FIRST DIVISION
April 13, 2015

No. 1-13-0900

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. 08 CR 3347
	)	
JOSE RAMOS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's post-conviction petition affirmed over his contention of ineffective assistance of trial counsel; fines and fees order modified.

¶ 2 Defendant, Jose Ramos, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2010). He contends that trial counsel failed to provide him effective assistance regarding his decision to enter a guilty plea. Defendant further contends that

his fines and fees order should be modified to reflect a $5 offset for each day he spent in presentence custody.

¶ 3 The record shows that on April 21, 2008, defendant pleaded guilty to an amended charge of criminal drug conspiracy in exchange for an 11-year prison sentence. The State agreed to amend the charge against defendant from intent to deliver more than 900 grams of cocaine to intent to deliver more than 100 grams, but less than 400 grams in exchange for his guilty plea. The State then provided a factual basis for defendant's plea stating that Chicago police officer Richard Velazquez would testify that he was working undercover as a cocaine supplier. He spoke with two co-conspirators on the phone and eventually met defendant and one of the co-conspirators in a parking lot, where defendant brought $37,000 to purchase two kilograms of cocaine. After his arrest, defendant gave a statement to police that he was contacted by an individual who was looking to purchase the cocaine defendant intended to buy from Officer Velazquez, and further admitted to meeting the officer in the parking lot to purchase cocaine. Defendant stipulated to the facts as provided by the State.

¶ 4 At sentencing, the trial court admonished defendant at length regarding his 11-year sentence and his decision to plead guilty. Defendant stated that he understood the charge, and that by pleading guilty his sentence would be 11 years, and that he was entering his plea freely, voluntarily, and with knowledge of its implications.

¶ 5 On May 30, 2008, defendant filed a *pro se* motion to reduce his sentence, maintaining that his trial counsel informed him that he would have to serve only 50% of his 11-year sentence, but the prison calculated he had to serve 75% of the sentence. The court appointed defendant a public defender, and on January 16, 2009, defendant decided to withdraw his motion to reduce

his sentence. Counsel stated that defendant now understood the nature of his sentence, although he was ill-advised by trial counsel, and that after explaining to defendant the nature of the charges and the consequences of his plea, he now wished to withdraw his motion. Defendant stated that he heard and agreed with everything his counsel said and confirmed that he was withdrawing his motion. The court allowed defendant to withdraw the motion with prejudice.

¶ 6 On May 17, 2011, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, again claiming that his trial counsel was ineffective because counsel informed him he would have to serve only 50% of his 11-year sentence. Defendant referenced his May 2008 motion stating that after he filed that motion, the IDOC provided him with a calculation sheet that reflected that he would have to serve only 50% of his 11-year sentence. Thereafter, he withdrew his motion in January 2009, but he subsequently received an IDOC calculation sheet reflecting that he would have to serve 75% of his 11-year sentence. On May 24, 2011, the court dismissed defendant's motion as untimely because it was filed outside the 30-day period for post-plea motions.

¶ 7 On June 29, 2011, defendant filed a motion to correct the *mittimus* to reflect "the agreed upon plea bargain of 11 years IDOC at 50% ***." The motion did not include a claim of ineffective assistance of counsel, but instead stated that the IDOC was "confused" as to the proper sentence. The court denied the motion, defendant appealed, and appellate counsel moved to withdraw under to *People v. Finley*, 481 U.S. 551 (1987). This court allowed counsel to withdraw and affirmed the judgment. *People v. Ramos*, 2013 IL App 112626-U.

¶ 8 On November 9, 2012, defendant filed the *pro se* post-conviction petition at bar contending that his constitutional rights were violated because his trial attorney was ineffective

in mistakenly advising him that he would have to serve only 50% of his 11-year sentence. Defendant maintains that the charge counsel advised him to plead guilty to is not eligible for a 50% good conduct credit, as counsel informed him, and that he would not have pled guilty to the charge if he had known he would have to serve at least 75% of his sentence.

¶ 9 On December 20, 2012, the circuit court summarily dismissed defendant's petition.[1] Defendant now appeals that dismissal.

¶ 10 On appeal, defendant contends that trial counsel incorrectly advised him that he was eligible for day-to-day good conduct credit and would therefore be required to serve only 50% of his 11-year sentence, when in fact he was required to serve at least 75%. He maintains that his allegation that he would not have pled guilty absent counsel's erroneous advice must be taken as true and that it is sufficient to require second-stage proceedings. The State responds that defendant's claim is barred by *res judicata* and rebutted by the record. Defendant replies that *res judicata* does not apply because his 2008 motion was withdrawn, his May 2011 motion was dismissed as untimely, and his motion to correct the *mittimus*, which was the subject of our *Finley* order, did not raise a claim of ineffective assistance.

