

No. 1-12-0695

**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. 08 CR 1261
	)	
GUILLERMO BUSTOS,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justices McBride and Howse concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Trial court followed proper procedure when it summarily dismissed defendant's *pro se* post-conviction petition; summary dismissal at first stage of proceedings was proper where defendant's petition lacked an arguable basis in law.
- ¶ 2 Defendant Guillermo Bustos appeals from an order of the circuit court 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 argues that the circuit court erred in summarily dismissing his petition because the court did not find his petition to be frivolous or patently without merit within 90 days of docketing, as required by the Act. Defendant also contends that his petition

presented an arguable claim that his counsel was ineffective because he induced defendant to plead guilty by promising a 6-year prison sentence, but he ultimately agreed to a 10-year prison sentence. We affirm.

¶ 3 The record shows that in December 2007, a grand jury indicted defendant on 7 counts of criminal sexual assault and 13 counts of aggravated criminal sexual abuse relating to various sexual acts committed by defendant with his teenage daughter.

¶ 4 On February 27, 2009, defendant appeared with private counsel, who informed the court that defendant was prepared to plead guilty and would be assisted by a Spanish interpreter. The State acknowledged that in exchange for defendant's plea of guilty to one count of criminal sexual assault, he would receive a 10-year prison sentence and the State would enter a *nolle prosequi* for the remaining counts. The trial court acknowledged defendant's wish to enter a plea of guilty, addressed defendant personally in open court, and determined that he understood the sentencing range for the offense was 4 to 15 years. The trial court also informed defendant that by pleading guilty, he would relieve the State of its obligation to prove him guilty beyond a reasonable doubt, and would give up the rights to confront and cross-examine the State's witnesses and have the court subpoena witnesses who would testify on his behalf, as well as his right to a jury trial. When the trial court asked defendant whether he knew what a jury trial was, defendant responded, "[t]hat's when 12 people come and listen," and then "[t]hey take a decision and they can find me guilty or not guilty." The trial court acknowledged that defendant was assisted by the official Spanish interpreter, and when defendant was asked where he was born, defendant responded that he was born in Mexico, and said "I had just gotten my residency." The trial court determined his understanding that he may be deported after completing his prison term, and defendant responded "yes" to questions about whether he wanted to continue his plea and whether he was pleading guilty freely and voluntarily.

¶ 5 The State then presented the factual basis for the plea as follows. On December 12, 2007, Officer Hiatt and his partner were conducting a routine patrol when they observed defendant's vehicle parked with the engine running. As the officers pulled up to defendant's car, they saw that defendant's 15-year-old biological daughter was on top of defendant, and both defendant and his daughter had their clothes off. Once the daughter came off defendant, the officers observed that both parties' genitals were exposed. Pursuant to an investigation, which included verbal admissions from defendant and an interview with the daughter, it was determined that after becoming involved in his daughter's life in December 2006, defendant and his daughter first had vaginal intercourse on February 23, 2007, and defendant and his daughter had engaged in oral, vaginal, and anal intercourse from that date until December 12, 2007.

¶ 6 After defendant indicated that he was pleading guilty to the above facts, the trial court found that there was a factual basis for the plea, the plea was given freely and voluntarily, and that defendant understood the nature and possible consequences of the plea. When asked if he had anything to say, defendant replied, "No." Defendant also indicated that he understood the length of his sentence. The court accepted defendant's plea and imposed the recommended 10-year sentence. Defendant did not file any postplea motion or a direct appeal.

¶ 7 On August 16, 2011, defendant filed the subject *pro se* post-conviction petition, alleging that his guilty plea was the product of ineffective assistance of counsel. The petition stated that defendant's counsel told him that if he did not accept the State's offer, he would receive the maximum sentence at a later date. In addition, counsel told defendant to only say "yes, yes, yes" and not to ask the judge for anything, even though the judge had asked defendant if he was sure he wanted to accept a 10-year sentence on an offense with a 4 to 15-year sentencing range. Defendant's petition also alleged that good communication was not established with the interpreter.

¶ 8 In support of his allegations, defendant attached his own affidavit, which was written in Spanish.<sup>1</sup> Defendant averred that his attorney, Alfredo Acosta, promised he would receive a sentence of six years. They planned to request a Rule 402 conference on February 27, 2009, but on that date, Acosta was not present, and a different lawyer or assistant, who did not speak Spanish, appeared instead. Further, even though defendant did not speak English and only understood a little, the interpreter did not translate everything that was said. Acosta's representative told defendant that the State had offered a 10-year sentence. When defendant replied that Acosta had said he would get defendant a six-year sentence, the representative replied he did not know about that, but he had spoken with Acosta, who recommended that defendant take the offer because defendant could win or lose at trial, and if he lost, he could be sentenced to up to 28 years. Scared, defendant accepted the offer and signed a paper, the purpose of which he was not told. Defendant further averred that he was told not to speak in front of the judge or the State would revoke the offer. The judge asked defendant why he wanted the 10-year sentence and said he did not want to sign it, but stated he would do so if that was what defendant wanted. When the judge asked if defendant wanted to ask something or have the judge do something for him, defendant replied "no," as instructed.

