

2013 IL App (1st) 111718-U

THIRD DIVISION
May 15, 2013

No. 1-11-1718

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. 08 CR 18240
)	
TOMMIE PETERSON,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

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

¶ 2 Tommie Peterson, the defendant, 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 failing to properly investigate and raise the issue of his mental fitness to plead guilty, requiring further proceedings under the Act.

¶ 3 The record shows that defendant was charged with aggravated arson, residential arson, and arson stemming from an incident that occurred on December 24, 2000, and resulted in damage to an apartment building at 913-915 South Western Avenue in Chicago. The record further reflects that after a Supreme Court Rule 402 conference on January 8, 2010, the trial court informed defendant that the resulting plea offer by the State was no longer valid because all parties had erroneously believed that he would serve 85% of the agreed-upon sentence. However, due to the statute in effect at the time of the offense, defendant would serve only 50% of the imposed sentence.

¶ 4 A second Rule 402 conference was held on January 19, 2010. Six days later, defendant entered a negotiated plea of guilty to aggravated arson, for which he was sentenced to 13 ½ years' imprisonment, to be served at 50% time. The factual basis for the plea shows that, in an effort to defraud an insurance company, defendant and his co-defendants ignited a fire which caused damage to an apartment building occupied by a family that was not involved in the fraudulent scheme. 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. On April 28, 2010, however, the court received defendant's *pro se* motion for an order *nunc pro tunc* requesting that his mittimus be corrected to reflect that he will serve 50% of his 13 ½-year sentence. The trial court ordered the issuance of a corrected mittimus reflecting defendant's entitlement to day-for-day credit on his imposed sentence.

¶ 5 On April 21, 2011, defendant filed the *pro se* post-conviction petition at bar. He alleged that he was deprived of his right to effective assistance of counsel because counsel led him to believe that he was pleading guilty to a 10-year term of imprisonment, and not the 13 ½-year term imposed. He also alleged that counsel failed to share information with the court and the State's Attorney regarding his mental illness.

¶ 6 As relevant to this appeal, defendant alleged in his petition that he was transferred to Division 10 in jail due to the "psych medication" he was taking at that time, and also received a "psych" evaluation for his mental illness, but that defense counsel never shared this information with the court or the State's Attorney. In an affidavit filed in support of the petition, defendant averred that defense counsel twice visited him in the "psych unit," but never informed the court that he had been "on [m]eds" since his early teen years.

¶ 7 Defendant also filed the identical affidavits of his aunt, Joan Austin, his sister, Sekai Peterson, and Beverly Peterson, whose relationship to him is not clear, in support of his petition. All three averred, in pertinent part, that defense counsel "never mentioned [defendant's] psychiatric problems which have been ongoing since he was a teenager. Defense counsel visited him at Cook County Jail's psychiatric ward unit and knew he had been on medication for at least teen [*sic*] years. If this information had been presented this would have helped [defendant's] current case."

¶ 8 In further support of his petition, defendant attached four pages of medical records, all of which were dated after he entered his guilty plea. The first document, dated February 16, 2010, refers to an intake evaluation conducted on January 26, 2010, the day after he pled guilty. The report details information provided by defendant, including that (1) he began treatment for issues including depression and anxiety when he was a teenager, (2) he began taking psychotropic medication at age 13, (3) he is currently taking trazodone, cogentin and risperidol for mental health and emotional issues, (4) he has tried to kill himself about 10 times, the most recent of which occurred about a year ago. In that report, the evaluator reached a provisional diagnosis of "major depressive disorder - recurrent (sever [*sic*] with psychotic features.)" The report reflects a recommendation for referral to a psychiatrist and that defendant "seems okay for a general population institution." The three other documents are "mental health and diagnostic treatment note[s]," and are dated, respectively,

July 14, 2010, September 17, 2010, and February 1, 2011, and all reflect defendant's reported anxiety, depression and related weight loss.

