

No. 1-12-0281

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. 06 CR 15585
)	
OTIS WORLEY,)	Honorable
)	James M. Schreier,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

- ¶ 1 **Held:** The circuit court's summary dismissal of defendant's *pro se* post-conviction petition was affirmed where appellate counsel was not ineffective for failing to raise a nonmerititious claim that the trial court's comments during closing argument and at sentencing demonstrated judicial bias.
- ¶ 2 Defendant Otis Worley 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 that his petition presented an arguable claim of ineffective assistance of appellate counsel based on counsel's failure to argue on direct appeal that comments made by the trial court during closing argument and at sentencing demonstrated judicial bias. We affirm.

¶ 3 Following a 2008 bench trial, defendant was convicted of two counts of aggravated criminal sexual assault where the victim, then 17-year-old H.H., was grabbed at a bus stop, forced at knife point into an abandoned building, and sexually assaulted on September 22, 1996. The court sentenced defendant to two consecutive terms of 30 years' imprisonment.

¶ 4 At trial, H.H. testified that while she was waiting for a bus, a man grabbed her, produced a knife, forced her into a nearby abandoned building, and sexually assaulted her twice. He tried unsuccessfully to break her neck, and then tried to stab her in the stomach, but she grabbed the knife by the blade and broke it. As she fled toward a window, the man pushed her through it and she fell to the ground. H.H. ran home, her mother called the police, and she was brought to the hospital where she received stitches on her hand, back, legs, and head. Swabs were taken from H.H.'s mouth and vagina, and it was later determined that defendant's DNA profile matched the DNA profile from H.H.'s swabs. H.H. identified defendant as her attacker from a photographic array in October 2007. When she was asked to identify defendant in court, H.H. was uncertain that defendant was her attacker, but emphasized her confidence in the photo array identification. She denied knowing or dating defendant, attending church in 1996, or recalling that defendant or Ronald Dillard offered their assistance in finding the assailant. H.H. acknowledged that she joined a church in 1999, and that she knew pastor Willie Douglas and church musician Jason Douglas.

¶ 5 Defendant testified that in September 1996 he knew H.H. for several months and they attended the same church. He was involved in a relationship with H.H. and they had sex "off and on" at that time. Defendant did not see H.H. on the day of the incident. A couple of days later, while he was selling drugs, he saw that television news crews were at H.H.'s house. Defendant and his nephew Ronald Dillard went to see H.H., and H.H. told defendant that she would not

have been attacked had he been present. Defendant and Dillard looked for the attacker, but could not find him.

¶ 6 Ronald Dillard and Sonya Simpson, defendant's sister, testified that defendant and H.H. were dating in 1996. Felicia Black, the mother of defendant's son, testified that she saw H.H. with defendant in 1996.

¶ 7 Jason Douglas, defendant's friend, testified that he knew H.H. and defendant, but never saw them together, nor had he ever heard that they were in a relationship. Douglas stated that he, defendant, and H.H. attended the same church in 1996. On cross-examination, Douglas testified that he was uncertain as to when H.H. joined the church, and, on re-direct, Douglas explained that he presumed H.H. was a member of the church because a pastor prayed for her, and may have visited her, following the assault in 1996.

¶ 8 During closing argument, defense counsel suggested that H.H. had repressed the events in question or suffered a psychological trauma that caused her to deny her relationship with defendant and identify him as her attacker. The following exchange then occurred between the court and defense counsel:

"THE COURT: What would be the motivation of lying aside from a psychological kind of notion of repression? What could be the possible motivation for her reporting this to the police after it happened and for not going to work that morning, for involving herself in this whole messy horrific situation? People tend to tell the truth unless they are psychotic, divorced from reality. They tend to tell the truth because they subject themselves to perjury, getting in serious trouble themselves, retribution for false allegations. It is easier to tell the truth because you don't have

to worry about what you said the last time. Unless there is a motivation to lie, one thinks that human beings tend to tell the truth. I am listening to you about repression.

MR. WARD [defense attorney]: I am speculating, Judge.

THE COURT: Do you care to elaborate on any possible motivation as to why [H.H.] *** would come in here in this messy case before God and man and tell the kinds of lies you are attributing to her?

MR. WARD: Judge, I don't want to categorize at all what she said in this courtroom as lie. I don't know that it was. There may well be some sort of psychological problems that caused her to repress this or block it. If you look at it from the other angle, she did cry out, she did talk to police, and she said that she had never seen this person, never met this person, and we know that couldn't be true."

