

No. 1-12-2830

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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. 02 CR 10438
)	
ANDRE HARRIS,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice ROCHFORD concurred in the judgment.

O R D E R

- ¶ 1 **Held:** We affirm the summary dismissal of defendant's *pro se* post-conviction petition where his sentence is not disparate to those received by his codefendants when he was convicted after trial and they were sentenced pursuant to plea agreements.
- ¶ 2 Defendant Andre Harris appeals from the judgment of the circuit court that summarily dismissed his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS

5/122-1 *et seq.* (West 2012). On appeal, defendant contends his petition sufficiently alleged arguable claims that his 40-year sentence is fundamentally unfair because his codefendants received 21-year terms, and that his trial and appellate counsel were ineffective where they failed to effectively contest his disparate sentence. We affirm.

¶ 3 Defendant and his three codefendants, William Chatman, Joseph Tillman, and Ravonna Bledson, who are not parties to this appeal, were charged with multiple counts of first degree murder and aggravated battery stemming from the beating and shooting of Ana Sepulveda on September 17, 2001. Both codefendants Tillman and Chatman pled guilty to first degree murder and received a sentence of 21 years in prison. Defendant rejected the State's offer to plead guilty to murder in exchange for 20 years in prison. Subsequently, defendant elected a bench trial and was convicted of first degree murder and aggravated battery in 2008. The trial court imposed concurrent terms of 40 years and 5 years in prison for the respective offenses.

¶ 4 At trial, the evidence showed that defendant and his codefendants were members of the Gangster Disciples street gang. They were celebrating defendant's 20th birthday at an apartment located at 1528 West Pratt Avenue in Chicago on the date in question when the victim, who was a member of a rival street gang, was brought into the apartment by Chatman. Defendant pointed a gun at the victim, and he and his codefendants beat her by kicking and "stomping" her. Defendant stated that they needed to kill her before they were killed or went to jail. After defendant and Tillman passed the gun back and forth and debated who would kill the victim, Tillman shot and killed her. Defendant, Tillman, and Bledson then fled to Ohio.

¶ 5 Following trial, defendant was found guilty of murder, under an accountability theory, and aggravated battery. In its findings, the court stated the evidence was "overwhelming" that

defendant was responsible for the murder of the victim. In particular, the court stated defendant participated in the murder by stomping and hitting the victim, and noted the evidence indicated that he started the beating. Defendant also stated that they had to kill the victim, procured the gun, gave it to the offender who killed her, attempted to create a false alibi, threatened witnesses, helped plan the cleaning of the apartment, and fled to Ohio.

¶ 6 At sentencing, the State noted in aggravation that defendant was on probation for battery when he committed the present murder, after fleeing to Ohio he was arrested for and convicted of attempted robbery in Ohio, and, while in jail awaiting trial in the instant case, he was charged with possession of contraband in a penal institution after he was observed chasing another inmate with a homemade knife. Shortly thereafter, defendant was again charged with possessing contraband in a penal institution after a shank was found hidden in his court documents. The State argued that, given his criminal history, defendant had little to no rehabilitation potential and showed no remorse. In mitigation, defense counsel presented the testimony of defendant's mother, who stated that defendant had suffered from mental health problems as a child and took a variety of medications. Defense counsel argued that defendant was not the actual shooter, but that codefendant Tillman, who was the shooter, pled guilty and received a sentence of 21 years in prison. Counsel reiterated that defendant suffered from mental health problems, and was not taking medications at the time of the murder. In allocution, defendant stated that he was young and did not know how to tell his codefendants to stop harming the victim. Regarding the pending charges of possessing contraband in a penal institution, defendant indicated that he was in a "hard" division.

