FOURTH DIVISION
March 12, 2015

No. 1-13-0855

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. 07 CR 22600
	)	
ALONZO CAMPBELL,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's *pro se* postconviction petition was properly dismissed as frivolous and patently without merit when its claims were contradicted by the trial record.

¶ 2 Defendant Alonzo Campbell 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 2012)).

On appeal, defendant contends the circuit court erred in dismissing his petition because his claims had arguable bases in law and fact. Specifically, defendant claims that he was denied the effective assistance of trial counsel when counsel denied him his right to a bench trial and failed to investigate and present the testimony of certain alibi witnesses. We affirm.

¶ 3 Following a joint jury trial with codefendants Shantrell Tucker and Antonio Cox, defendant was convicted of first degree murder, and sentenced to 28 years in prison.[1]

¶ 4 Defendant's arrest and prosecution arose from the May 2007 shooting death of the victim Terrance Smith. At a pretrial status hearing, the State indicated that defendant's counsel was sick, but had agreed that the matter should be set for a jury trial. The court then asked defendant whether he had any problem with what the State said, and defendant answered no. At another status hearing, the State indicated that defendant's case was set for a jury trial on April 29, 2008. The court then addressed defendant, and asked whether defendant agreed to that date for a jury trial. Defendant answered in the affirmative.

¶ 5 The matter proceeded to a joint jury trial. At a hearing prior to picking the jury, the State informed the court that it was the State's understanding that defendant would not be calling any witnesses. A jury was then selected. Defendant was present in court during *voir dire*.

¶ 6 The evidence at defendant's trial established that around 11 p.m. on May 25, 2007, Vernon Walls, Alvin Lee and the victim were sitting in a car outside Vernon's house. Vernon's sister, Jennifer Walls, was also present. At one point, Steve Wooten drove up, parked his car, and

[1] Codefendant Cox was acquitted. Codefendant Tucker was convicted of first degree murder, and sentenced to natural life in prison. Codefendant Tucker is not a party to this appeal.

walked over to speak to the men. Shortly thereafter a SUV containing codefendant Tucker, codefendant Cox and defendant arrived. Defendant was seated in the backseat.

¶ 7 Vernon, Lee and Wooten then had a conversation with codefendants Tucker and Cox. Codefendant Tucker asked Lee if Lee knew who had previously shot at his van. When Lee said he did not, codefendant Tucker asked who else was in the car. After Lee asked "what difference do it make who I have in my car," shots were fired from the front and backseats of the SUV. Vernon testified that he saw shots coming from the backseat of the SUV. The victim was shot multiple times and later died. A police officer testified that Jennifer, Vernon and Wooten all identified codefendant Tucker and defendant as involved in the shooting during a photo array.

¶ 8 At the close of the State's case, the court asked trial counsel whether defendant planned to present any witnesses. Trial counsel answered in the negative. The court then addressed defendant, stating that trial counsel had indicated that he intended to rest without calling any witnesses and asking defendant if there were any witnesses that defendant wished to have called. Defendant answered in the negative. Defendant also indicated that he did not wish to testify. Ultimately, the jury found defendant guilty of first degree murder and he was sentenced to 28 years in prison.

¶ 9 Defendant and codefendant Tucker then filed an unsuccessful consolidated appeal, alleging that they were denied their statutory right to a speedy trial and that the State failed to prove them guilty of first degree murder beyond a reasonable doubt. See *People v. Tucker and Campbell*, 2011 IL App (1st) 090340-U.

¶ 10 In October 2012, defendant filed the instant *pro se* postconviction petition alleging, *inter alia*, that he was denied the effective assistance of trial counsel when counsel denied defendant

his right to a bench trial and failed to investigate and present the alibi testimony of defendant's mother, sister, and girlfriend. Attached to the petition in support were the affidavits of defendant, his mother Jacqueline Dowdy, and his sister Tysha Moore.

¶ 11 In his affidavit, defendant averred that on the night of the shooing, he and his girlfriend Donvalla[2] spent the night at his mother's home. Defendant further averred that when he told trial counsel about his whereabouts that night, counsel "seemed to just brush" the information off. When defendant asked, after several court appearances, whether counsel had contacted the witnesses and again provided names and addresses, counsel told defendant that judges and juries don't believe family, friends, and girlfriends. Defendant averred that when he again brought up the issue of alibi witnesses because he wanted them to testify in support of his testimony, counsel responded in a "forceful and authoritative fashion" that counsel was hired to do a job and that defendant should let counsel do that job. Defendant was left surprised and disappointed and felt "totally powerless and helpless." Defendant averred that he also felt helpless and powerless when counsel "took it upon himself" without consulting defendant to proceed with a jury trial even though defendant had already made it clear that he wanted a bench trial. Defendant finally averred that although he told the court that he did not want any witnesses called on his behalf, he did so under the assumption that trial counsel had already made that decision.

¶ 12 In her affidavit, Dowdy averred that defendant was at her home around 10:30 p.m. the night of the shooting with his girlfriend Donvalla and that she gave this information to trial counsel. However, trial counsel told her that juries rarely find family members and girlfriends credible, preferring instead to believe disinterested witnesses, but that they would "see" when

[2] Donvalla is also spelled "Davalla" in the record.

counsel received all the documents from the State. Although defendant told her that trial counsel was not pursuing the alibi witnesses and was not cooperating with defendant, Dowdy told defendant to be patient because the family had already paid trial counsel. Counsel later denied contacting alibi witnesses because juries would not believe family or girlfriends and told Dowdy to let him do his job. Moore averred that defendant and Donvalla arrived at Dowdy's home around 10:15 p.m. on the night of the shooting.