¶ 9 Following closing arguments, the trial court found defendant guilty of two counts of aggravated criminal sexual assault. In doing so, the court stated that it believed H.H.'s testimony.

¶ 10 At sentencing, defense counsel argued in mitigation that defendant was candid regarding his background and that he was selling drugs at the time. The court interrupted and stated:

"He wasn't candid when he maligned and absolutely lied about this poor little girl waiting for a bus to try to go to work, total perjury and maligning this poor little victim. He wasn't candid at all. He was a liar."

¶ 11 In allocution, defendant stated, in part, that he had love and respect for women. After listening to defendant, the court stated:

"You loved and respected this girl so much that you pushed her out of a second floor window and tried to shortly send her soul to heaven. But by the grace of God, she survived your vicious attack and your throwing her out the window."

The trial court then sentenced defendant to two consecutive terms of 30 years' imprisonment for each count of aggravated criminal sexual assault. We affirmed that judgment on direct appeal. *People v. Worley*, No. 1-08-2348 (2010) (unpublished order under Supreme Court Rule 23).

¶ 12 On July 24, 2011, defendant filed a *pro se* post-conviction petition alleging, in pertinent part, that the trial court showed improper bias in several of its comments, and that appellate counsel was ineffective for failing to raise this issue on appeal. Defendant appended to his petition several documents and transcripts that are not relevant to this appeal.

¶ 13 On September 20, 2011, the circuit court issued a written order dismissing the petition as frivolous and patently without merit. In doing so, the court found that defendant's judicial bias claim was conclusory where he failed to allege prejudice as a result of the trial court's bias. The court also found that the petition was unsupported by transcripts or documentation.

¶ 14 In this appeal, defendant challenges the propriety of that dismissal, contending that he raised an arguable claim of ineffective assistance of appellate counsel. He specifically maintains that his appellate counsel was ineffective for failing to argue that comments made by the trial court demonstrated judicial bias.

¶ 15 This court reviews the summary dismissal of a post-conviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10. Under plenary review, this court is required to make our own assessment of the allegations raised in the post-conviction petition, and we are "free to substitute

[our] judgment for that of the circuit court in order to formulate the legally correct answer." *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). This court may affirm the circuit court's dismissal of a post-conviction petition on any basis in the record. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

¶ 16 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 post-conviction 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). 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 indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17.

¶ 17 A defendant's claim of ineffective assistance of appellate counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing of deficient performance by counsel and prejudice to the defendant from the deficient performance. At the first stage of post-conviction proceedings, a petition may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. Appellate counsel is not required to argue every conceivable issue on appeal (*People v. Easley*, 192 Ill. 2d 307, 329 (2000)), and if counsel concludes that an issue is without merit, then counsel's decision to refrain

from raising it is not incompetence (*People v. Barrow*, 195 Ill. 2d 506, 522-23 (2001)).

Generally, counsel's decision not to raise an issue on appeal is given substantial deference (*People v. Harris*, 206 Ill. 2d 293, 326 (2002)), and unless the underlying issue is meritorious, the defendant was not prejudiced by counsel's failure to raise it on direct appeal (*Barrow*, 195 Ill. 2d at 523)).

¶ 18 We initially note that defendant concedes that he forfeited his contention of judicial bias by failing to object at the time and to raise the issue in his posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Defendant, however, maintains that forfeiture need not have prevented appellate counsel from raising this issue on direct appeal because forfeiture is relaxed where the actions of the trial court are at issue. See *People v. White*, 249 Ill. App. 3d 57, 60 (1993). In the alternative, defendant asserts that appellate counsel could have raised this issue as a matter of plain error. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (a reviewing court may address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence").

¶ 19 While we have held that the forfeiture rule should be relaxed when the basis for the objection is the conduct of the trial judge (*People v. Davilla*, 236 Ill. App. 3d 367, 379 (1992)), the supreme court explained that the failure to preserve a claim should be excused "only under extraordinary circumstances," such as when the trial court makes inappropriate remarks to the jury (*People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)). The extraordinary circumstances detailed in *McLaurin* did not exist in this case, and thus the forfeiture rule would not have been relaxed on this basis. Moreover, as shown below, no error occurred in this case because the complained of comments do not establish judicial bias. Accordingly, defendant cannot claim that he would have had relief on appeal under the plain error doctrine. See *People v. Moreira*, 378 Ill. App. 3d

120, 131 (2007) (stating that if a court determines that no error occurred, it need not go any further in the plain error analysis).

