

No. 1-11-3530

**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.
	)	
v.	)	No. 04 CR 18953
	)	
DEMETRIUS SLOAN,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hall and Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Summary dismissal of his postconviction petition was proper where it was not arguable defendant received ineffective assistance of counsel during his guilty plea proceedings.

¶ 2 Defendant, Demetrius Sloan, appeals from the summary dismissal of his *pro se* petition for relief pursuant to section 5/122-1 of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2004). Defendant argues his petition presented an arguable claim of ineffective assistance of counsel based on counsel's failure to ensure defendant's guilty plea was knowing and voluntary where the trial court failed to review the exact nature of the charge with him, and where the record did not contain a factual basis for the plea. For the reasons that follow, we affirm.

¶ 3 In 2004, defendant was charged in a 37-count indictment which included many counts of predatory criminal sexual assault, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, and criminal sexual abuse, based upon acts committed against his

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minor daughter, K.. Defendant admitted to police that he had sexually penetrated K.

¶ 4 Defendant's amended motion to suppress his statements was denied and the State's Attorney's motion to admit outcry statements was granted.

¶ 5 On January 2, 2009, an off-the-record Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 2012)), conference was held. Thereafter, defendant pled guilty to one count of aggravated criminal sexual assault and was sentenced to six years' imprisonment on count 7—aggravated criminal sexual assault—a Class X felony. The State, in return for the plea on count 7, *nolle prossed* the other 36 charges.

¶ 6 The record sets forth the following as to the 402 conference and the plea. Prior to the conference, the trial court advised defendant that it would discuss with his counsel the mitigating factors and circumstances of his case, including defendant's family life, medical history, and criminal history. Defendant stated that he understood.

¶ 7 Following the conference, defense counsel stated on the record that "a 402 conference was held in this matter the sum and substance of which was conveyed to [defendant]." Counsel stated defendant "would ask to plead guilty." The trial court confirmed with the State that it was proceeding on count 7 (aggravated criminal sexual assault), and the State indicated it would *nolle pros* counts 1 through 6, and counts 8 through 37.

¶ 8 The following exchange ensued:

"THE COURT: All right. That having been done, [defendant], as to count seven, sir, which is the count that remains against you, what is your plea?

[DEFENDANT]: Guilty, your Honor.

THE COURT: Sir, you understand that you have a right to continue to plead not guilty?

[DEFENDANT]: Yes, I do.

THE COURT: Sir, the charge that remains against you is a class X felony.

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A class X felony is punishable by up to 30 years in the Illinois Department of Corrections. Under certain circumstances it can be extended to 60 years. You can be fined up to \$25,000 and with regards to mandatory supervised release or parole after you serve your penitentiary term, sir, you will serve a period of mandatory supervised release or parole. Just a moment please.

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THE COURT: Now, [defendant] - -

[DEFENDANT]: Yes, sir.

THE COURT: - - as to mandatory supervised release or parole, I need to advise you, sir, that after you serve your penitentiary term, sir, you will serve a period of mandatory supervised release or parole for a minimum period of three years. It could be a maximum period for your natural life, do you understand that, sir?

[DEFENDANT]: For parole?

THE COURT: Yeah. Your parole is at minimum three years.

[DEFENDANT]: Oh.

THE COURT: But a maximum up to natural life, do you understand that?

[DEFENDANT]: Right. Yes, sir."

¶9 The trial court admonished defendant as to the rights he would forfeit by pleading guilty, and defendant indicated he understood. Defendant also stated that no one had coerced him or promised him anything in exchange for his guilty plea. Defense counsel presented the court with defendant's jury and signed presentence investigation waivers. As to the factual basis for the plea, the trial court asked: "Do the parties agree and stipulate that a sufficient factual basis exists for the plea of guilty pursuant to the information that the Court received at the 402 conference?" Defense counsel and the prosecutor indicated that they would so stipulate. The trial court stated:

"[The] Court finds [defendant] understands the nature of the charges against him, the

possible penalties. He understands his legal rights and knowingly and voluntarily ha[s] waived those rights and a factual basis exists for the plea of guilty. I will accept the plea of guilty. There will be a finding of guilty. Judgment is entered on the finding."

¶ 10 Defendant, thereafter, declined to address the trial court. The trial court sentenced him to six years' imprisonment. The trial court admonished defendant as to his appeal rights. Defendant did not move to withdraw his guilty plea nor file a direct appeal.

¶ 11 In 2012, defendant filed a *pro se* petition for postconviction relief which included a claim of ineffective assistance of counsel. Defendant alleged that prior to entering his plea, counsel informed him he was pleading guilty to a charge of criminal sexual abuse, and "would be home shortly." According to defendant, he much later discovered that he had pled guilty to aggravated criminal sexual assault. Defendant alleged that because counsel misled him and allowed him to plead guilty without being informed by the trial court of the specific nature of the charge against him, or the factual basis for the plea, his plea was not knowing or voluntary. Defendant asserted that if he had known the correct charge, he would not have pleaded guilty. The trial court summarily dismissed defendant's *pro se* petition for postconviction relief.

