2015 IL App (4th) 130413-U

NO. 4-13-0413

Order filed January 16, 2015

Modified upon denial of rehearing February 19, 2015

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
DAVIEON L. HARPER,	)	No. 09CF526
Defendant-Appellant.	)	
	)	Honorable
	)	Michael D. Clary,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did state the gist of a constitutional claim of ineffective assistance of counsel where he alleged that, during the plea bargaining process, trial counsel improperly informed him he could not be convicted based on an accountability theory because the State did not charge it and he rejected a plea for a sentence much shorter than the one received after trial based on that information.

¶ 2 This court has jurisdiction to vacate the fines imposed by the circuit court and remand the cause for the imposition of the applicable mandatory fines.

¶ 3 In February 2013, defendant, Davieon L. Harper, filed a *pro se* postconviction petition, alleging ineffective assistance of trial counsel. In April 2013, the Vermilion County circuit court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals, asserting the trial court erred by summarily dismissing his postconviction petition. In its brief, the State asserts we should vacate the fines imposed by the circuit court and remand the cause to the trial court for the imposition of fines. We reverse in part, vacate in part, and remand

the cause with directions.

¶ 4 I. BACKGROUND

¶ 5 In connection with the October 24, 2009, death of Timothy Shutes, a grand jury indicted defendant with one count of the following: (1) unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), (2) armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)), and (3) first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2008)). The charges did not contain any accountability language. In April 2010, the trial court granted defendant's motion to sever the unlawful-possession-of-a-weapon-by-a-felon charge. At defendant's September 2010 trial on the two remaining charges, the jury instructions given by the court for both armed robbery and felony murder contained accountability language. The record shows defendant did object to the jury instructions based on the accountability language. The jury found defendant guilty of both armed robbery and felony murder. In November 2010, the trial court denied defendant's posttrial motion and found the armed-robbery conviction merged with the felony-murder conviction. Thus, the court sentenced defendant to 30 years' imprisonment for felony murder. In December 2010, the court denied defendant's motion to reconsider his sentence.

¶ 6 Defendant appealed and challenged (1) the handling of his statutory speedy-trial rights, (2) the sufficiency of the evidence against him, and (3) the use of photographic evidence at his trial. This court affirmed the Vermilion County circuit court's judgment. *People v. Harper*, 2012 IL App (4th) 100998-U. In November 2012, the Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Harper*, 2012 IL 114865, 981 N.E.2d 1000.

¶ 7 On February 14, 2013, defendant filed his *pro se* postconviction petition with exhibits, raising numerous claims of error. On April 17, 2013, the trial court dismissed the

petition at the first stage of the proceedings. As to the claim at issue on appeal, the court noted it was defendant's personal decision whether or not to accept the plea offer and defendant did not allege he was forced to do something he did not want to do. Further, it found defendant was still trying to overturn his conviction on the same accountability issues. The court also noted there was no guarantee it would have accepted the parties' plea agreement and prejudice cannot be based on conjecture or speculation as to the outcome.

¶ 8 On May 13, 2013, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction of defendant's postconviction petition under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 9 II. ANALYSIS

¶ 10 A. Postconviction Petition

¶ 11 In this appeal, defendant challenges the trial court's dismissal of his *pro se* postconviction petition at the first stage of the proceedings. We review *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105-06 (2000).

¶ 12 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). When a case does not involve the death penalty, the adjudication of a defendant's postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must, independently and

without considering any argument by the State, decide whether the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Legal argument or citation to legal authority is not required. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). However, section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2012)) requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." In analyzing the petition, courts are to take the allegations of the petition as true, as well as liberally construe them. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 13 Moreover, our supreme court has explained a court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one the record completely contradicts. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 14 On appeal, defendant asserts he established the gist of a constitutional claim based on ineffective assistance of counsel relating to the plea-bargaining process. That is the only issue in his postconviction petition that he raises on appeal and, thus, that is the only issue we will address.

¶ 15 A defendant's sixth amendment right to counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1384 (2012). We review ineffective-assistance-of-counsel claims during the plea-bargaining process under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Lafler*, 566 U.S. at __, 132 S. Ct. at 1384. To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. "At the first stage of proceedings under the [Postconviction] Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed 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." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 16 Here, defendant specifically argues he was denied effective assistance of trial counsel because counsel improperly advised him he could not be convicted of armed robbery and felony murder because he was not charged with accountability in the indictment, which caused

defendant to reject the State's plea offers. However, before addressing the merits of defendant's postconviction claim, this court must first find defendant's petition satisfied the evidentiary requirements of section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2012)). Our supreme court has expressly stated the purpose of a section 122-2 affidavit is to "show[ ] that the verified allegations are capable of objective or independent corroboration." *People v. Collins*, 202 Ill. 2d 59, 67, 782 N.E.2d 195, 199 (2002). Moreover, it has emphasized "the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." (Internal quotation marks omitted.) *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008) (quoting *Collins*, 202 Ill. 2d at 66, 782 N.E.2d at 198).

