

NOTICE
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2013 IL App (4th) 120570-U
NO. 4-12-0570
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
December 19, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
DARRELL G. NEELEY,)	No. 08CF115
Defendant-Appellant.)	
)	Honorable
)	James R. Glenn,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's summary dismissal of defendant's postconviction petition, concluding defendant failed to set forth the gist of a constitutional claim that he was denied the effective assistance of counsel or that his plea was involuntary.

¶ 2 In April 2012, defendant, Darrell G. Neeley, filed a *pro se* postconviction petition, alleging he was denied effective assistance of trial counsel and his guilty plea was involuntary. Later that month, the trial court dismissed defendant's postconviction petition, finding (1) it was unsupported by affidavits, records, or other evidence; (2) the allegations did not establish defense counsel's representation fell below an objective standard of reasonableness or prejudiced defendant; (3) the allegations failed to set forth a substantial denial of defendant's constitutional rights; and (4) the petition was frivolous or patently without merit.

¶ 3 Defendant appeals, arguing the trial court erred by dismissing his postconviction

¶ 8 The State presented the following factual basis for defendant's plea. T.B., J.B.'s mother, would testify she met defendant at a Walgreen's parking lot in May 2007 and dropped J.B. off with defendant. Defendant then took 14-year-old J.B. back to his residence in Mattoon, Illinois, where he engaged in sexual intercourse with J.B. Defendant's attorney stipulated to the State's factual basis and defendant agreed the evidence would "show substantially" what the prosecutor indicated it would show. The trial court found a factual basis supported defendant's plea.

¶ 9 The trial court asked defendant whether "any force or threat" had been used to make defendant plead guilty, to which defendant responded "No." Defendant also stated that no promises had been made to him other than what was stated in court. Defendant confirmed that his plea was voluntary and that he wished to persist in his plea. Thereafter, the court accepted defendant's plea.

¶ 10 In June 2009, defendant's sentencing hearing commenced. Travis Eastin, a Mattoon detective, testified in December 2007, he was asked to investigate a sexual relationship between J.B. and Bradley Shafer, a 31-year-old who lived with J.B. and her mother. On December 5, 2007, J.B.'s mother provided Eastin a taped statement concerning Shafer in the Mattoon police department's interview room. Afterward, Eastin stepped out of the interview room and went into the conference room, where he overheard a conversation through the department's speaker system that J.B. and her mother were having in the interview room. Specifically, Eastin overheard T.B. tell J.B. "not to say anything about J.D." Eastin did not know who J.D. was. Because T.B. and J.B. were whispering, Eastin could not hear the rest of their conversation, but Eastin was concerned another suspect may have abused J.B.

¶ 11 According to Eastin, another detective and a police officer interviewed Shafer at the Coles County Safety and Detention Center. Shafer indicated J.B. had been assaulted by another man, defendant. Eastin then spoke to T.B. again, who confirmed she had been in a relationship with defendant and defendant would often visit her home. T.B. had "numerous conversations" with defendant about J.B.'s relationship with Shafer and defendant "devised a plan to help her get rid of Mr. Shafer," which involved defendant having sex with J.B. Consistent with the plan, T.B. met defendant in a Walgreen's parking lot in Mattoon, where J.B. got into defendant's truck and went to defendant's home. At midnight that night, J.B. called T.B., indicating "bad things" were happening to her and she wanted to come home.

¶ 12 Three days after Eastin spoke to T.B., Eastin and Marla Ellett, an employee at the Children's Advocacy Center in Charleston, Illinois, interviewed J.B. J.B. said her mother was dating defendant, whom J.B. called "J.D." J.B. acted "apprehensive" during her interview and told Eastin she was scared to speak to him. Eastin left the room so that J.B. could speak to Ellett privately. J.B.'s conversation with Ellett was recorded, and afterward, Eastin reviewed a statement of that interview. According to the statement, J.B. told Ellett defendant took her clothes off and she tried to hide herself with a blanket, crying, but defendant "yanked" the blanket away from her. Defendant then engaged in sexual intercourse with J.B. When Eastin returned to the interview room, J.B. told Eastin and Ellett that defendant indicated he would hurt and kill J.B. if she told anyone. J.B. also told a sexual-assault nurse at Sarah Bush Lincoln Health Center that defendant (1) yanked her clothes off and put his penis in her vagina while J.B. was crying, (2) told J.B. she could not go home, and (3) told J.B. he would kill her or hurt her mom if she ever told anyone.