¶ 12 In cases which do not involve the death penalty, the Act (725 ILCS 5/122-1 (West 2004)) provides a three-stage process for adjudication. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). The instant case involves the first stage of the process, where the trial court independently assesses the petition, taking the allegations as true. *Id.* Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit" and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2003).

¶ 13 A petition for postconviction relief may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12. A petition for postconviction relief has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory which is completely belied by the record. *Id.* at

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16. A petition for postconviction relief has no arguable basis in fact when it is based on a "fanciful factual allegation," including allegations which are "fantastic or delusional," or contradicted by the record. *Id.* at 17. Our review of a first-stage dismissal is *de novo*. *Id.* at 9.

¶ 14 On appeal, defendant argues the trial court erred in summarily dismissing his petition because it presented an arguable claim of ineffective assistance of trial counsel for failing to ensure that his guilty plea was knowing and voluntary. Defendant asserts that counsel's performance fell below an objective standard of reasonableness by advising him that the guilty plea was for the charge of criminal sexual abuse, and by allowing him to unknowingly plead guilty to the greater charge of aggravated criminal sexual assault. Defendant contends it is arguable counsel was ineffective for persuading him to plead guilty despite defendant's not knowing or understanding the specific nature of the charge as evidenced by the offense being described as "Count 7" at the plea hearing, and despite there being no factual basis for the guilty plea on the record. He further asserts that it is arguable he was prejudiced by counsel's ineffectiveness because he would not have pled guilty had he known the nature of the charge.

¶ 15 To establish an ineffective assistance of counsel claim, a defendant must show: (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) A challenge to a guilty plea based on allegations of ineffective assistance of counsel is subject to the standards set forth in *Strickland*. *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). Under *Strickland*, the defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by that substandard performance. *Id.* at 335. Counsel performs inadequately where he fails to ensure the defendant's guilty plea was entered voluntarily and intelligently. *Id.* Prejudice exists if there is a reasonable probability that absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Id.* A bare allegation that the defendant would have pleaded not guilty and

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insisted on trial is not enough to establish prejudice. *Id.* Rather, such a claim must be accompanied by either a claim of innocence, or the articulation of a plausible defense which could have been raised at trial. *Id.* at 336-37.

¶ 16 However, our supreme court has indicated that, in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors. In *Hodges*, our supreme court held: "a petition alleging ineffective assistance may not be summarily dismissed 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.

¶ 17 In the instant case, we need not determine whether or not it is arguable that counsel's performance fell below an objective standard of reasonableness because defendant has not presented an arguable claim of prejudice. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, this court is not required to address whether counsel's performance was objectively reasonable). Both in his petition and in his brief on appeal, defendant has asserted that, had counsel not been deficient, he would not have pleaded guilty. However, defendant has neither claimed that he is innocent of the charges brought against him, nor articulated any defense which could have been raised at trial. Therefore, defendant has failed to make a showing that it is arguable he suffered prejudice as a result of counsel's alleged deficiencies. See *Hall*, 217 Ill. 2d at 329; see also *People v. Hughes*, 2012 IL 112817, ¶¶ 65-66 (characterizing the defendant's claim "that had he known of the possibility for civil commitment he would not have pleaded guilty because he thought that it would resolve the matter" as insufficient to articulate prejudice).

¶ 18 Defendant asserts that the requirement in *Hall*—that a defendant make a claim of innocence, or articulate a plausible defense which could have been raised at trial— "has come into doubt in recent years." However, defendant does not cite to any case which specifically raises doubts as to the holding in *Hall*. Defendant cites to *People v. Clark*, 2011 IL App (2d) 100188—decided after

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*Hall*—and proposes it is sufficient for a defendant simply to claim that he would not have pleaded guilty absent counsel's errors. We disagree. In *Clark*, the defendant articulated that, absent his counsel's ineffectiveness, he would have put forth an insanity defense at trial. Defendant alleged counsel misrepresented that there were no witnesses to testify on his behalf. In support of his petition, defendant provided an affidavit from the victim showing she would have testified as to facts in support of the insanity defense. *Clark*, 2011 IL App (2d) 100188, ¶¶ 1, 22. Thus, *Clark* is distinguishable from the instant case, where defendant has not articulated a plausible defense.

¶ 19 We further note that the holding in *Hall*—that a defendant raising a contention of ineffectiveness of counsel during a guilty plea proceeding must make a claim of innocence or articulate a plausible defense which could have been raised at trial—has been reaffirmed by our supreme court in *Hughes*. *Hughes*, 2012 IL 112817, ¶ 63. The holding in *Hall* has also been cited in *People v. Ramirez*, 402 Ill. App. 3d 638 (2010). We reject defendant's argument that *Hall* does not apply in his case.

¶ 20 Based on the allegations raised in defendant's petition, it is not arguable that defendant was prejudiced by his attorney's performance. While defendant is not required to establish prejudice conclusively at first-stage postconviction proceedings, the lack of facts to support his claim of pleading not guilty had he known the nature of the charge, is insufficient to establish arguable prejudice. Accordingly, summary dismissal of the petition was proper.

¶ 21 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.