

No. 1-13-0986

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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. 05 CR 21890
)	
TERRY BROWN,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE COBBS 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 postconviction petition did not set forth an arguably meritorious claim of ineffective assistance of counsel by trial counsel or appellate counsel where the petition failed to show an arguable claim of prejudice to defendant.

¶ 2 Following a jury trial, defendant Terry Brown was found guilty of two counts of criminal sexual assault and sentenced to two consecutive 40-year terms of incarceration. He filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), which the circuit court summarily dismissed. On appeal, defendant contends that his petition set forth an arguably meritorious claim that his appellate counsel was ineffective where she failed to properly present his fitness claim to the appellate court. He also contends that his trial counsel was ineffective where he failed to advise defendant that he faced mandatory consecutive sentences, causing him to reject the State's plea offer. We affirm.

¶ 3 In October 2005, the trial court ordered defendant be given a behavioral clinical examination ("BCX"). While defense counsel noted that he had interacted with defendant and believed him to be fit, the court explained that it wanted the BCX based on defendant's prescribed use of psychotropic drugs. An initial attempt at conducting the BCX failed due to defendant's refusal to cooperate.

¶ 4 In January 2006, Dr. Roni Seltzberg performed a BCX on defendant. At a fitness hearing, Dr. Seltzberg testified that she believed defendant was fit to stand trial while on his prescribed medications. She also noted that defendant was on several medications, including multiple antidepressants and an "atypical antipsychotic." The trial court found defendant fit to stand trial.

¶ 5 In May 2006, the State filed notice that they were seeking a sentence of natural life without parole. The trial court notified defendant of the State's intention. In September 2006, defendant asked the trial court to set bond. The court refused to set bond noting that defendant

faced a maximum sentence of natural life in prison. Defendant responded that he understood.

¶ 6 In November 2008, defendant indicated to the trial court that he had been transferred to the jail's psychiatric ward and was not receiving his eye medication in the frequency prescribed. He told the court that he had been taken off of his psychotropic medication. During a long conversation with the court, defendant requested that the court order the jail employees to come to court and "explain on record" why they were harassing him. After continued arguing and complaints from defendant, the trial court asked if he had filed a grievance. Defendant said he had. The court responded:

"I'm sure those will be heard at the proper time. I'm not hearing grievances on the jail. I'm not doing it, Mr. Brown. I'm not doing it.

Because one day you could go over there and start acting crazy, and they say send him to the psyche ward, and next day, you're like I'm dying, and they send you to the medical ward, and the next day, you are crazy again in their eye and they send you back to the psyche ward, and I am doing what I do in this courtroom.

If they are violating your rights as you feel, you have filed a grievance. I am not going to tell them where to house you. That's not going to happen from me. I'm not going to do it, sir."

Defendant continued to argue and the court stated:

"And I have no problems now understanding why they are taking you from 8 to 10, from 8 to 10 to 8 to 10. I really don't. So the last thing I'm going to do is ask them to explain what I can see very clearly, sir."

When defendant continued to argue, the court indicated it would strike any previous orders instructing the jail employees to give defendant his eye medication.

¶ 7 In December 2008, defendant wrote a letter addressed to the "Chief Judge" at the 26th and California courthouse. In the letter, defendant complained that the trial judge had threatened to strike previous orders directing jail medical staff to give him his medication and asked for a substitute judge. Two weeks later defendant wrote a letter addressed to "Mr. Ed Bernette, Head of Public Defendant Office" asking for his help with defendant's grievances regarding his medical treatment. Both letters indicate that defendant sent similar letters to "the Justice Dept. and Mr. Todd Stroger Jr."

¶ 8 In January 2009, defense counsel reported to the trial court that defendant had been removed from his psychotropic medication. He then asked for an additional BCX "to make sure that Mr. Brown is fit for trial, because previously there had been an issue regarding his fitness with medication." Defendant complained that he had told the court he was off medication two months before and the court responded, "I know you did, sir. I have to hear from a doctor, okay?" Defendant then asked if the trial court hated him. The court responded that she and defense counsel were trying to accommodate his needs and that they would be ready to set the case for trial, "as soon as I get clearance from the doctors that you are fit without the medication that you were previously issued." The trial court ordered a second BCX.

¶ 9 In February 2009, the State and defense counsel discussed potential expert witnesses for trial after which the following exchange occurred:

"THE COURT: There's not going to be expert witnesses testifying for the

defense?

THE DEFENDANT: Which is them?

THE COURT: No, you're the defense. You're the defendant."