¶ 13 Based on his investigation, Eastin applied for two court-authorized overhears. T.B. agreed to allow Eastin to record her conversation with defendant. In that conversation, defendant admitted having sex with J.B. The trial court admitted a transcript of the overhear into evidence. That transcript contained, in relevant part, the following statements:

"TB: Well, then why did you do it if you knew it was wrong [defendant], I mean.

[DEFENDANT]: We both knew it was wrong. And we both did it. It was wrong. It was wrong. We never incorporated the kid into our plan. We should never have done that. That was wrong."

¶ 14 Eastin also interviewed defendant. Defendant admitted he knew J.B. was underage and, on the night J.B. stayed at his apartment, J.B. got into his bed and defendant had sex with her. T.B. was never charged.

¶ 15 The trial court sentenced defendant to 14 years in prison. In July 2009, defendant filed a motion to reconsider sentence, arguing his sentence was excessive. The record in this case does not indicate initially the court ruled on the motion to reconsider sentence. However, our appellate records show that, during the pendency of his appeal in this matter, after defense counsel's appointment herein, the trial court held a hearing and ruled on defendant's motion to reconsider sentence on August 2, 2013. Defendant took a direct appeal, docketed as No. 4-13-0663. On September 5, 2013, we directed the parties to submit supplemental briefing discussing the effect, if any, of the trial court's August 2, 2013, order on defendant's appeal in this case. The parties submitted supplemental briefing as requested, agreeing the court's August 2, 2013, order

had no jurisdictional effect on the instant appeal. After reviewing the supplemental briefs, we agree with the parties that the trial court's belated ruling on defendant's motion to reconsider does not deprive our court of jurisdiction in the instant case. Thus, we will address the merits of defendant's contentions in this appeal.

¶ 16 In April 2012, defendant filed a *pro se* postconviction petition, alleging his attorney was ineffective for permitting him to plead guilty to criminal sexual assault where defendant had not been in a supervisory position over J.B. Defendant also asserted that defense counsel "repeatedly assured" defendant he had "worked out" a four-year sentencing agreement with the State. Specifically, according to defendant, if he passed a sex-offender evaluation and agreed to enter an open guilty plea, defendant would receive a four-year prison sentence. In addition, defendant claimed his attorney failed to "put in the paper work" to withdraw defendant's open plea or ask for a sentence reduction within 30 days of the sentencing hearing as requested by defendant.

¶ 17 Later that month, the trial court dismissed defendant's postconviction petition, finding (1) it was unsupported by affidavits, records, or other evidence; (2) the allegations did not establish defense counsel's representation fell below an objective standard of reasonableness or prejudiced defendant; (3) the allegations failed to set forth a substantial denial of defendant's constitutional rights; and (4) the petition was frivolous or patently without merit.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant asserts the trial court erred by dismissing his postconviction petition because the petition presented the gist of a claim that (1) he was denied effective

assistance of counsel where counsel allowed him to plead guilty to a charge for which he had a potential defense, (2) he was denied effective assistance of counsel because counsel failed to comply with defendant's request to file a motion to withdraw defendant's guilty plea, and (3) defendant's plea was involuntary because it was induced by counsel's statement concerning the length of sentence defendant would receive.

¶ 21 A. The Post-Conviction Hearing Act

¶ 22 The Post-Conviction Hearing Act (Act) sets out three distinct stages for the adjudication of postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. At the first stage, the circuit court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2010).

¶ 23 A petition is frivolous or patently without merit when its allegations fail to present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In other words, a petition is frivolous or patently without merit only where the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 12, 912 N.E.2d 1204, 1209 (2009). A petition that is based on an indisputably meritless legal theory—such as one that is completely contradicted by the record—or that is based on a fanciful factual allegation lacks an arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212.

¶ 24 A petition need not contain formal legal arguments or citation to legal authority to survive a first-stage summary dismissal. *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. Nonetheless, a *pro se* petitioner is not "excused from providing any factual detail at all surrounding the alleged constitutional violation." *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1208.