¶ 17 To his postconviction petition, defendant attached transcripts indicating plea negotiations did take place between defense counsel and the State as well as defense counsel's belief the State needed to include accountability language in the indictment. The State recognizes that, with an ineffective-assistance-of-counsel claim, a defendant is not expected to obtain an affidavit from his trial counsel stating the attorney was ineffective. See *People v. Ramirez*, 402 Ill. App. 3d 638, 641, 934 N.E.2d 1008, 1013 (2010) ("the failure to attach independent corroborating documentation or explain its absence may be excused where the petition contains facts sufficient to imply that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney"). However, citing *Ramirez* and *People v. Hall*, 217 Ill. 2d 324, 332-33, 841 N.E.2d 913, 919 (2005), and several other cases, it asserts defendant needed to provide his own affidavit in support of his petition. The State also points out defendant's verification is not notarized, but a trial court may not dismiss a petition at the first stage of the postconviction proceedings solely on the basis the

petition lacked a verification affidavit (*People v. Hommerson*, 2014 IL 115638, ¶ 11, 4 N.E.3d 58). Defendant did sign the verification and certify his statements in the petition were true and correct under the penalties provided by law pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)).

¶ 18 In *Hall*, 217 Ill. 2d at 333, 841 N.E.2d at 919, our supreme court also recognized section 122-2's requirement may be met without an explanation as to the absence of supporting materials when the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney. Under the facts of that case, the defendant's explanation for the absence of additional documentation could easily be inferred from the allegations of his petition and affidavit because the allegations described a conversation at which the defendant and his counsel were the only two people present. *Hall*, 217 Ill. 2d at 333, 841 N.E.2d at 919. "[T]he 'difficulty or impossibility of obtaining such an affidavit from counsel [was] self-apparent.' " *Hall*, 217 Ill. 2d at 333-34, 841 N.E.2d at 919 (quoting *People v. Williams*, 47 Ill. 2d 1, 4, 264 N.E.2d 697, 698 (1970)). Thus, the *Hall* court concluded the documentation attached to defendant's petition was sufficient to comply with the Postconviction Act. *Hall*, 217 Ill. 2d at 333-34, 841 N.E.2d at 919.

¶ 19 As pointed out in *People v. Teran*, 376 Ill. App. 3d 1, 3-4, 876 N.E.2d 734, 737 (2007), the *Hall* court did not determine the defendant's affidavit provided objective or independent corroboration of his claim. In fact, a defendant's own affidavit is clearly not objective or independent. *Teran*, 376 Ill. App. 3d at 4, 876 N.E.2d at 737. What the *Hall* court did find was the nature of the allegations in the defendant's affidavit and petition excused his failure to attach objective or independent corroboration. *Teran*, 376 Ill. App. 3d at 4, 876 N.E.2d at 737. In *Teran*, 376 Ill. App. 3d at 4, 876 N.E.2d at 737, the defendant did not submit his own

affidavit, and his petition established his second claim was based on a private consultation between him and his attorneys. Thus, the *Teran* court explained the defendant's affidavit was not necessary to establish the nature of the claim, and, because no affidavit of the defendant's would have provided objective or independent corroboration for the purpose of section 122-2, the defendant's affidavit was not necessary for that purpose either. *Teran*, 376 Ill. App. 3d at 4, 876 N.E.2d at 737. Corroborating documentation was unnecessary under those circumstances. *Teran*, 376 Ill. App. 3d at 4, 876 N.E.2d at 737.

¶ 20 We agree with the *Teran* court that defendant's own affidavit would neither be objective nor independent evidence of his allegations and thus was not required by section 122-2 of the Postconviction Act. In this case, the record contains no evidence anyone else was present when trial counsel discussed the State's plea offer with him and advised defendant a directed verdict would be a "sure shot." Thus, besides defendant's trial counsel, the only other person who could corroborate defendant's allegations was the member of the State's Attorney's office that offered the plea to defense counsel and that affidavit could only address the terms of the plea offer. The State does argue defendant was required to provide an affidavit from the State's Attorney's office. As with obtaining an affidavit from defense counsel, the difficulty with such an affidavit seems self-apparent as the State would be the opposing party in a subsequent postconviction proceeding. Thus, defendant did not need to explain the absence of the affidavits for his trial counsel and a member of the State's Attorney's office. Accordingly, we find defendant's *pro se* postconviction petition met the requirements of section 122-2 of the Postconviction Act.

