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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE | ) | Appeal from the Circuit Court |
| OF ILLINOIS,            | ) | of Winnebago County.          |
|                         | ) |                               |
| Plaintiff-Appellee,     | ) |                               |
|                         | ) |                               |
| v.                      | ) | No. 08-CF-4775                |
|                         | ) |                               |
| DENNIS LYLES,           | ) | Honorable                     |
|                         | ) | John R. Truitt,               |
| Defendant-Appellant.    | ) | Judge, Presiding.             |

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in dismissing at the first stage defendant's *pro se* postconviction petition. Defendant's ineffective assistance argument was not frivolous or patently without merit where defendant claimed that counsel advised him against taking a favorable plea in the face of overwhelming evidence and the lack of a viable defense.

¶ 2 Defendant, Dennis Lyles, appeals the first-stage dismissal of his postconviction petition (725 ILCS 5/122-1 *et seq.* (West 2008)). For the reasons that follow, we reverse the dismissal and remand for second-stage proceedings. Reversed and remanded.

¶ 3 **BACKGROUND**

¶ 4 In February 2009, a grand jury charged defendant with armed robbery with a firearm. 720 ILCS 5/18-2(a)(2) (West 2008). A violation of subsection (a)(2) is a Class X felony (which carries a sentencing range of 6 to 30 years) for which an additional 15 years shall be added to the term of imprisonment imposed by the court. 720 ILCS 5/18-2(b) (West 2008).

¶ 5 In May 2009, the State initially offered defendant six years' imprisonment in exchange for a guilty plea to armed robbery with a dangerous weapon *other than* a firearm. 720 ILCS 5/18-2(a)(1) (West 2008). A violation of subsection (a)(1) is also a Class X felony (which carries a sentencing range of 6 to 30 years of imprisonment), but it carries no mandatory enhancement. According to defendant, his attorney advised him not to take the offer, telling him that she could obtain an acquittal at trial by challenging: (1) the identification process; and (2) the existence of the gun.

¶ 6 Subsequently, defendant was appointed a new attorney with whom he would proceed to trial. In October 2009, the trial court informed defendant that, if convicted, the crime with which he was charged carried a mandatory 15-year firearm enhancement. The court informed defendant that this would effectively make the range 21 to 45 years. Defendant stated that he understood the enhancement.

¶ 7 Sometime after November 2009, counsel withdrew a motion to suppress identification because, counsel determined, there was no State action involved in the victim's viewing of a surveillance video shortly after the offense. (Apparently, the private owner of the surveillance video played it for the victim.)

¶ 8 The case proceeded to trial. The State called three witnesses and presented eight exhibits, including a surveillance video and surveillance still photos. Defendant presented no evidence, and he did not testify.

¶ 9 This court viewed the video surveillance, which we described in greater detail in our appellate order (*People v. Lyles*, 2011 IL App (2d) 100843-U). It shows defendant at the crime scene outside the Central Park Tap in Rockford. Defendant looks head-on into the camera. He briefly leaves the scope of the camera, returning within minutes, waving an object—the purported gun—at two victims. This causes one victim to flee while the other victim is brought to his knees beside a parked car. Defendant walks toward that victim while pointing the object at him. He then moves as though taking something from the victim’s pocket. After that, defendant and the victim both leave the scope of the camera.

¶ 10 The victim testified at trial that, as he and an acquaintance left the Central Park Tap, defendant pointed a silver revolver at them. With the gun pointed at his head, the victim allowed defendant to remove \$500 from his pocket.

¶ 11 Rockford police detective Scott Mastroianni testified that he went to the Central Park Tap to watch the surveillance video. While the video was playing, a patron approached him and stated that he recognized the robber in the video to be “Johnny McFadden’s brother.” Mastroianni then checked his files and learned that Johnny McFadden had a brother named Dennis Lyles, *i.e.*, defendant. Mastroianni obtained a photo of defendant, compared it to the surveillance records, and opined that it was the same person. Defense counsel did not object to this portion of Mastroianni’s testimony.

¶ 12 Mastroianni interviewed defendant and showed him a still frame of the video surveillance. Defendant said, “It’s me.” However, defendant maintained that he was only there to participate in a drug deal and he did not have a gun.

¶ 13 When Mastroianni described the surveillance still frame to the jury, he stated that the frame showed defendant pointing a gun at the victims. Defense counsel objected (implying that

the identity of the man should be left for the jury to decide). The trial court, perhaps erroneously, overruled the objection, stating that Mastroianni was merely providing foundation that the still frame came from the video surveillance.