¶ 10 In March 2009, the trial court noted that defendant had failed to cooperate with Dr. Seltzberg's attempts to perform the second BCX. She explained that the case could not go to trial without an "opinion back from the doctors." Defendant complained about the need for a second BCX. He complained that he had been ruled fit with medication, "[u]ntil Doctor Dunlap, a medical doctor, intervened *** and they cut me off. And I was taking medication in the world. It ain't like I just came here and began to take medication." Defendant continued to complain about the doctor's decision to take him off his psychotropic medication, indicating that he heard voices. The court responded that it believed defendant was hearing voices and stated, "We need to get an examination done. We have to have a diagnosis." Defendant stated he would cooperate with the BCX.

¶ 11 In April 2009, defendant's second BCX was returned to the trial court. The court indicated that Dr. Seltzberg had found defendant fit to stand trial without his medication. Seltzberg found defendant understood the charges and nature of the proceedings and could assist defense counsel if he chose to. During the hearing, the trial court mistakenly stated that defendant was facing 30 years in prison. Defendant then asked "what happened to life in jail?" The trial court apologized and acknowledged its mistake. It then repeated multiple times that the State was seeking a sentence of natural life.

¶ 12 During jury selection, defendant complained that he did not understand the trial's

procedure, and thus he was not getting a fair trial. The trial court stated that any allegations against the court, defense counsel, or the jury were in his mind.

¶ 13 At trial, defendant's cousin Q.G. testified that she had let defendant stay at her apartment for a short time in August 2005. Late in the night on August 5, defendant came into her room, choked her, and then penetrated her vagina with his tongue and his penis. She then escaped by telling defendant she needed to use the restroom. The State also presented DNA evidence.

¶ 14 The jury found defendant guilty of both counts of criminal sexual assault. Defense counsel and defendant both filed motions for a new trial. Defendant's motion argued that he had not understood the trial processes. He repeatedly requested to argue the motion in front of the trial court.

¶ 15 Defendant's presentence investigation reported that he had received mental health treatment since he was 17 years old and that he had attempted suicide several times. Prior to sentencing, defendant spoke in allocution, arguing that defense counsel was ineffective. He also complained that counsel had first told him that he would receive a life sentence, before telling him that his sentence would be 30 to 60 years. He alleged that ten minutes before the jury reached a verdict, defense counsel told him that the State offered him "ten years, 85 percent and we are sending the jury home. We won't even get their response. We won't even get their verdict." Defense counsel told defendant that this meant only two more years spent in jail, but defendant refused to "accept" criminal sexual assault. Defendant continued to speak at length about defense counsel's alleged ineffectiveness, his own innocence, and his family life. He

indicated that he had been the victim of sexual molestation by Q. G. and others in his past.

Finally he asked the trial court for clarification of his possible sentence range.

¶ 16 The trial court sentenced defendant to two consecutive terms of 40 years' incarceration.

¶ 17 On direct appeal, defendant alleged, *inter alia*, that the trial court should have ordered a fitness hearing prior to trial where there was a *bona fide* doubt as to his fitness to stand trial. This court found that defendant's appellate counsel failed to argue that either prong of plain error doctrine applied to the fitness issue, and thus defendant had forfeited it on appeal. *People v. Brown*, 2012 IL App (1st) 093577-U.

¶ 18 Subsequently, defendant filed a *pro se* postconviction petition under the Act, alleging that appellate counsel was ineffective for failing to properly argue that the trial court's failure to order a fitness hearing was plain error. He also argued, *inter alia*, that trial counsel was ineffective for failing to inform him that he faced potential consecutive sentences, and had defendant known, he would have accepted the State's plea offer. The trial court found defendant's claims to be frivolous and patently without merit, summarily dismissing the petition. Defendant appeals.

¶ 19 Defendant contends that both trial and appellate counsel provided constitutionally deficient representation. The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). A postconviction proceeding consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage of proceedings, as in this case, a postconviction petition may be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A post-conviction

petition is frivolous or patently without merit only if the allegations in the petition, liberally construed in favor of the petitioner, do not form the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. All factual allegations in the petition must be taken as true, unless they are contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). We review the first stage dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 20 To prevail on a claim of ineffective assistance of counsel a defendant must show that counsel's performance "was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Domagala*, 2013 IL 113688, ¶ 36, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In a first stage postconviction petition proceeding, a petition alleging ineffective assistance of counsel must show "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 21 Defendant first contends that that his petition raised an arguably meritorious claim that his appellate counsel was ineffective in failing to properly present his fitness claim to the appellate court and thus should not have been dismissed. He argues that the trial court's failure to hold a fitness hearing was arguably plain error and had his appellate counsel properly raised the argument on appeal he would have received a new trial. He asserts that there was a *bona fide* doubt of his fitness to stand trial, noting that he heard voices, acted bizarrely, complained that he did not understand the trial process, and had a history of mental illness.