Indeed, a petitioner must attach to his petition "affidavits, records, or other evidence supporting its allegations" or "state why the same are not attached." 725 ILCS 5/122-2 (West 2010).

¶ 25 We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Harris*, 224 Ill. 2d at 123, 862 N.E.2d at 966.

¶ 26 B. Defendant's Claims

¶ 27 On appeal, defendant asserts he presented the gist of a constitutional claim that (1) defendant pled guilty as a result of counsel's defective representation, (2) counsel was ineffective for failing to comply with defendant's request to file a motion to withdraw defendant's guilty plea, and (3) defendant's plea was involuntary because it was induced by trial counsel's statement that he had negotiated a four-year sentence.

¶ 28 1. *Defendant's Claim That He Pled Guilty as a Result of Defective Representation*

¶ 29 Defendant contends he presented the gist of a claim that he received ineffective assistance of counsel because his attorney advised him to plead guilty to an offense for which he had a potentially meritorious defense. Specifically, defendant argues he presented an arguable claim that he did not hold a supervisory position over J.B. as alleged in the State's information. According to defendant, because J.B.'s mother delivered J.B. to defendant knowing defendant would have sexual intercourse with J.B., defendant was not responsible for J.B.'s welfare or expected to provide J.B. with a safe place to stay. We disagree.

¶ 30 Defendant pleaded guilty to count I, which alleged defendant committed criminal sexual assault in that defendant, "who was 17 years of age or older and held, as a caregiver, a position of supervision in relation to J.B.," and placed his penis into the vagina of J.B., who was between 13 and 18 years old. 720 ILCS 5/12-13(a) (West 2008) (now 720 ILCS 5/11-1.20(a)(4),

as amended Pub. Act 96-1551, Art. 2, § 5 (eff. July 1, 2011)). The Criminal Code of 1961 (Criminal Code) does not define the phrase "position of supervision." In construing section 12-13(a) of the Criminal Code, Illinois courts have given the words "trust," "authority" and "supervision" their common dictionary meanings. *People v. Reynolds*, 294 Ill. App. 3d 58, 65, 689 N.E.2d 335, 340 (1997). Thus, "supervise" has been defined as meaning to "superintend, oversee." *People v. Kaminski*, 246 Ill. App. 3d 77, 81, 615 N.E.2d 808, 811 (1993) (quoting Webster's Ninth New Collegiate Dictionary 1185 (1985)).

¶ 31 In analyzing defendant's claims, we find instructive the First District's decision in *Reynolds*. There, the First District concluded a jury could find the defendant developed a position of trust, authority, or supervision in relation to the teenage victim because the victim volunteered on the defendant's campaign for weeks and the defendant served as the victim's "mentor," arranged for her enrollment in a private school, and gave her money. *Reynolds*, 294 Ill. App. 3d at 66, 689 N.E.2d at 341. Here, the evidence indicated J.B.'s mother, T.B., was in a relationship with defendant and defendant "often" visited T.B.'s home. Thus, defendant was not a stranger to J.B.; rather, he had been in J.B.'s home "often" and J.B. knew defendant as someone with whom her mother had a dating relationship.

¶ 32 Moreover, on the night of the incident, defendant, a 48-year-old, transported 14-year-old J.B. to his home, from which J.B. had no means of leaving. Indeed, after the assault, J.B. called her mother asking to come home, demonstrating J.B. lacked the ability to leave on her own. In *People v. Secor*, 279 Ill. App. 3d 389, 396, 664 N.E.2d 1054, 1059 (1996), the Third District rejected the defendant's claim that section 12-13(a)(4) was ambiguous, finding it was evident that "the legislature sought to prevent sex offenses by *those whom a child would tend to*

obey, such as a teacher or coach, as well as those in whom the child has placed his trust[.]” (Emphasis added.) Here, J.B. was a guest in defendant's home, late at night, with no means of leaving. Thus, J.B. was in a position in which she would "tend to obey" defendant.

¶ 33 Defendant points out that in *Secor*, the court found the defendant's relationship with the victim could be characterized "at a minimum, as that of a baby sitter or chaperone." *Secor*, 279 Ill. App. 3d at 394, 664 N.E.2d at 1057. The *Secor* court also found the defendant assumed a "parental or quasi-parental role" by driving the victim, the victim's brother, and the defendant's son to the store and by instructing them to go to bed. *Secor*, 279 Ill. App. 3d at 394, 664 N.E.2d at 1057. Likewise, in *Kaminski*, the court found the defendant and his wife "were responsible for looking after the welfare of the victim on the night in question" and the victim's parents entrusted the victim's care to the defendant. *Kaminski*, 246 Ill. App. 3d at 82-83, 615 N.E.2d at 812.

