

2015 IL App (1st) 132196-U

FOURTH DIVISION
August 13, 2015

No. 1-13-2196

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 21476
)	
CARLOS MURRILLO,)	Honorable
)	Carol Howard,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 **Held:** The circuit court properly dismissed defendant's postconviction petition, which alleged that his trial counsel was ineffective for failing to inform him of a plea offer made by the State where defendant did not attach any independent affidavits, records, or other evidence supporting the petition's allegations nor did the petition explain the absence of such evidence.

¶ 2 Defendant Carlos Murrillo was charged and convicted of attempted first-degree murder, aggravated battery with a firearm and aggravated unlawful use of a weapon. The circuit court sentenced defendant to 21 years in prison for attempted murder while merging the other convictions into the murder conviction. We affirmed his convictions on direct appeal in *People v. Murrillo*, 2011 IL App (1st) 101373-U. Defendant then filed a *pro se* postconviction petition alleging both his trial counsel and appellate counsel were ineffective, and requesting an opportunity for limited discovery. The circuit court dismissed defendant's petition finding that his claims were frivolous and patently without merit. On appeal, defendant contends that the circuit court erred in dismissing his petition because it presented an arguable claim that his trial counsel was ineffective for not communicating the State's alleged plea offer. For the reasons that follow, we affirm the circuit court's dismissal of defendant's postconviction petition.

¶ 3 The State charged defendant with attempted first-degree murder, aggravated battery with a firearm and aggravated unlawful use of a weapon based on accountability. At trial, the State elicited evidence that on September 23, 2007, defendant, codefendants Alex Casarez¹ and Gonzalo Garduno, and defendant's girlfriend, Ariana Madrigal, were driving around in Madrigal's SUV. During the ride, defendant and codefendants, who were members of the Latin Kings street gang, discussed the murder of a fellow Latin Kings member. Defendant showed codefendants a gun he had and placed it in the center of the SUV.

¶ 4 As the group drove past a park, Garduno said he saw two men believed to be members of the Two-Sixer gang, a rival of the Latin Kings. Defendant told Garduno to hand the gun to

¹ Casarez's last name is also spelled Caserez at various points in the record.

Casarez. Garduno did and then told Casarez to "[a]im at [the Two-Sixers]." Casarez proceeded to shoot Rodolfo Sosa twice in the abdomen.

¶ 5 A witness saw the shooting, called the police and gave them a description of the SUV. The police found the SUV approximately an hour later, and the witness identified the SUV as the one from which gunshots were fired earlier in the day.

¶ 6 The circuit court found defendant guilty of attempted first-degree murder, aggravated battery with a firearm and aggravated unlawful use of a weapon based on accountability. The court subsequently merged the convictions for aggravated battery with a firearm and aggravated unlawful use of a weapon into the conviction for attempted murder and sentenced defendant to 6 years in prison for attempted murder with an additional 15-year mandatory firearm enhancement, for an aggregate sentence of 21 years in prison. Defendant's sentence was the minimum permissible based on his convictions. See 720 ILCS 5/8-4(c)(1) (West 2006); 720 ILCS 5/8-4(c)(1)(B) (West 2006); 730 ILCS 5/5-8-1(a)(3) (West 2006).

¶ 7 Defendant appealed his conviction, contending that there was insufficient evidence to prove that either he or his codefendants possessed the specific intent to kill Sosa. We rejected defendant's arguments and affirmed the judgment of the circuit court on direct appeal in *People v. Murrillo*, 2011 IL App (1st) 101373-U.

¶ 8 Defendant then filed the *pro se* postconviction petition, which is the subject of this appeal, alleging that his trial counsel was ineffective for failing to communicate to him the State's plea offer and his appellate counsel was ineffective for failing to challenge his firearm-sentencing enhancement. Defendant's petition also requested limited discovery to determine the

terms of the State's plea offer, and he supported his petition with his own affidavit. The circuit court summarily dismissed his petition as frivolous and patently without merit. In addressing defendant's argument for ineffective assistance of trial counsel, the circuit court stated that defendant failed to attach any evidence that the State made a plea offer nor had he shown that a reasonable probability existed that his disposition would have been different.

¶ 9 On appeal, defendant abandons his contention concerning his appellate counsel's ineffectiveness and instead only contends that the circuit court erred in dismissing his postconviction petition alleging that his trial counsel was ineffective for not communicating to him the State's plea offer.

¶ 10 The Post-Conviction Hearing Act (the "Act"), (725 ILCS 5/122-1 *et seq.* (West 2012)), allows review of a defendant's claim where there was a "substantial denial of his *** rights" under either, or both, the Illinois Constitution or United States Constitution in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2012). In the first stage under the Act, the circuit court must determine whether the defendant's petition is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). The circuit court should not dismiss a petition at the first stage if it "alleges sufficient facts to state the gist of a constitutional claim." *People v. Allen*, 2015 IL 113135, ¶ 24. All well-pled facts are taken as true. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. However, despite the "low threshold" to pass first-stage review, the defendant still must provide "factual support for his claims." *Allen*, 2015 IL 113135, ¶ 24. Because whether the circuit court properly dismissed a defendant's petition in the first stage of the Act is purely a question of law, we review first-stage dismissal's *de novo*. *Id.* ¶ 19.