¶ 22 The State responds that defendant failed to state the gist of a meritorious claim because the record shows that there was no *bona fide* doubt as to defendant's fitness. The State notes that Dr. Seltzburg opined that defendant was fit to stand trial on two occasions and also found that defendant did not require medication to stand trial. The State also asserts that defendant's lucid interactions with the court show an understanding of the nature of the court proceedings.

¶ 23 Under plain error analysis, a reviewing court may consider an error, despite forfeiture, when a clear and obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant or (2) the error is so serious as to challenge the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Where there is a *bona fide* doubt as to a defendant's fitness to stand trial, proceedings against the defendant are rendered "fundamentally unfair." *People v. Sandham*, 174 Ill. 2d 379, 382 (1996). Thus, a claim regarding a defendant's fitness is reviewed under the second prong of plain error. See *id.*; see also *People v. Moore*, 408 Ill. App. 3d 706, 710 (2011).

¶ 24 A defendant is unfit to stand trial if, based on a mental condition, the defendant cannot "understand the nature and purpose of the proceedings against him or to assist in his defense." *People v. Burton*, 184 Ill. 2d 1, 13 (1998). While a defendant's fitness is presumed, where there is a *bona fide* doubt as to the defendant's fitness, the court must hold a fitness hearing before proceeding. *Id.* When determining whether a *bona fide* doubt exists, a reviewing court considers several factors including: "(1) the rationality of the defendant's behavior and demeanor at trial; (2) counsel's statements concerning the defendant's competence; and (3) any prior medical opinions on the issue of the defendant's fitness." *People v. Hanson*, 212 Ill. 2d 212, 223 (2004).

The granting of a defendant's motion for a fitness examination "cannot, by itself, be construed as a definitive showing that the trial court found a *bona fide* doubt of the defendant's fitness." *Id.* at 222.

¶ 25 Having examined the record, we conclude that the defendant cannot satisfy the first factor for a bona fide doubt of fitness. During these proceedings, defendant appeared interested; his demeanor and behavior were rational and generally appropriate. Throughout the proceedings, defendant filed and argued *pro se* motions, wrote letters to multiple authority figures requesting help with his legal situation, and communicated with the court. In all of these attempts to assist in his legal defense, the defendant demonstrated a rational understanding of his situation and an attempt to support his defense. While defendant's motions and arguments did not reflect the legal acumen of a trained lawyer, they were not irrational or incoherent.

¶ 26 Similarly, the second factor weighs against any doubt of defendant's fitness. The record contains two references by trial counsel to defendant's fitness. When the trial court ordered the initial BCX, defense counsel stated that he believed defendant to be fit and to understand the nature of the proceedings. When defendant was removed from his medication, counsel asked for another BCX "to make sure that Mr. Brown is fit for trial, because previously there had been an issue regarding his fitness with medication." Counsel based his request not on defendant's behavior, but merely on the fact that the initial finding of fitness had been made when defendant was on medication, and now defendant was no longer medicated. Thus, there is no evidence of defendant's unfitness evidenced in any statements made by trial counsel.

¶ 27 Finally, the medical opinions as to defendant's fitness both indicated that defendant

understood the nature of the trial and was able to assist in his own defense. Dr. Seltzberg examined defendant while on and while off medication and both times found him fit to stand trial. Therefore, none of the three factors indicate that there was a *bona fide* doubt of defendant's fitness to stand trial.

¶ 28 Defendant argues that the record demonstrates "a sea of irrationality." He notes that during jury selection he stated that he did not understand the procedure. He reasserted this claim in his *pro se* posttrial motion. However, this singular statement, without any explanation pales in comparison to the abundance of evidence in the record of defendant's rationality. Moreover, when read in context, the statement appears to involve defendant's dissatisfaction with the jury pool, rather than confusion at the trial process in its entirety. Defendant also contends that during one status hearing he expressed confusion as to which side was the defense. Again this singular instance, where it is not clear whether defendant inquired who the defense was or rather who the expert witnesses were, is not enough to create a *bona fide* doubt in light of all the other evidence within the record.