¶ 34 Here, defendant argues, he did not assume a quasi-parental or chaperone role, nor was he responsible for providing J.B. with a safe place to stay, because J.B.'s mother gave J.B. to defendant for the purpose of having sex with her. We acknowledge the factual scenarios in *Secor* and *Kaminski* differ from this case in that T.B. knew defendant's intentions when she caused J.B. to go with defendant. Nonetheless, regardless of T.B.'s intentions, J.B. did not know of defendant and T.B.'s plan. As the *Secor* court recognized, "[i]t is the trust that makes the child particularly vulnerable, and it is the betrayal of that trust that makes the offense particularly devastating." *Secor*, 279 Ill. App. 3d at 396, 664 N.E.2d at 1059. Thus, it is J.B.'s perception, not T.B.'s, that is relevant. Here, 14-year-old J.B. went with defendant, someone who was dating her mother and a frequent visitor in J.B.'s home, late at night to his residence, at her mother's

urging, completely unaware of what was to take place at defendant's home. Under these circumstances, defendant was in a position of supervision in relation to J.B. within the meaning of section 12-13(a)(4) of the Criminal Code. Accordingly, the trial court properly dismissed defendant's postconviction petition because defendant did not present an arguable claim that he had a meritorious defense such that counsel was ineffective for allowing him to plead guilty.

¶ 35 *2. Defendant's Claims That Counsel Failed To File
a Motion To Withdraw Guilty Plea and That Defendant's Plea Was Involuntary*

¶ 36 Defendant contends he presented the gist of a constitutional claim that counsel was ineffective for failing to comply with defendant's request to file a motion to withdraw his guilty plea. Defendant also asserts he presented the gist of a constitutional claim his plea was involuntary because it was induced by trial counsel's statement that he had negotiated a four-year sentence. These claims are intertwined and we address them together.

¶ 37 The two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), governs ineffective-assistance-of-counsel claims. However, at the first stage of a postconviction proceeding, a defendant need not "demonstrate" or "prove" ineffective assistance; rather, to survive a first-stage summary dismissal, the petition need only show it is arguable that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant suffered prejudice. *Tate*, 2012 IL 112214, ¶¶ 19-20, 980 N.E.2d 1100. In cases where we can dispose of an ineffective-assistance-of-counsel claim because defendant suffered no prejudice, we need not address whether defense counsel's performance was objectively unreasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457, 943 N.E.2d 303, 317 (2011). Regarding the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 38 Here, defendant has alleged he told both the trial court and his attorney that he wished to withdraw his guilty plea. He indicates he wished to withdraw his plea because the four-year deal his counsel represented he had worked out did not come to fruition. The State correctly points out the record contradicts defendant's claim he told the court he wanted to withdraw his plea. Moreover, assuming counsel was deficient in failing to act on defendant's directive to file a motion to withdraw the guilty plea, defendant cannot demonstrate actual prejudice. Given a motion to reconsider sentence was timely filed, from which defendant has appealed, defendant was not deprived of a direct appeal. Therefore, as to his claim counsel failed to file a motion to withdraw defendant's plea of guilty, prejudice is not presumed. See *People v. Edwards*, 197 Ill. 2d 239, 252, 757 N.E.2d 442, 449-50 (2001) (explaining that, pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), prejudice should be presumed only where counsel's alleged deficiency results in a complete deprivation of appellate proceedings).

¶ 39 A review of the record demonstrates the trial court properly admonished defendant and ascertained that defendant (1) was entering his plea voluntarily, (2) had not been promised anything to plead guilty, and (3) understood the possible penalties he faced. These portions of the record completely contradict defendant's contention his counsel promised he would receive a four-year sentence and reveal a complete absence of any legitimate basis upon which to grant a motion to withdraw the plea of guilty. It is clear any motion to withdraw defendant's plea of guilty would have been denied. Thus, the result of the proceedings would

have been no different.

¶ 40

III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.