¶ 20 A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010). Allegations of judicial bias or prejudice must be viewed in context and should be analyzed in terms of the trial court's reaction to the events taking place. *People v. Urdiales*, 225 Ill. 2d 354, 426 (2007). The fact that the court displays displeasure with an attorney's behavior, for example, is not necessarily evidence of prejudice against a party or that attorney. *Urdiales*, 225 Ill. 2d at 426. A defendant has the burden to establish the trial court's bias or prejudice by showing the existence of active personal animosity, hostility, ill-will or distrust toward him (*People v. Shelton*, 401 Ill. App. 3d 564, 583 (2010)), and in the absence of such a showing, the "proof falls short of establishing actual prejudice which would interfere with a fair trial" (*People v. Neumann*, 148 Ill. App. 3d 362, 370 (1986)).

¶ 21 Here, defendant's assertion that the trial court was biased is completely contradicted by the record, and is thus based on an indisputably meritless legal theory. Defendant first contends that the trial court's comments during closing argument challenging defense counsel to offer a possible motivation for why H.H. would lie in court showed that the court prejudged the evidence against him. We find that although the trial court interrupted defense counsel's closing argument, he did not make any derogatory comments about defendant, did not comment on the sufficiency of the evidence, and allowed counsel to complete his argument. See *Faria*, 402 Ill. App. 3d at 482-83 (finding that the defendant was not denied a fair trial where the trial court challenged the attorney's remarks during closing argument, but permitted him to argue his theory of the case without giving him a time limit or pressuring him to finish early); compare with *People v. Stevens*, 338 Ill. App. 3d 806, 810 (2003) (trial court repeatedly interrupted defense

counsel, exhibited impatience by limiting counsel's time to argue, and showed a prejudgment of the case by remarking before counsel concluded that the State had proven defendant guilty).

¶ 22 When viewed in context, at most, the trial court's interruption showed that it was displeased with counsel's argument that H.H. suffered from a psychological trauma that caused her to deny her relationship with defendant and identify him as her attacker. However, the fact that a trial court displays displeasure or irritation with certain behavior is not necessarily evidence of judicial bias against the defendant. *People v. Jackson*, 205 Ill. 2d 247, 277 (2001). Furthermore, in making its statements during closing argument, the court was merely inquiring about the unresolved question raised by the conflicting testimony and counsel's theory, which is the role of the trier of fact and not an example of bias. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 30 (finding that the court's statements, when viewed in context, did not show bias but instead reflected the court's attempt to reconcile conflicting representations).

¶ 23 Defendant also contends that the trial court's comments at his sentencing hearing were examples of judicial bias. However, when the trial court made these statements, defendant had already been found guilty. He was thus no longer clothed in the presumption of innocence. *People v. Brown*, 229 Ill. 2d 374, 384 (2008). Defendant, however, maintains in his reply brief that the trial court's comments at sentencing "provide important evidence of the trial court's strong emotional involvement in this case." We disagree. The court's comments at sentencing were in response to defendant's assertions that his testimony was candid and he was an innocent victim of false allegations made by H.H. They did not display the court's bias against defendant or a strong emotional involvement in this case.

¶ 24 In reaching this conclusion, we find unpersuasive defendant's argument that the court's comments show that it misapprehended his defense. Defendant indicates that his defense at trial was to show that an individual other than himself committed the crimes. He asserts, however,

that the trial court acted under the mistaken belief that defense counsel was arguing that H.H. was lying about being sexually assaulted. As evidence of the court's misunderstanding of his defense, defendant points to the court's question, "[w]hat could be the possible motivation for her reporting this to the police after it happened and for not going to work that morning, for involving herself in this whole messy horrific situation?"

¶ 25 However, when the court's comments are viewed in their entirety, the record shows that the trial court did not misapprehend the defense. Instead, the trial court was clearly commenting on the believability of counsel's argument that, due to some psychological trauma, she identified defendant as her assailant and could not recall that she had a previous relationship with him. Furthermore, in finding defendant guilty, the court found H.H. credible, and thus the court believed that defendant was the offender in question and that H.H. did not have a previous relationship with him.

¶ 26 For the reasons stated above, the record rebuts defendant's claim that the trial court was biased, prejudged the case, or misapprehended counsel's closing argument. Because defendant's underlying claim that the trial court was biased has no merit, it follows that defendant was not arguably prejudiced by counsel's failure to raise it on direct appeal. Therefore, appellate counsel did not render ineffective assistance. See *Easley*, 192 Ill. 2d at 329.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 28 Affirmed.