¶ 7 Following arguments in aggravation and mitigation, the trial court sentenced defendant to concurrent prison terms of 40 years for murder and 5 years for aggravated battery. In doing so, the court stated defendant's goal since childhood "[was] to be a thug, to be a menace. And he's not a failure. He's wanted very hard for many years to be dangerous and that's exactly what [defendant] is. He is dangerous." The trial court highlighted additional violent incidents from defendant's childhood contained in the pre-sentence investigation report, and also noted his 1999 conviction for carrying and possessing a firearm in school, his battery conviction and sentence of probation in 2001, and his violation of the probation. The court also pointed out that defendant was on probation at the time he committed the murder, and discussed defendant's violent acts and arrests following the subject murder. Just before sentencing defendant, the court specifically stated that "looking at the factors in mitigation, under the statute, it was hard for me to come up with any that applied in this case," and "based on the facts of this case and the dangerousness that he presents to society as he's shown over and over again for fifteen years, I believe that a substantial sentence is in order."

¶ 8 Immediately after the trial court imposed the sentence, defense counsel announced he was filing a motion to reconsider sentence, but did not make any argument. The trial court denied the motion.

¶ 9 Defendant's convictions and sentences were by affirmed by this court on direct appeal. *People v. Harris*, No. 1-08-1377 (2010) (unpublished order under Supreme Court Rule 23).

¶ 10 On May 18, 2012, defendant filed a *pro se* post-conviction petition, alleging, in pertinent part, that there is a "large chasm between the sentence received by [Tillman] who pulled the trigger in this case, who has a vastly worse criminal record than [defendant]. Versus the sentence

received by [defendant] in this matter. Who was not found to have pulled the trigger." Defendant also argued that trial counsel was ineffective for not bringing to the trial court's attention that his sentence was "double the amount of time of his co-defendants," and that he was "sentenced to double the original offer solely because he chose to avail himself of his constitutionally guaranteed right to a trial." Finally, defendant asserted that his appellate counsel was ineffective for not raising the issue of disparate sentences on appeal.

¶ 11 In support of his petition, defendant attached his own affidavit, attesting that although he told trial counsel he wanted to file a detailed motion to reconsider his sentence because it was significantly more than his codefendants' sentences, counsel did not prepare a written motion or provide any meaningful detail. After defendant turned down the State's plea offer of 20 years' imprisonment, trial counsel told him that if he was found guilty after trial he would only receive the same sentence as his codefendants. Defendant also included an affidavit from his trial counsel, who attested that he represented defendant, that defendant was offered 20 years' imprisonment in exchange for a guilty plea, and that defendant rejected the offer and was sentenced to 40 years' imprisonment after trial. Defendant also included the FBI criminal history sheet for Tillman, which listed 12 separate arrests but did not indicate whether any of the arrests led to charges, or the final disposition of any of the cases.

¶ 12 On August 14, 2012, the circuit court summarily dismissed defendant's *pro se* post-conviction petition as frivolous and patently without merit in a written order. In doing so, the court found that defendant failed to provide any supporting documents for his claim of a disparate sentence, and, even if he did, his claim would fail because he did not establish an unconstitutional disparity. The court further found defendant's claim that he was not the shooter

unavailing where a defendant found accountable for a crime shares equal guilt with the principal perpetrator, and a sentence imposed after a bench trial cannot be compared to sentences imposed after a plea agreement.

¶ 13 On appeal, defendant contends that his cause should be remanded for second-stage post-conviction proceedings because his petition contains an arguable claim that his sentence, which is nearly twice as long as his more culpable codefendants, is fundamentally unfair.

¶ 14 We review the summary dismissal of a post-conviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 15 The Act provides a method by which persons imprisoned in the penitentiary can assert that their convictions resulted from a substantial denial of their constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). At the first stage of post-conviction proceedings, the trial court must independently review the petition, taking the allegations as true and determine whether the petition is "frivolous or patently without merit." *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis in either law or in fact. *Tate*, 2012 IL 112214, ¶ 9. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16.