¶ 9 At a hearing on August 23, 2011, the trial court stated:

"This is a [*pro se*] post-conviction petition and I will grant it a date so I can review it.\*\*\*"

On October 7, 2011, the trial court orally summarily dismissed defendant's petition by stating "motion denied," and on October 25, 2011, the trial court entered a certified report of disposition, which read that "[t]he petition for post-conviction relief is denied."

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<sup>1</sup> The Office of the State Appellate Defender and the State's Attorney provided translations of the affidavit as an appendix to their briefs.

¶ 10 In this court, defendant argues that we should reverse the summary dismissal and remand the matter for second-stage proceedings because the circuit court did not find his post-conviction petition to be frivolous or patently without merit within 90 days of docketing, as required by the Act. According to defendant, it is unclear whether the court had read or was able to read his affidavit and did not dismiss his petition on either of the Act's permissible grounds.

¶ 11 The Act sets provides a three-step process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2010); *People v. Pendleton*, 223 Ill. 2d 458, 471-73 (2006). Proceedings begin when a defendant files a petition in the circuit court where the original proceeding occurred. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act's pleading requirements are met if the *pro se* defendant alleges enough facts to make a "gist" of a constitutional claim, and need not include formal legal arguments or citations to legal authority in the petition. *Id.* After it independently reviews the defendant's petition, if the circuit court finds that the claims alleged in the petition are frivolous and patently without merit, the court "shall dismiss the petition in a written order," specifying the findings of fact and conclusions of law it made in reaching its decision. 725 ILCS 5/122-2.1(a)(2) (West 2010). At this stage, the circuit court acts strictly in an administrative capacity, screening out only those petitions which are without legal substance or are obviously without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. All well-pleaded facts that are not positively rebutted by the original trial record are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). We review the dismissal of a post-conviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 12 We find that the trial court followed the proper procedure for dismissing defendant's petition and that the trial court did not use the language of the statute is not dispositive. As noted above, if the court determines the petition is frivolous and without merit, "it shall dismiss the

petition in a written order." 725 ILCS 5/122-2.1(a) (West 2010). Nothing in the Act requires that the order use specific language when dismissing the petition. The trial court is also not required to state its reasons for dismissal. *People v. Porter*, 122 Ill. 2d 64, 81 (1988). Indeed, the essence of the trial court's task is to determine whether or not the petition should be dismissed. *People v. Cox*, 136 Ill. App. 3d 623, 626 (1985). It is the trial court's judgment that is under review at this court, not the contents of the order. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). As such, we do not find it significant that the trial court departed from the language of the Act in dismissing the petition.

¶ 13 Further, we presume that the trial court properly considered the petition. Contrary to defendant's assertions, the record shows that the trial court knew it was considering a post-conviction petition, illustrated by its statement, "this is a [*pro se*] post-conviction petition" at the hearing on August 23. The trial court continued proceedings for over a month so that it could review the petition. We ordinarily presume that the trial judge knows and follows the law unless the record indicates otherwise. *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996). Thus, we presume that the trial court translated the affidavit, if necessary, so it could examine the petition pursuant to the Act (725 ILCS 5/122-2.1(a) (West 2010)). We also presume the trial court dismissed the petition because it found the petition to be frivolous or patently without merit, as required by the Act (725 ILCS 5/122-2.1(a)(2) (West 2010)). Nothing in the record indicates the contrary. However, even if the trial court dismissed the petition using different grounds, we may nonetheless affirm the judgment for any reason supported by the record. *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005).

