

No. 1-12-0798

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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. 00 CR 16875
)	
WILLIE HAMPTON, JR.,)	Honorable
)	Preston L. Bowie
)	Neera L. Walsh
)	Michael Brown
Defendant-Appellant.)	Judges Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed over his contentions that he presented an arguable claim of ineffective assistance of counsel for denying him his right to testify and right to a jury trial.

¶ 2 Willie Hampton, the defendant, 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 trial counsel where counsel denied him his right to testify and his right to a jury trial. We affirm.

¶ 3 The evidence at the bench trial established that defendant, codefendant Cory Durr, and a third unknown man illegally entered the home of the victim, Y.N., at 2016 West 65th Street in Chicago, at 3 a.m. on June 21, 2000. Y.N. testified that she was awakened by defendant, who placed a gun to her head and told her to give him money and drugs. Y.N. further testified that the offenders took \$100 from her brother, some jewelry, and an Aldi's bag containing her clothes. Defendant and the third unknown man also took Y.N. into her bedroom and committed four separate acts of sexual assault.

¶ 4 Codefendant Durr's statement, which was admitted at trial, revealed that he participated essentially as a look-out and knew the third man as Maurice Alexander. Defendant demanded money from Y.N. Defendant pulled out his gun when a man entered from the basement and made him lie on the floor. Durr saw defendant and Maurice sexually assault Y.N. in her bedroom.

¶ 5 Defendant presented four witnesses who testified that Y.N. denied that defendant was one of the offenders when the police brought him to her house in a squad car after his arrest later that same morning. A fifth witness testified by way of stipulation that Y.N. said defendant was not one of her attackers.

¶ 6 At the close of this bench trial in 2002, the court convicted defendant of four counts of aggravated criminal sexual assault (ACSA) for committing the sexual assaults while armed with a firearm (Counts 22, 23, 24, and 25) and imposed four consecutive 21-year terms for these offenses, for a total of 84 years in prison. The court also convicted defendant of four counts of ACSA based on committing the sexual assault during the commission of another felony, *i.e.*, home invasion (Counts 1, 4, 7, and 10) and imposed four concurrent six-year prison terms for these offenses. In addition, the court convicted defendant of two counts of home invasion with a firearm (Counts 29 and 36) and imposed two concurrent 21-year prison terms for these offenses. Also, the court found defendant guilty of armed robbery but did not impose a sentence for that offense. In sum, all terms

were to be served concurrently with the four consecutive 21-year terms for ACSA while armed with a firearm, for a total of 84 years in prison.

¶ 7 Following the 2002 bench trial, this case was remanded to the trial court twice. See *People v. Hampton I*, 363 Ill. App. 3d 293 (2006); *People v. Hampton II*, 406 Ill. App. 3d 925 (2010). During the second remand, the court imposed four consecutive 21-year terms for ACSA based on the commission of another felony (Counts 1, 4, 7, and 10). The court also reinstated one 21-year term for home invasion (Count 29), ordering it to run consecutively to the ACSA terms. Finally, the court imposed one 25-year term for armed robbery (Count 37), a count for which he was originally found guilty of but never sentenced on. The court ordered the 25-year term for armed robbery to be served concurrently with the 21-year term for home invasion and consecutively to the ACSA counts. The aggregate sentence totaled 109 years. The outcome of the second remand is the subject of a separate appeal in *People v. Hampton*, No. 1-12-1783 (2013).

¶ 8 On November 14, 2011, defendant filed a *pro se* postconviction petition alleging, in pertinent part, that trial counsel was ineffective for failing to allow defendant to testify, and for forcing him to take a bench trial. In particular, defendant stated in his petition that:

"[A]t the closing of the states [*sic*] case, [defendant's] attorney came to the bullp[e]n to speak with him briefly. [Defendant] informed his attorney that he wanted to testify. The lawyer then informed [defendant] that if he testified then his entire backgroun[d] would categorically be used against him for impeachment purposes. [Defendant] informed lawyer that he did not care, he still wanted to testify because there were too many lies being told on him. The lawyer then informed [defendant] that he was not put[t]ing him on the stand but the judge would admonish him on his right to testify the

same way he did for the bench or jury trial. [Defendant] contends that the judge never did ask him if he wanted to testify so his understanding was, it was too late because things were almost done. *** [Defendant] contends had he testified a different result would have resulted at trial.