¶ 16 The first stage in the proceedings allows the trial court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). Because most first-stage post-conviction petitions are drafted by defendants with little legal knowledge, the "threshold for

survival [i]s low." *Tate*, 2012 IL 112214, ¶ 9. Nevertheless, 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 2012); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). The failure to attach the required documents or explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 17 Here, we agree with the State that defendant failed to attach any supporting documents to his petition that would support his claim of a disparate sentence. A defendant who claims that his sentence is inappropriately disparate from a codefendant's bears the burden of producing a record sufficient to make a rational comparison (*People v. Ralon*, 211 Ill. App. 3d 927, 957 (1991)), which would include a codefendant's "history, character, criminal records, potential for rehabilitation or relative maturity" (*People v. Brown*, 267 Ill. App. 3d 482, 487 (1994)). In his petition, defendant claims that his 40-year sentence was disparate to the 21-year terms that his codefendants received after pleading guilty, and Tillman's criminal record was more extensive than his own. However, defendant failed to include any documentation to support that claim. Defendant did not provide any documents or information on Chatman but, rather, simply alleged that defendant's "record was similar to that of his other co-defendant," referring to Chatman. The sole document defendant relies on to support his claim that Tillman had a more extensive record is an FBI criminal history sheet that lists Tillman's arrest history from January of 2000 through August of 2001. However, the document does not indicate the disposition of any of the arrests, or even whether any of the arrests led to charges. Therefore, defendant's unsupported conclusory allegation that the trial court imposed a disparate sentence upon him is not sufficient to require further proceedings under the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 18 More significantly, we find defendant's petition failed to make an arguable claim that his sentence was disparate to those of his codefendants.

¶ 19 The trial court has broad discretionary powers in imposing a sentence, and, absent an abuse of discretion, the sentence may not be altered on review. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000).

¶ 20 Although similarly situated defendants should not receive grossly disparate sentences, a mere disparity in the sentences, in and of itself, is not sufficient to constitute a violation of fundamental fairness. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005). A disparity in sentences will not be disturbed when it is warranted by the difference in the nature and extent of each defendant's participation in the offense (*People v. Caballero*, 179 Ill. 2d 205, 216 (1997)), and may be justified by a defendant's degree of culpability, potential for rehabilitation, or criminal history (*Spriggle*, 358 Ill. App. 3d at 455). However, a sentence imposed on a codefendant following the entry of a guilty plea does not provide a valid basis of comparison to a sentence imposed following a trial. *Caballero*, 179 Ill. 2d at 217. This is because "a trial court may grant leniency to the defendant who pleads guilty and thereby insures prompt and certain application of correctional measures, acknowledges his guilt, and demonstrates a willingness to assume responsibility for his conduct." *People v. Foster*, 199 Ill. App. 3d 372, 393 (1990). Moreover, a trial court's determination whether to ratify a plea agreement struck through negotiations between a defendant and the State differs qualitatively from its finding of an appropriate sentence following a trial and a sentencing hearing. *People v. Scott*, 2012 IL App (4th) 100304, ¶ 25.

¶ 21 In the case at bar, defendant was convicted, after a bench trial, of first degree murder, which has a sentencing range of 20 to 60 years in prison. 730 ILCS 5/5-8-1(a)(1)(a) (West 2000) (now codified at 730 ILCS 5/5-4.5-20 (West 2012)). His codefendants Chatman and Tillman, on the other hand, were each sentenced to 21 years' imprisonment after the entry of guilty pleas. Consequently, codefendants' sentences do not provide a valid basis of comparison to defendant's sentence. See *Caballero*, 179 Ill. 2d at 217; see also *People v. Portis*, 147 Ill. App. 3d 917, 926 (1986) (sentences reached as part of plea agreements cannot be a basis for comparison with sentences reached after a trial). At the sentencing hearing, the trial court noted that defendant was a dangerous individual, had an extensive criminal history, was on probation at the time of the murder, and continued his violent behavior while in jail. The court also stated that it had difficulty finding any mitigating factors that would apply to defendant, and emphasized that a substantial sentence was necessary. This court cannot say that defendant made even an arguable claim that the trial court abused its discretion where it sentenced him to a term in the middle of the applicable sentencing range, and defendant's allegation in his petition and appellate brief that he was "taxed" when he decided to exercise his right to trial finds no support in the record.