¶ 14 We reject defendant's reliance on *People v. McDonald*, 373 Ill. App. 3d 876 (2007) and *People v. Woods*, 141 Ill. App. 3d 1079 (1986). In *McDonald*, the trial court's summary dismissal of the defendant's *pro se* petition was reversed because the trial court refused to

consider the petition based solely on the defendant's failure to refer to a section of the Act by number. *McDonald*, 373 Ill. App. 3d at 881. The trial court also referred to defendant's filed documents as "[ ]whatever he filed\*\*\*[ ]" *Id.* at 878. Here, the trial court explicitly stated it was considering a post-conviction petition and the record indicates that the trial court reviewed it. In *Woods*, we reversed the summary dismissal of the defendant's *pro se* post-conviction petition because the record demonstrated no "independent consideration whatsoever by the court with regard to the allegations set forth" in the petition. *Woods*, 141 Ill. App. 3d at 1081. Instead, the court gave the petition to an assistant public defender to read and when counsel informed the court the following week that she did not find the petition contained a cause of action, the court dismissed it. *Id.* at 1080. In contrast to the improper reliance on an assessment by counsel in *Woods*, nothing in the present record suggests that the trial court abdicated its responsibility to evaluate the contents of the petition. In fact, the trial court gave itself over a month to review defendant's petition. Under these circumstances, we find that the trial court independently examined defendant's petition in compliance with section 122-2.1(a) of the Act.

¶ 15 Defendant next contends that the trial court erred in dismissing his post-conviction petition because he presented an arguable claim that he received ineffective assistance of counsel. Defendant states that his attorney induced him to plead guilty by promising him a six-year sentence, as opposed to the 10-year sentence to which he ultimately agreed, rendering his guilty plea unknowing and involuntary. According to defendant, his affidavit implies that without his attorney's misrepresentation of a more lenient sentence, he would not have pled guilty.

¶ 16 A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis in law or in fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. Generally, to

demonstrate ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Applying a more lenient standard for a first stage post-conviction proceeding, a petition alleging ineffective assistance of counsel may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Tate*, 2012 IL 112214 at ¶ 19.

¶ 17 Defendant's petition is indisputably meritless under both prongs of this standard. The actions of Acosta's representative did not render defendant's plea involuntary and unknowing. According to defendant's petition and affidavit, Acosta initially promised a six-year sentence. However, defendant was later informed that the State was offering a 10-year sentence. Acosta's representative told defendant that Acosta recommended the 10-year sentence because if defendant lost at trial, he could receive a 28-year prison sentence. Scared, defendant then accepted the offer. According to defendant's affidavit, because he was afraid, defendant relied on the advice of his attorney based on his attorney's assessment of the case, which cannot be the basis for finding that his guilty plea was involuntary. See *People v. Witherspoon*, 164 Ill. App. 3d 362, 365 (1987) (attorney's statement that he could not do anything for the defendant was not ineffective assistance of counsel or coercion, as the attorney was telling the defendant that he did not believe a guilty verdict could be avoided, and a defense counsel's honest assessment of a case cannot be the basis for holding that a plea was involuntary); *People v. Carmichael*, 17 Ill. App. 3d 249, 251-52 (1974) (guilty plea made in reliance upon advice of counsel estimating a defendant's chances of acquittal, and expected sentencing, is a voluntary plea); *People v. Singleton*, 4 Ill. App. 3d 46, 48 (1972) (guilty plea is not involuntary because it was made in fear of receiving a heavier sentence at trial); *People v. Edwards*, 49 Ill. 2d 522, 525 (1971) (guilty

plea was not coerced where the defendant's attorney told him that if he pleaded guilty he would receive a 14 to 17-year sentence, and if he pleaded not guilty, he would probably receive a 40 to 80-year sentence if convicted).

¶ 18 Defendant notes that post-conviction petitions have advanced from the first stage based on sworn allegations that defense counsel induced a plea by misrepresenting or not fulfilling a promise of a more lenient sentence (*People v. Johnson*, 97 Ill. App. 3d 976, 978 (1981); *People v. Cook*, 11 Ill. App. 3d 216, 218 (1973)). This was not the case here. At the time of the plea, Acosta's representative told defendant the exact sentence he would receive if he accepted the State's offer —10 years —and in his affidavit, defendant admits that he knew the offer was for that length of time. Neither Acosta nor his representative promised a more lenient sentence at the time the plea was offered and accepted.

¶ 19 Further, it is not arguable that defendant was prejudiced by accepting the 10-year offer. To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). It is not arguable that defendant would have insisted on going to trial but for his counsel's recommendation to take the 10-year sentence. In exchange for defendant's guilty plea, the State declined to prosecute 19 counts of criminal sexual assault and aggravated criminal sexual abuse. Had the case proceeded to trial, the State would have introduced the eyewitness testimony of the police officers who observed defendant and his daughter in the car. Other evidence would have included defendant's admissions and interviews from his daughter, as well as evidence that their encounters spanned a nearly 10-month period. At trial, the evidence would have been more than sufficient to convict him of multiple offenses and he would have served a longer sentence. Summary dismissal of defendant's post-conviction petition was appropriate.

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¶ 20 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 21 Affirmed.