¶ 21 As to the performance prong of defendant's ineffective-assistance-of-counsel claim, our supreme court has recognized a sixth amendment right to effective assistance of

counsel during plea negotiations. *People v. Hale*, 2013 IL 113140, ¶ 16, 996 N.E.2d 607. Specifically, " '[a] criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer.' (Emphasis in original.) This right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial." *Hale*, 2013 IL 113140, ¶ 16, 996 N.E.2d 607 (quoting *People v. Curry*, 178 Ill. 2d 509, 528, 687 N.E.2d 877, 887 (1997)). Defendant asserts his trial counsel's performance was deficient because counsel incorrectly informed defendant he had a "sure shot" at obtaining a directed verdict due to the State's failure to include accountability language in his indictments. Under Illinois law, "[a]n indictment charging a defendant as principal will also support the conviction of the defendant under the theory of accountability." *People v. Carlson*, 224 Ill. App. 3d 1034, 1045, 586 N.E.2d 1368, 1376 (1992). Thus, no error results from the failure to charge a defendant as an accomplice. *Carlson*, 224 Ill. App. 3d at 1045, 586 N.E.2d at 1376. Accordingly, defendant's counsel's alleged advice was an incorrect statement of law and defendant was not reasonably informed during the plea bargaining process. Thus, defendant's allegation of deficient performance by trial counsel in the plea bargaining process has an arguable legal basis.

¶ 22 As to the factual basis, the record shows defense counsel did move for a directed verdict, asserting the indictment did not allege accountability and the evidence was insufficient to prove defendant guilty as the principal. Defense counsel also objected to the jury instructions containing the accountability language and presented his own instructions that did not have accountability language. Thus, we agree with defendant his deficient performance argument has a factual basis in the record and thus is not fanciful.

¶ 23 Regarding prejudice, the United States Supreme Court has held that, to satisfy the

prejudice prong in the context of a rejected plea offer, a petitioner must show a reasonable probability that (1) he would have accepted the earlier plea offer had he been afforded effective assistance of counsel; (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012). In this case, the allegations in defendant's petition indicate he rejected the State's plea offers based on his counsel's erroneous advice he would receive a directed verdict based on the indictments lacking accountability language. Defendant also explained how his testimony against the shooter was important because the surviving witness had given conflicting identifications. Further, defendant contends the State's first plea offer was for "12 years at 50% for the testimony against the killer of Shutes." Thus, defendant's sentence was "five times more severe" than his sentence after trial. The State asserts defendant's last allegation is contrary to the record because the 12-year sentence at 50% was not statutorily available for the charges against defendant and defendant fails to note the charge the plea involved. However, defendant's assertion is not completely contradicted by the record because the State could have been offering to have defendant plead guilty to a new charge. Accordingly, we find defendant's allegations of prejudice have an arguable basis in law.

¶ 24 As to the factual basis, the State asserts defendant's allegations are fanciful and clearly baseless as well as speculative. It again notes the alleged plea offer was not to a charged offense and asserts the following: (1) the record shows the State knew defendant's cousin Lafayette was the shooter; (2) defense counsel only cited the sixth amendment in support of his directed verdict argument and this court found the evidence of defendant's guilt was extensive (*Harper*, 2012 IL App (4th) 100998-U, ¶ 48); and (3) defendant's claim he went to trial on the

assurance he would not be convicted of the State's charges instead of accepting the plea offer is fanciful and baseless. We disagree with the State.

¶ 25 In his petition, defendant asserts the plea offer was in exchange for his testimony against the shooter. Thus, the fact the identity of the shooter was known does not make it less likely the State would have canceled its plea offer. The State does not challenge defendant's explanation as to why his testimony was important to the State. Moreover, the fact defense counsel only cited the sixth amendment in support of his assertion the State had to include accountability language in the indictment does not render defendant's allegations fanciful. The record shows defense counsel's trial strategy was the accountability argument as he raised it in the directed verdict and at the instruction conference. Additionally, the fact this court found the evidence as to defendant's guilt on an accountability theory was extensive makes it more likely, not less, that defense counsel informed defendant he could not be found guilty on that theory due to the language missing from the indictments. Further, the 12-year sentence to an unspecified charge does not seem fanciful where defendant was not the principal, and according to defendant's allegations, the State's case against the principal was not that strong.

¶ 26 Accordingly, we find defendant's petition does state the gist of a constitutional claim of ineffective assistance of counsel during the plea bargaining process.

¶ 27 In light of our finding, the entire postconviction petition must be remanded for further proceedings because "summary partial dismissals are not permitted at the first stage of a postconviction proceeding." *Hodges*, 234 Ill. 2d at 22 n.8, 912 N.E.2d at 1215 n.8. However, our finding is in no way an opinion on the actual merits of the issue or on whether defendant will ultimately prevail on his ineffective-assistance claim. See *Hodges*, 234 Ill. 2d at 22, 912 N.E.2d at 1215.