¶ 22 In reaching this conclusion, we are not persuaded by defendant's attempt to circumvent well-established case law by asserting that a conflict of authority exists on the question of whether a sentence imposed after trial can be compared to that of a codefendant who pled guilty. In support of his claim that such a conflict exists, defendant relies on *People v. Milton*, 182 Ill. App. 3d 1082 (1989), *People v. Daniels*, 173 Ill. App. 3d 752 (1988), *People v. Jackson*, 145 Ill. App. 3d 626 (1986), and *People v. Cowherd*, 63 Ill. App. 3d 229 (1978). As noted by the State, however, the cases relied on by defendant predate the Illinois Supreme Court's decision in

Caballero, 179 Ill. 2d at 217, which affirmatively stated that the sentence of a codefendant who pled guilty as part of a plea agreement could not provide a valid basis of comparison to a sentence entered after trial. Furthermore, in *Scott*, 2012 IL App (4th) 100304, ¶ 26, the fourth district rejected the same cases relied on by defendant. The *Scott* court found *Daniels* and *Jackson* unpersuasive because they did not consider the codefendant's guilty plea in their analysis of the sentencing disparity, and questioned the relevance of *Milton*, stating that "the imposition of a maximum sentence in *Milton* appears to have been excessive *regardless of any comparison with the codefendant's sentence.*" (Emphasis in original.). *Scott*, 2012 IL App (4th) 100304, ¶¶ 26, 28, quoting *People v. Garcia*, 231 Ill. App. 3d 460, 479 (1992). The *Scott* court thus held that "[t]he general rule – that a sentence imposed following a guilty plea provides no valid basis for comparison with respect to a sentence imposed following a trial – persists." *Scott*, 2012 IL App (4th) 100304, ¶ 29. We thus reject defendant's reliance on outdated cases that do not take into account our supreme court's decision in *Caballero*.

¶ 23 We also note that defendant's attempts in his brief on appeal to argue that he was less culpable than his codefendants fail. Defendant specifically argues that he was less culpable than Tillman where the trial court found there was no evidence that defendant pulled the trigger, and where defendant claims that Tillman "created the conditions for the murder and carried it out." However, defendant's attempts to downplay his participation in the murder contradict the findings by the trial court. The court found that the evidence was "overwhelming" that defendant was responsible for the murder "whether or not he pulled the trigger." The trial court enumerated several ways in which defendant facilitated the murder, including that the victim was going to be allowed to leave until he began hitting her, he "started the stomping," procured the gun, and

stated "we have got to kill her." Defendant thus shared equal responsibility for the murder.

Defendant's further argument on appeal that the State considered defendant less culpable where it offered him a 20-year sentence, instead of the 21-year sentences imposed upon his codefendants, is pure speculation and has no relevance to the sentence the trial court ultimately deemed appropriate.

¶ 24 Defendant next contends that his petition contains an arguable claim that trial and appellate counsel were ineffective where they failed to contest his disparate sentence.

¶ 25 A defendant alleging ineffective assistance of counsel at the first stage of proceedings must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. 2d at 17.

¶ 26 Here, we found that defendant's underlying claim that his sentence was disparate to that of his codefendants was without arguable merit. Since defendant's underlying claim is without merit, his claim of ineffective assistance of trial counsel is equally without arguable merit because he cannot show that he was prejudiced by trial counsel's failure to raise the disparate sentence argument. In so finding, we note that trial counsel did in fact mention Tillman's sentence at the sentencing hearing, but defendant faults trial counsel for not including it in a motion to reconsider sentence. However, trial counsel did not have to include a nonmeritorious issue in a motion to reconsider sentence. See *People v. Bailey*, 364 Ill. App. 3d 404, 408 (2006) (trial counsel is not *per se* ineffective for failing to file a motion to reconsider sentence when, in counsel's judgment, such a filing would be frivolous). Moreover, defendant's allegation of ineffective assistance of appellate counsel is also without arguable merit. See *People v. Johnson*,

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183 Ill. 2d 176, 187 (1998) (if the underlying claim lacks merit, defendant suffered no prejudice due to appellate counsel's failure to raise the issue on direct appeal).

¶ 27 For the foregoing reasons, we affirm the summary dismissal of defendant's post-conviction petition.

¶ 28 Affirmed.