¶ 9 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found that defendant's claim that his plea agreement called for a 10-year sentence was clearly contradicted by the record. Defendant now challenges the propriety of the dismissal order and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 10 Defendant maintains that, in summarily dismissing his petition, the circuit court "totally ignored" his arguably meritorious claim of ineffective assistance of counsel based on counsel's failure to inform the court of his mental history and current treatment. 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). That said, because defendant has concentrated solely on his ineffective assistance claim related to his mental fitness, 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).

¶ 11 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.

¶ 12 Defendant maintains that he set forth a claim of ineffective assistance of counsel warranting further proceedings under the Act. 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, 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. *People v. Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. 2d at 17. Where an ineffective assistance of counsel claim can be disposed of on the ground that defendant failed to establish that he was arguably prejudiced, we need not determine whether counsel's performance was arguably deficient. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 13 Here, defendant contends that the allegations in his petition and supporting documents, taken as true, stated the gist of a meritorious claim that counsel was ineffective for failing to raise the issue of his mental fitness with the court. According to defendant, the information which counsel possessed would arguably have raised a *bona fide* doubt about his fitness.

¶ 14 Although the prosecution of a defendant who is not fit to stand trial violates due process (*People v. Haynes*, 174 Ill. 2d 204, 226 (1996)), a defendant is presumed to be fit to stand trial, plead guilty, and be sentenced, and will be considered unfit for these purposes only where, due to his mental or physical condition, he is not able to understand the nature and purpose of the proceedings against him or to assist in his defense (725 ILCS 5/104-10 (West 2008); *People v. Easley*, 192 Ill. 2d 307, 318 (2000)).

¶ 15 The thrust of defendant's argument, as gleaned from his petition and supporting documents, is that, in spite of counsel's knowledge that he was housed in the jail's "psych ward," and that he was taking medication for an ongoing mental illness, counsel failed to raise the issue of his mental fitness with the trial court. Taking these allegations as true (*People v. Rissley*, 206 Ill. 2d 403, 412 (2003)), we find that defendant has failed to show that it is arguable that he suffered prejudice due to counsel's alleged omission.

¶ 16 The fact that defendant suffers from a mental impairment, or is using psychotropic medication, does not necessarily lead to the conclusion that he is mentally unfit for trial. 725 ILCS 5/104-21(a) (West 2008); *Easley*, 192 Ill. 2d at 322-23; *People v. Mitchell*, 189 Ill. 2d 312, 331

(2000). The crucial issue is whether defendant could understand the proceedings against him and cooperate with counsel in his defense. *Easley*, 192 Ill. 2d at 322-23.

¶ 17 Here, defendant not only failed to allege that his mental illness or the psychotropic medication he was taking to treat it, in any way interfered with his ability to understand the proceedings in his case, but he also failed to provide any facts from which such a conclusion could be inferred. To the contrary, the medical report upon which defendant heavily relies in his opening brief, reflects that the evaluator found defendant to be alert, cooperative, and deemed him to be "okay for a general population institution." Nothing in the record reflects an inability on the part of defendant to understand the proceedings, as illustrated by his repeated indications to the trial court that he understood the charges against him, the numerous rights that he was waiving by pleading guilty, the potential sentencing range for the charged offense, as well as his rights on appeal. Defendant's understanding of the proceedings, and his bargained-for sentence, is underscored by his *pro se* motion for an order *nunc pro tunc*, in which he requested that his mittimus be corrected to accurately reflect that he was to serve only 50% of his imposed sentence.

¶ 18 Additionally, the other medical documents which defendant attached to his petition are dated 6, 8, and 13 months after he entered his guilty plea, and, accordingly, do not speak to his ability to understand the proceedings in question. However, even assuming that those reports reflected the state of his mental condition at the time he entered his guilty plea, they show that defendant was depressed, but that his thought processes were intact, that he exhibited good impulse control and judgment, and that he was coherent. Accordingly, we find that defendant failed to raise a *bona fide* doubt of his mental fitness in his petition and supporting documents, and that his claim of ineffective assistance of counsel for failing to bring this matter to the attention of the court or the State's Attorney fails for lack of arguable prejudice. *Easley*, 192 Ill. 2d at 322-23; see also *Mitchell*, 189 Ill. 2d at 333-37.