¶ 11 A petition is considered "frivolous" or "patently without merit" when it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition will have "no arguable basis either in law or in fact" when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* Where the record contradicts a defendant's legal theory, his theory is meritless. *Id.* "Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 17. If the circuit court determines that the petition is frivolous or patently without merit, the court will dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 12 The defendant must verify the contents of his petition by affidavit. 725 ILCS 5/122-1 (West 2012). Additionally, the defendant must attach to his petition "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The purpose of section 122-2 is to provide evidence that the allegations in the defendant's petition are "capable of objective or independent corroboration." *People v. Collins*, 202 Ill. 2d 59, 67 (2002). "Common sense dictates that a defendant's own affidavit is not at all objective or independent." *People v. Teran*, 376 Ill. App. 3d 1, 4 (2007). Moreover, defendant's sworn verification is not a substitute for the "affidavits, records, or other evidence" required by the Act. *People v. Payne*, 336 Ill. App. 3d 154, 164 (2002).

¶ 13 While defendant did include a sworn verification in his petition (see 725 ILCS 5/122-1 (West 2012)), he did not attach an affidavit from his trial counsel or the State stating that a plea offer was made to his trial counsel, nor did defendant attach any other evidence indicating the same. See 725 ILCS 5/122-2 (West 2012). Furthermore, defendant's petition did not attempt to explain the absence of independent affidavits or other evidence concerning the existence of the

State's plea offer. See *id.* Instead, defendant attached to his petition his own affidavit essentially repeating the allegations in his petition that an offer was made by the State and his trial counsel did not convey to him the offer.

¶ 14 The State argues that defendant's petition could have been dismissed based solely on his failure to comply with section 122-2 of the Act. Therefore, we must address this issue before addressing the merits of defendant's contention.

¶ 15 As a general rule, the failure to attach the necessary documentation to a postconviction petition or explain its absence as required by section 122-2 (*id.*), is fatal and will justify a circuit court dismissing the petition. See *Collins*, 202 Ill. 2d at 66. However, defendant cites to *People v. Williams*, 47 Ill. 2d 1 (1970), and argues we should not dismiss his petition for failing to provide independent corroboration for his allegations or explain why such evidence is absent because of an exception to the rule. Defendant argues the *Williams* rule should be extended to his current situation where the only sources of an affidavit would be from his trial counsel or the State. He argues the difficulty in obtaining an affidavit from the State is similarly difficult to obtaining an affidavit from his trial counsel. The State argues against such an extension of the rule and instead contends that defendant should have attempted to obtain an affidavit from an assistant State's Attorney about the purported offer.

¶ 16 In *Collins*, the court discussed *Williams* and admitted in very limited situations, "an unreasonable burden" will be placed upon postconviction defendants to attach "affidavits, records, or other evidence." *Collins*, 202 Ill. 2d at 68. However, despite these burdens, *Collins* maintained that postconviction defendants must still comply with section 122-2 of the Act. *Id.* If

a defendant cannot obtain the requisite "affidavits, records, or other evidence," the defendant still must "at least explain why such evidence is unobtainable." *Id. Collins* held that a defendant's request to excuse him from attaching the necessary documentation to his petition or explaining its absence was a "comprehensive departure" unauthorized by the Act. *Id.*

¶ 17 Therefore, following the guidance from *Collins*, we must reject defendant's contention that he should be excused from complying with the requirements of section 122-2 of the Act. 725 ILCS 5/122-2 (West 2012). Here, defendant not only failed to attach the necessary support for his allegation, he also failed to explain its absence. Accordingly, the circuit court was justified in dismissing defendant's postconviction petition. See *Collins*, 202 Ill. 2d at 66.

¶ 18 Although we have concluded that defendant's failure to comply with section 122-2 of the Act (725 ILCS 5/122-2 (West 2012)), justified his petition's dismissal by the circuit court, the petition itself contained fanciful factual allegations. See *Hodges*, 234 Ill. 2d at 17. Defendant's petition alleged that his trial counsel was ineffective because the State made him a plea offer that was not communicated to him by his trial counsel. Furthermore, he alleged that had his trial counsel presented to him the offer, he would have accepted it. However, nothing in the record supports the petition's allegation that an offer was made by the State. Beyond the record indicating that defendant had preliminary discussions with the State concerning a possible plea deal, there is no evidence that these preliminary discussions materialized into anything formal. In fact, defendant's affidavit alleged that he asked his trial counsel to "speak with the State's Attorney about a plea deal." However, nothing in the record indicates defendant followed up with his request. Because the petition's allegations are not supported by the record, the

allegations therein were fanciful. See *id.* Accordingly, the circuit court was likewise justified in dismissing defendant's postconviction petition for this reason.

¶ 19 Finally, defendant also briefly discusses his petition's request for limited discovery to determine the terms of the plea offer made by the State. He argues that the circuit court erred in denying the petition's request for limited discovery because it thought discovery was "not cognizable under the Act." Additionally, defendant argues he has demonstrated good cause for his discovery request. The State responds arguing that defendant's discovery request is merely a "fishing expedition." However, defendant has not cited to any authority where a court has granted discovery at the first stage of the Act. Moreover, section 6 of the Act governs postconviction discovery, and this section dictates procedures that have already progressed beyond first-stage review. See 725 ILCS 5/122-6 (West 2012). Accordingly, to the extent that defendant argues on appeal he is entitled to discovery at this stage, there is no basis for such an argument.

¶ 20 For the foregoing reasons, we affirm the circuit court's order dismissing defendant's postconviction petition.

¶ 21 Affirmed.