¶ 28 B. Fines

¶ 29 In its brief, the State raises a new issue and argues the fines imposed on defendant by the circuit clerk should be vacated and the cause remanded for the trial court to impose the mandatory fines. In his reply brief, defendant cites the Fifth District's decision in *People v. Newlin*, 2014 IL App (5th) 120518, ¶¶ 28-31, 18 N.E.3d 277, and asserts this court cannot consider the State's fine issue. Specifically, he asserts the State cannot (1) unilaterally raise an issue and (2) properly appeal the imposition of a fine because such appeals by the State are not authorized by Illinois Supreme Court Rule 604(a) (eff. Feb. 6, 2013).

¶ 30 In *People v. Warren*, 2014 IL App (4th) 120721, ¶¶ 151-52, 16 N.E.3d 13, this court stated the following:

> "Even if, for the sake of argument, we considered the State's street-value fine argument to be a 'free-standing claim of error,' we would not change our conclusion the State could properly point out this error. Rule 604(a) strictly limits the circumstances under which the State may appeal a trial court's judgment. Ill. S. Ct. R. 604(a) (eff. July 1, 2006); see also *People v. Ramos*, 339 Ill. App. 3d 891, 904, 791 N.E.2d 592, 603 (2003) (the rule 'strictly limits the State's right to appeal'). The rule does not permit the State to challenge the propriety of the sentence imposed on a defendant. *City of Chicago v. Roman*, 184 Ill. 2d 504, 509-10, 705 N.E.2d 81, 85 (1998). Where an appeal by the State is not authorized by Rule 604(a), the appellate court lacks jurisdiction to entertain the issue. *In re K.E.F.*, 235 Ill. 2d 530,

540-41, 922 N.E.2d 322, 328 (2009).

> The State may, however, seek to correct a void or partially void judgment on appeal. See *People v. Malchow*, 306 Ill. App. 3d 665, 675-76, 714 N.E.2d 583, 591 (1999) (where the trial court ordered a sentence less than that mandated by statute, the sentence was 'illegal and void' and 'the appellate court ha[d] the authority to correct the sentence at any time, and Rule 604(a)(1) [did] not limit the State's right to appeal'). 'A void judgment is one entered by a court that lacks, *inter alia*, the inherent power to make or enter the particular order involved. A void judgment may be attacked at any time, either directly or collaterally.' *Roman*, 184 Ill. 2d at 510, 705 N.E.2d at 85. A trial court is obligated to order the criminal penalties mandated by the legislature and has no authority to impose punishment other than what is provided for by statute. *Id.* 'The court exceeds its authority if it orders a lesser sentence than what the statute mandates.' "

While the *Warren* decision involved a direct criminal appeal, its analysis applies to postconviction appeals since "an attack on a void judgment may be raised at any time." *People v. Brown*, 225 Ill. 2d 188, 199, 866 N.E.2d 1163, 1169 (2007). Accordingly, we continue to follow our decision in *Warren* and will address the State's issue.

¶ 31 While the record in this case indicates fines were imposed on defendant, the record does not show those fines were imposed by the trial court. This court has held "[t]he imposition of a fine is a judicial act," and the circuit clerk, a nonjudicial member of the court, has

no power to levy fines. *People v. Swank*, 344 Ill. App. 3d 738, 747-48, 800 N.E.2d 864, 871 (2003). Accordingly, we vacate the fines imposed by the circuit clerk. When a fine is statutorily mandated, a trial court does not have the authority to decline to impose it. See *People v. Montiel*, 365 Ill. App. 3d 601, 606, 851 N.E.2d 725, 728 (2006) (holding the defendant's sentence was void to the extent it did not include mandatory fines and fees). Therefore, we remand the cause with directions for the trial court to impose the mandatory fines and fees as required at the time of the offense, which was October 24, 2009. In doing so, we encourage the trial court to review the reference sheet this court provided in *People v. Williams*, 2013 IL App (4th) 120313, 991 N.E.2d 914, to assist the trial courts in ensuring the statutory fines and fees in criminal cases are properly imposed. After the mandatory fines and fees are properly imposed, defendant then should receive credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)) against his fines that allow such credit. See *Williams*, 2013 IL App (4th) 120313, 991 N.E.2d 914 (containing a reference sheet that notes what fines can receive credit under section 110-14(a)).

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the Vermilion County circuit court's dismissal of defendant's petition at the first stage of the postconviction proceedings, vacate the fines imposed by the circuit clerk, and remand the cause for further proceedings consistent with this order.

¶ 34 Reversed in part and vacated in part; cause remanded with directions. .