¶ 29 Defendant also argues that the trial court manifested a *bona fide* doubt as to defendant's fitness. He asserts that the trial court stated it had no problem seeing why the jail staff might "think he was crazy." The court's statement in full explained that defendant might "start acting crazy one day", and then complain that he was "dying" the next, thus causing transfers between the medical and psyche wards. The trial court's understanding was not as to a *bona fide* doubt of his fitness, but rather an understanding that defendant's continual and varying complaints could lead to the transfers. Defendant also notes that the trial court believed defendant was hearing

voices and wanted an expert to examine defendant before going to trial. Yet auditory hallucinations alone do not create a *bona fide* doubt of fitness. See *People v. Fields*, 331 Ill. App. 3d 323, 329 (2002). Furthermore, a BCX does not necessarily indicate a *bona fide* doubt of fitness, and may be used by the court as a tool to determine whether a *bona fide* doubt exists. See *Hanson*, 212 Ill. 2d at 222.

¶ 30 After a thorough review of the record, we find that all three factors decidedly weigh against defendant's contention that there was a *bona fide* doubt as to his fitness. Therefore, defendant has not set forth an arguably meritorious claim that the trial court was required to hold a second fitness hearing before proceeding to trial and consequently no plain error occurred. Because there was no plain error, defendant could not have been prejudiced by appellate counsel's failure to properly argue plain error on appeal and defendant has failed to show that he was arguably prejudiced by appellate counsel's performance. Because defendant's petition does not show that he was arguably prejudiced, we need not determine the reasonableness of appellate counsel's actions. See *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2003). For the foregoing reasons, we conclude that defendant's petition failed to set forth the gist of a constitutional claim of ineffective assistance of appellate counsel.

¶ 31 Defendant next contends that his petition presents an arguably meritorious claim that his trial counsel was ineffective for failing to advise defendant that he faced mandatory consecutive sentences if convicted on both counts. He notes that he alleged in his petition that he would have accepted the State's plea deal had he been advised of the possibility of consecutive sentences.

¶ 32 The State responds that defendant has forfeited this issue by failing to raise it on direct

appeal. Alternatively, it argues that defendant cannot show prejudice where he was repeatedly informed that the State was seeking a term of natural life and the record affirmatively shows that defendant would have rejected the plea deal even if he had been advised of potentially consecutive terms.

¶ 33 Before reaching the merits of defendant's claim, we must determine whether he has forfeited the claim. A postconviction proceeding is a collateral attack on the trial court proceedings, not an appeal from the judgment of conviction. *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). Issues that could have been raised on direct appeal but were not are forfeited. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). Therefore, when a claim is based entirely on facts contained in the trial court record, it is forfeited. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

Defendant's present claim is based upon conversations with defense counsel that occurred outside the record. Though defendant referenced the conversations in the trial record, the conversations themselves were not included in the trial record. Thus, the issue could not have been raised on appeal and is not forfeited. See *id.*

¶ 34 We now turn to the merits of defendant's claim. A defendant has no constitutional right to a plea bargain, but is entitled to effective assistance of counsel in negotiations if the State chooses to bargain. *People v. Curry*, 178 Ill. 2d 509, 517 (1997). A defendant, therefore, has the right "to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea." To show prejudice from a rejected plea offer, a defendant must show that they would have accepted the offer had counsel rendered effective assistance. *People v. Hale*, 2013 IL 113140, ¶ 21.

¶ 35 Defendant has failed to set forth an arguably meritorious claim of ineffective assistance of counsel because the record clearly shows that he would not have accepted the offer even if he had been informed of the possibility of consecutive sentences. The trial court repeatedly informed the defendant that the State was seeking a sentence of natural life. While defendant notes that he expressed confusion on the record as to whether he faced natural life or 30 to 60 years, in each instance the trial court clarified that the maximum sentence could be natural life without parole. As defendant rejected the plea deal after being informed he faced a maximum sentence of natural life, his contention that he would have accepted the deal if he had been informed that he faced consecutive sentences if convicted is patently meritless. Furthermore, the record clearly shows that defendant rejected the plea deal based on his professed innocence, not based upon sentencing considerations. According to defendant's statements to the trial court, defense counsel advised him that he would serve a total of two more years in jail if he accepted the State's offer. Defendant replied that he would not "accept" criminal sexual assault. He then continued to profess his innocence at length. It is clear from defendant's own words that his rejection of the State's alleged offer was based upon his refusal to admit guilt, regardless of the sentence imposed. Therefore, we find that defendant's petition has failed to arguably show that he would have accepted the State's alleged plea deal had he been effectively advised. Because defendant's petition makes no arguably meritorious claim of prejudice, it similarly fails to set forth an arguably meritorious claim of ineffective assistance of counsel by defendant's trial counsel.

¶ 36 For the foregoing reasons, we find the defendant's postconviction petition failed to set

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forth an arguably meritorious claim of a violation of defendant's constitutional rights.

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

¶ 37 Affirmed.