¶ 14 The jury found defendant guilty of armed robbery with a firearm. It returned a special verdict, which read: “We, the jury, find the allegation that defendant was armed with a firearm during the commission of the offense of armed robbery was proven.”

¶ 15 At sentencing, defendant orally moved the court to find that his counsel were ineffective for failing to fully inform him of the consequences he would face if he went to trial. Defendant set forth the history of his plea offers. He stated that he had initially been given an offer of 6 years, which remained open for months. His first attorney told him that the 15-year enhancement did not apply to him and pushed for trial. Later, days before trial, his second attorney came back with an offer of 18 years, and then, a day later, 10 years. He rejected these offers because they were higher than the 6-year offer. He asked for a Rule 402 conference (Ill. S. Ct. Rule 402 (eff. July 1, 1997)), but counsel told him it was too late for that.

¶ 16 The prosecutor indicated that the six-year offer had been left open until it was made clear on the record that defendant understood the enhancement. The trial court confirmed that defendant had been made aware of the enhancement. The court found that defendant’s oral motion lacked merit where he had been informed of the mandatory enhancement. It then sentenced him to 27 years of imprisonment (12 years plus the 15-year firearm enhancement). Defendant appealed his conviction.

¶ 17 On direct appeal, defendant argued that his trial counsel was ineffective for failing to object to certain portions of Mastroianni’s testimony regarding: (1) information given by the patron that the robber was “Johnny McFadden’s brother;” (2) his conclusion that the person in the photograph he obtained and the person in the surveillance video were the same person; (3)

his opinion that the surveillance still frames showed defendant holding a handgun; and (4) defendant's statement that he was in the parking lot to participate in a drug deal. *Lyles*, 2011 IL App (2d) 100843-U. Defendant also argued that the State failed to prove that a firearm was used in the commission of the offense. *Id.*

¶ 18 This court rejected defendant's arguments. *Id.* ¶ 31. As to the first two arguments challenging the identification process, defendant could not establish prejudice. The evidence of defendant's identity was overwhelming. The victim identified defendant in a photo line-up, defendant initially admitted to police that he was the man depicted in the surveillance video, and, at one point, defendant looked directly into the surveillance camera, providing the jury with virtually an unobstructed view of his face. We concluded: "It would be a stretch to say defendant's identity was at issue in this case." *Id.* ¶ 18.

¶ 19 As to Mastroianni's statement that defendant was holding a gun, defendant did not establish deficient performance. Defense counsel *did* object to the statement in general, and the trial court overruled the objection. Counsel could have been more precise in explaining that the jury should be in the position to decide not only whether the surveillance frame showed defendant but also whether it showed defendant holding a gun. Still, this lack of precision did not fall below an objective standard of reasonableness. *Id.* ¶ 22. Additionally, counsel made efforts throughout the trial to minimize the potential damage caused by Mastroianni's statement, reminding the jurors that it was their role to determine if the gun existed. *Id.*

¶ 20 As to the fourth argument regarding evidence of defendant's drug deal, defendant did not establish deficient performance. Evidence of the potential drug deal provided the jury with an alternative explanation for defendant's presence at the scene. Counsel's failure to object to the admission of that information could be explained as sound trial strategy. *Id.* ¶ 24.

¶ 21 Finally, this court rejected defendant's argument that the State failed to prove that a firearm was used in the commission of the offense. Regardless of what was depicted in the video surveillance (an object that may or may not be a gun), the victim testified that he saw a gun. The victim explained that, when they were behind the car, defendant held a silver revolver to his head, which caused him to drop to his knees. The surveillance video corroborated the victim's testimony. This evidence sufficiently supported the jury's finding that a firearm was used during the commission of the offense. *Id.* ¶ 28.

¶ 22 Following this court's resolution of his direct appeal, defendant filed the *pro se* postconviction petition at issue here. Defendant's arguments against trial counsel (and against appellate counsel for failing to raise the arguments) included an alleged failure to: (1) subject the State's case to meaningful adversarial testing; and (2) allow him to testify on his own behalf. Additionally, defendant argued that his first attorney, who represented him during the early plea negotiation process, was ineffective for advising him to reject a six-year plea offer. Defendant alleged that counsel advised against taking the offer because she could obtain an acquittal by challenging the identification process and the existence of a gun. Defendant then averred that he would have accepted the plea if he had known of the mandatory 15-year enhancement.