¶ 11 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). The instant case involves the first stage of the post-conviction process. At this stage, defendant is only required to set forth the

[1] We note that all briefs on appeal identify the presiding judge as the Honorable Domenica A. Stephenson. However, upon review of the record for defendant's postconviction proceedings, it appears that the Honorable Maura Slattery-Boyle was the presiding judge who summarily dismissed defendant's petition on December 20, 2012. The only reference to Judge Stephenson in the record appears on a transcript from December 4, 2012. On that date, Judge Stephenson continued the case for status to December 20, 2012.

"gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009).

¶ 12 Due process of law requires that a guilty plea must be made knowingly and voluntarily. U.S. Const., Amends. V, XIV; Ill. Const., Art 1, sec. 2. Whether the plea was made knowingly and voluntarily depends on whether defendant had effective assistance of counsel. *People v. Correa*, 108 Ill. 2d 541, 549 (1985). If a claim of ineffective assistance may be disposed of on the ground of lack of sufficient prejudice, a reviewing court need not consider whether counsel's representation was constitutionally deficient. *Strickland*, 466 U.S. at 697. We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 13 In this case, defendant contends that his petition sufficiently alleged that counsel's deficient performance caused him to enter an involuntary guilty plea. To survive summary dismissal, defendant was required to allege that his counsel's performance was arguably deficient, and that he was arguably prejudiced by the deficiency. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, counsel's conduct is considered deficient if the he failed to ensure that defendant's guilty plea was entered voluntarily and intelligently. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Prejudice exists if there is a reasonable probability that, absent counsel's errors, defendant would have pleaded not guilty and insisted on going to trial. *Id*. However, a bare allegation that defendant would have pleaded not guilty and insisted on trial is not enough to establish prejudice if the contention is not accompanied by a claim of innocence or the articulation of a plausible

defense that could have been raised at trial. *Id*. at 335-36. We note that although the court in *Hall* considered a second-stage dismissal, this court has applied its reasoning to first-stage dismissals. See e.g., *People v. McCoy*, 2014 IL App (2d) 100424-B.

¶ 14 In this case, defendant has failed to allege a claim of actual innocence or a plausible defense that could have been raised at trial. Nor is there anything in the record that would lend support to such an allegation. The factual basis for the plea shows that defendant was arrested while attempting to purchase $37,000 of cocaine from an undercover police officer, which he intended to re-sell. He made a statement admitting to his participation in the offense. The State's case was very strong.

¶ 15 Also, although we are required to take well-pled allegations as true unless rebutted by the record, the record before us contradicts defendant's claim that he would not have pled guilty and would have insisted on trial if he knew he could not receive 50% credit. Shortly after entering the guilty plea, defendant filed a motion to reduce his sentence alleging that his attorney advised him he could receive day-to-day credit and that he would not have pled guilty if he knew he was required to serve at least 75% of his sentence. The trial court appointed counsel to represent defendant. At a hearing on the motion, counsel informed the court that she had spent a significant amount of time going over the matter with defendant, including what he had originally been charged with, "how many classes [the State] came down, what would happen if he filed a motion[,] and the ramifications of trial." Counsel stated that after the discussion, defendant wished to withdraw his motion to vacate the guilty plea. The court asked defendant whether he agreed with what his attorney said, and defendant responded that he did and confirmed that he

wished to withdraw the motion. Thus, defendant had an opportunity to withdraw his guilty plea on the very same basis he sets forth in this appeal, and he did not do so.

¶ 16 We have considered *People v. Clark*, 386 Ill. App. 3d 673 (2008) and *People v. Stewart*, 381 Ill. App. 3d 200 (2008) and find them unpersuasive. Neither of these cases cite our supreme court's decision in *Hall* or contain facts contradicting the allegation of prejudice.

¶ 17 Defendant finally contends, the State concedes, and we agree, that the fines and fees order should be modified to reflect the offset of a $5 per day presentence custody credit. Although the trial court noted that the $3000 Controlled Substance Assessment would be offset by defendant's presentence custody credit, there was no credit included on the written fines and fees order. Therefore, defendant's total fines and fees of $3625 should be reduced by $5 for each of the 95 days ($475) he spent in presentence custody for a final assessment amount of $3150.

¶ 18 For the reasons stated, we order the clerk to modify defendant's fines and fees order to reflect the $475 offset for his presentence custody credit, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 19 Affirmed, fines and fees order modified.