's Attorney, who was "aware of and in agreement with this." Defendant averred that "after this conversation with [Prusak], I honestly and fully believed that my only option was to submit a blind guilty plea."

¶ 13 Defendant attached an affidavit from his mother attesting to her presence during, and the accuracy of, this conversation on November 4, 2004, and an affidavit from his father attesting to his presence during, and the accuracy of, a similar conversation on December 4, 2004. In addition, defendant attached to his petition sentence calculation sheets, one dated December 20, 2004, showing an adjusted projected out date of December 6, 2009, and another dated January

1-11-1541

18, 2005, when defendant claimed that he first learned he was required to serve 85% of his sentence, showing an adjusted projected out date of June 6, 2013.

¶ 14 The circuit court summarily dismissed the petition as frivolous and patently without merit in a detailed written order entered on March 3, 2011. As relevant to this appeal, the circuit court found that defendant's allegation that plea counsel rendered ineffective assistance was rebutted by the record, which showed that defendant answered "no" when the trial court asked him whether any promises had been made to him to cause him to enter his plea of guilty. The circuit court also found that defendant did not show that he would have succeeded at trial and thus he could not establish prejudice under the second prong of the *Strickland* test (*Strickland v. Washington*, 466 U.S. 668, 695-96 (1984)).

¶ 15 In this court, defendant contends that we must reverse the summary dismissal of his post-conviction petition and remand the cause for second-stage proceedings where he set forth, in his petition, an arguable claim that his open guilty plea was not knowing and voluntary due to the ineffective assistance of plea counsel.

¶ 16 At the first stage of post-conviction proceedings, a *pro se* defendant need only allege enough facts, with supporting affidavits, records, or other evidence to support the gist of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009); accord *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). However, a *pro se* defendant is not excused from providing any factual detail whatsoever regarding the alleged constitutional deprivations. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A *pro se* post-conviction petition may only be summarily dismissed as frivolous and patently without merit when it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. A petition lacks an arguable basis either in law or in fact when it is based on an indisputably meritless legal theory, *e.g.*, one which is completely contradicted by the record, or a fanciful factual allegation, *e.g.*, one which is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17.

¶ 17 A first-stage post-conviction 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 defendant was prejudiced thereby. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). We review *de novo* the summary dismissal of a post-conviction petition. *Hodges*, 234 Ill. 2d at 9.

¶ 18 The State argues that defendant's claims of ineffective assistance of plea counsel are refuted by the record and have no arguable basis in law or fact. The State points out that defendant had indicated to the trial court that there were no promises made to obtain his guilty plea and that he understood the consequences of pleading guilty. The State further asserts that defendant cannot make an arguable claim of prejudice.

¶ 19 We agree with the State that defendant's own words during the plea colloquy contradict his post-conviction claims that he pleaded guilty in reliance upon plea counsel's purported promise that the maximum sentence he would receive was four years at the rate of 50%. It is well established that defendant's acknowledgment in open court, during a plea hearing, as here, that there were no agreements or promises regarding his plea, contradicts a post-conviction assertion that he pleaded guilty in reliance upon an alleged, undisclosed promise by counsel regarding sentencing. *People v. Torres*, 228 Ill. 2d 382, 396-97 (2008).

¶ 20 Moreover, even if defendant could establish that plea counsel gave him erroneous advice regarding the impact of truth-in-sentencing upon his imposed sentence, he cannot show that he was arguably prejudiced by counsel's error (*Hodges*, 234 Ill. 2d at 17) because he has not articulated either a claim of actual innocence or a plausible defense that he could have raised at trial (*People v. Hall*, 217 Ill. 2d 324, 335-36 (2005)). Defendant's post-conviction assertion that "if [plea counsel] would have explained the truth about his case he would have never took an open blind plea guilty," does not *assert* either a claim of actual innocence or a plausible defense that could have been raised at trial. *People v. Hughes*, 2012 IL 112817, ¶¶ 64-66. For the same reason, defendant's supporting affidavits and attached sentence calculation sheets fare no better in

1-11-1541

asserting either a claim of actual innocence or a plausible defense that could have been raised at trial.

¶ 21 Accordingly, we affirm the summary dismissal of defendant's *pro se* post-conviction petition by the circuit court of Cook County.

¶ 22 Affirmed.