¶ 13 The trial court summarily dismissed the petition as frivolous and patently without merit in a written order finding, *inter alia*, that defendant denied on the record that he wanted any witnesses called on his behalf and that he failed to affirmatively express any dissatisfaction with a jury trial as required by *People v. Powell*, 281 Ill. App. 3d 68 (1996).

¶ 14 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 2012). 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 example of 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*, 2012 IL 112214, ¶ 10.

¶ 15 On appeal, defendant contends that he was denied the effective assistance of trial counsel when counsel denied him his right to a bench trial and failed to investigate and present the testimony of certain alibi witnesses.

¶ 16 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 17 At the first stage of proceedings under the Act, the circuit court must examine the record to determine whether the allegations in a defendant's *pro se* petition are positively rebutted by the record. *People v. Jones*, 399 Ill. App. 3d 341, 356-57 (2010). In those cases where the petition's allegations are contradicted by the record, the petition should be dismissed. *People v. Torres*, 228 Ill. 2d 382, 394 (2008). In the case at bar, defendant's *pro se* postconviction petition was properly dismissed because his claims, that counsel forced him to proceed with a jury trial and failed to investigate and present the testimony of certain witnesses, are contradicted by the record.

¶ 18 The burden to assert the right to a bench trial rests with the defendant because a "jury trial is the norm for a felony case and a bench trial is the exception." *People v. Powell*, 281 Ill. App. 3d 68, 73 (1996). Therefore, a defendant who wants a bench trial must make his desire known to

the court if trial counsel fails to do so. *Id*. In those instances when a defendant who wishes to proceed to a bench trial fails to say anything as the trial court begins the process of selecting and impaneling a jury, "his later, after-the-fact claim that he really wanted a bench trial all along" will not be considered on appeal. *Id.*

¶ 19 Here, not only did defendant not make his desire for a bench trial know during multiple pretrial status hearings or jury selection, he affirmatively indicated to the trial court on two occasions that he was in agreement with proceeding to a jury trial. Specifically, defendant indicated that he had no problem with the matter proceeding to a jury trial and agreed to a date for a jury trial. This includes one status hearing where trial counsel was not present due to illness. We reject defendant's apparent argument that because he felt "powerless" to overrule trial counsel's decision, he should be excused from expressing his desire for a bench trial to the court. See *Powell*, 281 Ill. App. 3d at 73 (extending "no sympathy" to a defendant who sits through jury selection while wishing for a bench trial, but says nothing to the trial court, even though "his trial counsel has failed to request a bench trial in accordance with defendant's wishes"). Ultimately, because defendant's contention that he wanted a bench trial is contradicted by his own statements to the trial court, this claim must fail. See *Torres*, 228 Ill. 2d at 394 (when the petition's allegations are contradicted by the record, the petition should be dismissed).

¶ 20 We reject defendant's argument that the "tension" between the holdings of *Powell* and that of *People v. McCarter*, 385 Ill. App. 3d 919 (2008), creates an arguable basis in law such that his petition should be advanced to second stage proceedings under the Act. The issue in *McCarter* involved a *pro se* posttrial motion in which the defendant alleged that his trial counsel disregarded and overrode his desire for a bench trial. On appeal, this court concluded that the

trial court's cursory examination of the defendant's allegation was insufficient and remanded the cause so that the trial court could clarify whether the defendant's claim was spurious or required further inquiry. *McCarter*, 385 Ill. App. 3d at 944. *McCarter* does not stand for the proposition that a defendant's mere claim that he was denied a bench trial by counsel is sufficient to state a claim under the Act, and we find defendant's reliance on this case misplaced.

¶ 21 Defendant next contends that he was denied the effective assistance of trial counsel by counsel's failure to investigate and present the testimony of certain alibi witnesses, *i.e.*, defendant's girlfriend, mother, and sister.

¶ 22 Initially, we note that the record does not contain Donvalla's affidavit. Consequently, defendant's unsupported allegations that Donvalla would testify that they were together at his mother's home at the time of the offense is not sufficient to require further proceedings under the Act. See *People v. Johnson*, 183 Ill. 2d 176, 192 (1998) (a claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from that proposed witness because in the absence of such an affidavit a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant; the absence of such an affidavit makes further review of the claim unnecessary).

¶ 23 With respect to defendant's contention that his mother and sister would have, absent trial counsel's refusal, testified that he was at his mother's home at the approximate time of the shooting, the record contradicts this claim. Specifically, defendant did not object when the State informed the trial court, prior to picking the jury that the State believed that defendant would not be calling any witnesses. Defendant also answered no when the trial court asked, at the conclusion of the State's case, whether defendant had any witnesses that he wished called on his

behalf. We note that defendant contends on appeal that this negative answer was a result of intimidation by counsel, and, within the context of that intimidation, must be understood to mean that he did not have any witness which counsel would agree to call. We decline defendant's invitation to interpret his "no" to the trial court's question asking if he had any witnesses that he wished to call upon his behalf as anything other than a "no." Thus, defendant's contention that trial counsel was ineffective for failing to interview and present the testimony of his mother and sister is completely contradicted by the record. See *Hodges*, 234 Ill. 2d at 16.

¶ 24 Ultimately, because defendant's claims of ineffective assistance of counsel were contradicted by the record (*Torres*, 228 Ill. 2d at 394), they lacked an arguable basis in fact or law and his petition was properly dismissed as frivolous and patently without merit (*Hodges*, 234 Ill. 2d at 11-12).

¶ 25 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.