¶ 23 The trial court issued a written first-stage dismissal of the petition. The court found that defendant's first argument had been raised on direct appeal and his second argument was belied by the record (wherein defendant advised the court that it was his decision not to testify). As to defendant's final argument, the trial court reasoned:

“[Defendant alleges that an offer of six years in the Illinois Department of Corrections was offered, but rejected on advice from counsel. Defendant admits that he was told by trial counsel ‘he could only be sentenced to the maximum for armed robbery,’ but that he was not advised by trial counsel of the significance of the gun language and the potential

enhanced sentence if that addition[al] element was proven. Defendant was convicted of armed robbery, a Class X felony with a range of sentence of [6 to 30 years]. Defendant was in fact sentenced to [27 years]. Defendant acknowledges that he was advised by trial counsel and knew that the maximum sentence for armed robbery was [30 years] and he was sentenced to [27 years]. Therefore, the [15-year] add-on for the gun language did not extend the sentence beyond the range the defendant was already aware that he may receive. Had the defendant been sentenced to a term of imprisonment greater than [30 years], this argument may have some basis, but he was not.”

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 Defendant appeals the first-stage dismissal of his postconviction petition, focusing on the argument that his first attorney was ineffective for advising him to reject a six-year plea offer. The Post-Conviction Hearing Act provides a method by which persons under a criminal sentence in Illinois may assert that their convictions were the result of a substantial denial of their rights under the United States or Illinois constitutions. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding for a noncapital offense has three stages. *Id.* at 10. At the first stage, the trial court independently considers whether the defendant’s petition is “frivolous or patently without merit.” *Id.* The petition must be supported by affidavits, records, or other evidence supporting its allegations, or the petition must state why they are not attached. 735 ILCS 5/122-2 (West 2008). If the court does not determine in a written order that the petition is frivolous and patently without merit, then the petition proceeds to the second stage. *Hodges*, 234 Ill. 2d at 10-11. At the second stage, the defendant is appointed counsel, counsel may amend the petition, and the State may move to dismiss the petition. *Id.* If the court determines that a “substantial showing” of the violation of a

constitutional right has been made, the petition will advance to a third-stage evidentiary hearing. *Id.* at 11.

¶ 27 There is a relatively low standard of pleading at the first stage. *People v. Tate*, 2012 IL 112214, ¶ 20. A petition is frivolous and patently without merit when it has no basis in law or fact and is obviously without legal significance; in other words, it fails to state the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). The use of the term “gist” describes what a petitioner must allege at the first stage; it is not the legal standard by which the petition should be dismissed. *Hodges*, 234 Ill. 2d at 11-12, 16. The defendant need not construct legal arguments or cite legal authority, but he or she is not excused from providing some factual detail regarding the alleged constitutional violation. *Id.* at 9-10. The petition lacks an arguable basis in fact when it is based on “fanciful allegations,” meaning that the allegations are fantastic, delusional, or baseless. *Id.* at 16-17. A petition lacks an arguable basis in law when it is grounded in an “indisputably meritless legal theory.” *Id.* at 16. We review *de novo* the trial court’s first-stage dismissal. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 28 To succeed on a claim for ineffective assistance of counsel, a defendant must show that counsel’s performance during a critical stage in the proceedings was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In first-stage postconviction proceedings, a petition alleging ineffective assistance will be dismissed unless it is arguable (*i.e.*, not based on fanciful allegations or on an indisputably meritless legal theory) that counsel’s performance fell below an objective standard of reasonableness that prejudiced the defendant. *Hodges*, 234 Ill. 2d at 17. To establish deficient performance, the defendant must overcome the strong presumption that counsel’s actions or inactions were sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). We review the reasonableness of counsel’s strategy from his or her perspective at the time the decision was made and not with

hindsight. *Id.* Only the most egregious tactical errors bring counsel's representation to the level of objective unreasonableness. *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006).

¶ 29 Plea bargaining is a critical pretrial stage for which a defendant is entitled to the right of effective representation. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385-87 (2012). Counsel's performance may be objectively unreasonable where he or she advises the defendant to reject a plea offer in the face of overwhelming evidence of guilt and in the absence of viable defenses. *Almonacid v. United States*, 476 F. 3d 518, 522 (7th Cir. 2007). Where a defendant has been denied effective assistance in determining whether to accept or reject a plea, prejudice is shown if the loss of a plea leads to a more serious conviction or sentence. *Lafler*, 132 S. Ct. at 1387.