[Defendant] contends that he informed counsel that he wanted a jury trial. Counsel informed [defendant] that he would see, and that was the end of the discussion. [Defendant] then had his family to inform counsel that he wanted a bench [*sic*] trial, counsel informed [defendant's] family that, the only way he was going to get a bench [*sic*] trial was if he paid some more money. Counsel said that he initially undercharged [defendant] for the case because he only charged a few thousand, so a bench [*sic*] trial would cost at least \$1500 more. *** [Defendant] contends that once his family told him this, he knew that they could not afford to give the attorney any more money so he thought his only option was to take a bench.

Counsel informed [defendant] that the judge was going to ask him whether he wanted a bench or jury trial, and [defendant] was to say bench and to sign the paper that was given to [him] to sign. So [defendant] simply followed instructions. [Defendant] still believe[s] that he should have had a bench [*sic*] trial, and counsel was too lazy to do more work so he lied to [defendant] and his family."

Defendant attached his own sworn affidavit attesting that the facts in the petition were true.

¶ 9 On February 3, 2012, the circuit court issued a written order dismissing the petition as frivolous and patently without merit. In doing so, the court found that defendant failed to allege or show any evidence that counsel refused to let him testify. The court further found that if counsel did advise defendant to waive his right to a jury trial, such advice was a matter of trial strategy, and defendant could not show that the waiver of his jury right was unknowing.

¶ 10 In this appeal, defendant challenges the propriety of that dismissal, contending that he raised an arguable claim of ineffective assistance of trial counsel. He first maintains that his trial counsel refused to allow him to testify.

¶ 11 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 postconviction 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 *People v. 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. This court reviews the summary dismissal of a postconviction petition *de novo*. *Tate*, at ¶ 10.

¶ 12 To state a claim of ineffective assistance of trial counsel, a defendant must show that his counsel's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In the context of a first-stage postconviction

proceeding, the summary dismissal of a petition alleging ineffective assistance of counsel incorporates the standard set out in *Hodges* in that the petition 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. *Hodges*, 234 Ill. 2d at 17; see also *Tate*, at ¶ 19 (applying that standard).

¶ 13 A defendant's right to testify at trial is a fundamental constitutional right, as is his right to choose not to testify. *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855 (2009). Undue interference with an accused's right to testify may constitute ineffective assistance of counsel. *People v. Seaberg*, 262 Ill. App. 3d 79, 82-83 (1994). The decision whether or not to testify rests ultimately with the defendant alone and is not merely a matter of trial tactics to be left to counsel. *People v. Brown*, 336 Ill. App. 3d 711, 719 (2002). However, merely advising a defendant not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel absent evidence that counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 14 Defendant's first ineffective assistance of counsel claim fails because although defendant's petition alleges that he told defense counsel at the close of the State's case that he desired to testify, there is no evidence that he reaffirmed his intention to the court at that time. Moreover, defendant failed to indicate his desire to testify when it was time for the defense to present its case, nor did he object when counsel rested his case without calling him to testify. Absent "a contemporaneous assertion by the defendant of his right to testify, the trial judge properly denied an evidentiary hearing." *People v. Thompkins*, 161 Ill. 2d 148, 178 (1994) quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973); see also *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 66 (stating, at the second stage of postconviction proceedings, that because the defendant's silence can be taken as acquiescence in counsel's decision to rest without calling the defendant as a witness, it was incumbent on the defendant to raise his desire to testify).