¶ 19 In reaching this conclusion, we have considered *People v. Brown*, 236 Ill. 2d 175 (2010), primarily relied upon by defendant. In *Brown*, defendant, who was shot by police after lunging at an officer with a butcher knife, was convicted of attempted first degree murder of a peace officer. *Brown*, 236 Ill. 2d at 179. At sentencing, defendant asserted that he had been depressed, had previously tried to kill himself, and that he had lunged at the officers because he wanted them to kill him. *Brown*, 236 Ill. 2d at 180. Defendant filed a post-conviction petition alleging ineffective assistance of counsel based on counsel's failure to request a fitness hearing, and, in support thereof, attached medical records documenting his bipolar disorder and his medications to treat it, as well as affidavits from relatives who averred that defense counsel had been informed that defendant was taking medication to treat his disorder and that he was previously suicidal. *Brown*, 236 Ill. 2d at 181. In his petition, defendant alleged that on the day of the offense, he was attempting "suicide by police." *Brown*, 236 Ill. 2d at 181.

¶ 20 This court affirmed the summary dismissal of defendant's petition, but the supreme court reversed and remanded the case for second stage proceedings. *Brown*, 236 Ill. 2d at 181-82, 195-96. In doing so, the supreme court found that the nature of the offense, along with defendant's allegation that defense counsel knew defendant was taking psychotropic medication for bipolar disorder and that he had previously attempted suicide, along with his allegation that the medication caused an inability to understand the trial proceedings, arguably raised a *bona fide* doubt of defendant's ability to understand the nature and purpose of the proceedings and assist in his defense. *Brown*, 236 Ill. 2d at 191. Accordingly, the supreme court found that defendant's petition was not frivolous or patently without merit in that it had an arguable basis in both law and fact. *Brown*, 236 Ill. 2d at 186, 191.

¶ 21 Although defendant in this case also had a history of suicide attempts, unlike *Brown*, the underlying offense for which he was convicted was arson based on an attempt to defraud an

insurance company, and there is no indication that it had anything to do with a suicide attempt. More importantly, unlike *Brown*, defendant did not allege that he did not understand the proceedings due to the medication that he was taking, nor provide any facts or documentation from which such a conclusion could be inferred. Also, unlike the "brief exchanges" that the court in *Brown* found were insufficient to demonstrate defendant's ability to understand the proceedings (*Brown*, 236 Ill. 2d at 190-91), here, as discussed above, defendant and the circuit court engaged in a more extensive colloquy wherein the court ascertained that defendant was pleading guilty intelligently and voluntarily. Accordingly, unlike the defendant in *Brown*, we find that defendant here has failed to present an arguable claim that he was prejudiced by counsel's failure to inform the court of his mental condition.

¶ 22 We also find that defendant's reliance on *Brown v. Sternes*, 304 F. 3d 677 (7th Cir. 2002), is misplaced. Initially, we note that we are not bound by this federal court decision. *People v. Kidd*, 129 Ill. 2d 432, 457 (1989). Additionally, the significant factual distinctions in *Brown v. Sternes* render it unpersuasive here, where the record does not reveal any statement by defense counsel regarding difficulty in communicating with defendant, and where defendant did not engage in a courtroom outburst. See *Brown v. Sternes*, 304 F. 3d at 695-96. Moreover, unlike *Brown v. Sternes*, the medical records upon which defendant relies here were all generated after his guilty plea and sentencing date. Accordingly, *Brown v. Sternes* is readily distinguishable from the case at bar.

¶ 23 In sum, defendant failed to set forth an arguable claim of ineffective assistance of counsel, therefore, the trial court did not err when it summarily dismissed his *pro se* petition. *Hodges*, 234 Ill. 2d at 16-17; see also *Easley*, 192 Ill. 2d at 322-23. Accordingly, we affirm the order of the circuit court of Cook County.

¶ 24 Affirmed.