¶ 30 We disagree with the trial court's stated basis for the first-stage dismissal, which the State essentially adopts. The court zeroed in on defendant's allegation that he did not understand the 15-year firearm enhancement. It reasoned that, regardless of whether defendant understood the enhancement, he understood that he could be sentenced to a maximum of 30 years for armed robbery. And, in the court's view, because defendant "only" received 27 years (12 years plus the 15-year enhancement), he was not prejudiced by any alleged ignorance of the mandatory enhancement.

¶ 31 This rationale misses the significance of defendant's argument that counsel unreasonably advised him against seizing an optimal outcome of six years while the offer remained open. Again, counsel's performance may be objectively unreasonable where he or she advises the defendant to reject a plea offer in the face of overwhelming evidence of guilt and in the absence of viable defenses. *Almonacid*, 476 F. 3d at 522. It is this argument that cannot be said to be frivolous or patently without merit.

¶ 32 The State initially offered defendant six years of imprisonment in exchange for a plea of guilty to armed robbery without a firearm. That offer represented the minimum length of

imprisonment for armed robbery without a firearm, which had a statutory sentencing range of 6 to 30 years. The State confirmed at sentencing that this offer existed and remained open until it was made clear on the record that the defendant understood the 15-year firearm enhancement.

¶ 33 Defendant's first attorney advised him not to take the offer, telling him that she could obtain an acquittal at trial by challenging: (1) the identification process; and (2) the existence of a gun. Defendant's postconviction argument that these defenses were unviable is not "indisputably without legal merit."

¶ 34 First, as we stated in our earlier order, "it would be a stretch to say defendant's identity was at issue in this case." *Lyles*, 2011 IL App (2d) 100843-U, ¶ 18. As noted, the victim identified defendant in a photo line-up, defendant initially admitted to police that he was the man depicted in the surveillance video, and, at one point, defendant looked directly into the surveillance camera, providing the jury with virtually an unobstructed view of his face. Therefore, even if counsel had been able to suppress portions of the information gleaned from the identification process, the question of identity was unlikely to be a viable defense. In any case, subsequent counsel withdrew the motion to suppress information from portions of the identification process.

¶ 35 Second, creating reasonable doubt as to the gun's existence would only have negated a conviction for armed robbery with a firearm (as defendant had been charged), which carried the 15-year enhancement. The first pretrial offer did not subject defendant to the enhancement. Because the video clearly showed defendant pointing an object (*i.e.*, likely a weapon of some sort) toward the victim, defendant can make a strong argument that counsel would *not* have been able to negate the armed robbery charge altogether.

¶ 36 Hence, defendant presents a non-frivolous argument that the best outcome he could have hoped for following trial was a conviction for unenhanced armed robbery, which had a statutory

sentencing range of 6 to 30 years. Given that the victim would have been able to testify to the presence of the gun, however, it is more likely that the best outcome defendant could have hoped for was a minimum of 21 years (6 years plus the 15-year enhancement). It is not without legal merit to argue that it was objectively unreasonable for counsel to advise defendant to reject an offer that would have secured the minimum sentence for what was likely an inevitable conviction.

¶ 37 The State argues that defendant cannot establish prejudice because he did not establish that he would have accepted the plea if he knew that his attorney's proposed defenses were unviable. The State points to defendant's assertion that he would have accepted the plea if he had known that, if found guilty, he would receive the firearm enhancement. The State concludes that, because defendant was (ultimately) made aware of the firearm enhancement, he cannot claim ignorance on that point as a basis for rejecting the plea. We disagree that defendant's later knowledge of the firearm enhancement is fatal to his claim. Rather, defendant's assertion is, in some ways, accurate, because the enhancement was *not* at issue at the time the six-year offer was on the table. The State was going to allow him to plead guilty to armed robbery with a dangerous weapon other than a firearm. 720 ILCS 5/2-18(a)(1) (West 2008).

¶ 38 Defendant presented non-frivolous argument that counsel was ineffective for advising him to reject an offer in the face of overwhelming evidence and no viable defenses. His petition should proceed to the second stage.

¶ 39 III. CONCLUSION

¶ 40 For the aforementioned reasons, we reverse the trial court's judgment and remand for further proceedings.

¶ 41 Reversed and remanded.