¶ 15 Defendant has also failed to show he suffered arguable prejudice from being denied his right to testify. *Youngblood*, 389 Ill. App. 3d at 218. The evidence against defendant was overwhelming. At trial, the victim testified that defendant threatened her with a gun, stole money, jewelry, and an Aldi's bag filled with clothes from her residence, and sexually assaulted her. Codefendant's statements were consistent with the victim's testimony. Police saw defendant, codefendant, and a third man with the same Aldi's bag, and arrested them. The victim identified defendant and codefendant as the offenders, and defendant's fingerprint was found at the site of entry into the residence. In addition, defendant failed to assert in his petition how his testimony would have changed the result at trial. He simply alleged that he wanted to testify "because there were too many lies being told on him." Defendant has thus failed to show how his testimony would refute the allegations against him. See *People v. Barkes*, 399 Ill. App. 3d 980, 989-90 (2010) (stating, at the second stage of postconviction proceedings, that the defendant's failure to specify which allegations he would refute by testifying, rendered his assertion of ineffective assistance conclusory). Defendant's assertion that his testimony would have supported that of his witnesses is unpersuasive where the trial court specifically found that the testimony of the defense witnesses carried "little weight."

¶ 16 In reaching this conclusion, we find *People v. Dredge*, 148 Ill. App. 3d 911 (1986), relied on by defendant, distinguishable from the case at bar. In *Dredge*, 148 Ill. App. 3d at 913-14, this court vacated the summary dismissal of the defendant's postconviction petition, which alleged that her trial counsel was ineffective for not allowing her to testify. However, *Dredge* is not dispositive here because the appellate court limited its analysis to whether the defendant's postconviction petition adequately stated "a claim of deprivation of [the defendant's] constitutional right to testify at her trial" (*Dredge*, 148 Ill. App. 3d at 913), and did not analyze the defendant's claim under *Strickland*. Recent cases, however, have made it clear that a defendant must allege at least arguable prejudice

when claiming ineffective assistance of counsel based on trial counsel's alleged deprivation of the defendant's right to testify. See *e.g.*, *Hodges*, 234 Ill. 2d at 17. As stated above, defendant in this case has failed to do so.

¶ 17 Defendant next contends that he was coerced into waiving his right to a jury trial because defense counsel told him he would require an additional \$1,500 for a jury trial, which defendant could not afford. The State maintains, however, that a review of defendant's petition shows that defendant only alleged that counsel discussed the matter of additional payment with defendant's family, and defendant failed to attach affidavits from these family members in support of his allegations.

¶ 18 Despite the low threshold for survival at the first stage of proceedings, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 379 (1988). The failure to attach the required documents or to explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 19 Here, defendant alleged in his petition that he informed counsel that he wanted a jury trial, and counsel responded that "he would see." Defendant then alleged that counsel informed his family members that he would only represent defendant at a jury trial if he was paid an additional \$1,500. Defendant stated in his petition that he knew his family could not afford to give his attorney more money, and thus thought his only option was a bench trial.

¶ 20 We agree with the State that, according to defendant's petition, counsel only discussed an additional \$1,500 payment to pursue a jury trial with defendant's family. Defendant does not, however, identify which family members spoke to counsel, attach affidavits from family members attesting to this conversation with counsel, or explain why he could not obtain such affidavits. Therefore, defendant's unsupported conclusory allegation that counsel coerced him into waiving his

right to a jury trial is not sufficient to require further proceedings under the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008). We further note that to the extent defendant alleges in his petition that trial counsel advised him to waive his jury trial, such advice has been held to be a matter of trial strategy (*People v. Elliott*, 299 Ill. App. 3d 766, 774 (1998)), and thus virtually unchallengeable. *People v. Childress*, 191 Ill. 2d 168, 177 (2000).

¶ 21 Furthermore, defendant's allegations do not amount to coercion. According to defendant, counsel only told him "he would see" in response to defendant's request for a jury trial. In addition, defendant never alleged that his counsel demanded more money from him if he insisted on a jury trial, as defendant argues in his brief. Instead, defendant only maintains in his petition that when his family told him that a jury trial would cost another \$1,500, he knew that they could not afford to pay the attorney and thought his only option was a bench trial. Because defendant's allegations do not amount to coercion, we find *People v. Smith*, 326 Ill. App. 3d 831 (2001), relied on by defendant, distinguishable from the case at bar. In *Smith*, counsel's alleged conduct, if true, would have prevented the defendant from knowingly waiving his right to a jury trial. See *Smith*, 326 Ill. App. 3d at 847 (the defendant alleged that counsel advised him to take a bench trial because the judge owed him a favor). Here, however, counsel's alleged comments do not approach that of the defendant's allegations in *Smith*.

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

¶ 23 Affirmed.