2016 IL App (1st) 130366-U
No. 1-13-0366

THIRD DIVISION
May 18, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07 CR 21319
	)	
BENITO HERNANDEZ,	)	
	)	The Honorable
Defendant-Appellant.	)	Joseph G. Kazmierski,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of *pro se* post-conviction petition affirmed over defendant's contentions that he set forth an arguable claim of ineffective assistance of trial counsel and that the circuit court failed to examine the entirety of his petition within 90 days as required by statute.

¶ 2 Defendant Benito Hernandez 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 2012)). He contends that the circuit court erred in summarily dismissing his petition as frivolous and patently without merit because he presented an arguable

claim that trial counsel misinformed him about his right to a jury trial. He also contends that the circuit court erred by failing to examine the entirety of his petition within 90 days as required by statute.

¶ 3 BACKGROUND

¶ 4 Defendant was assisted by a Spanish interpreter during court appearances and trial, and defendant's presentence investigation report (PSI) noted that he was born and educated in Mexico and "not able to speak English well." Defendant was found unfit to stand trial in February 2009 and subsequently found fit to stand trial in March 2009. Following a bench trial, defendant was found guilty of the first degree murder of his wife, Rosa, and sentenced to 30 years' imprisonment.

¶ 5 Briefly stated, the evidence at trial established that on October 1, 2007, defendant drank about 15 beers between 4 p.m. and midnight, accused Rosa of moving his gun that he kept in the garage, and fatally stabbed her with a kitchen knife.

¶ 6 On direct appeal, we affirmed the judgment entered on defendant's murder conviction over his sole claim that his sentence was excessive. *People v. Benito Hernandez*, No. 1-09-3234 (2011) (unpublished order under Supreme Court Rule 23).

¶ 7 Defendant then filed the instant *pro se* post-conviction petition in which he alleged, in pertinent part, that trial counsel provided ineffective assistance where counsel interfered with his right to a jury trial. Defendant maintained that trial counsel repeatedly said, "there is nothing to worry about, you need a bench trial," whenever he asked about the difference between a bench and jury trial, and the record did not show that he knew the difference. He added that appellate counsel was ineffective for not raising trial counsel's ineffectiveness in this regard on direct

appeal. In support of his petition, defendant attached his own affidavit in which he averred as follows:

> "Before trial I continued to inquire from my trial attorney about the difference between a jury trial and a bench trial. My trial lawyer responses [*sic*] to me in regards to the difference between a jury trial and bench trial is that they were the same thing. I was essentially coerced into taking a bench trial by my trial counsel."

¶ 8 The circuit court summarily dismissed the petition as frivolous and patently without merit in a detailed written order. As relevant to this appeal, the circuit court found that assuming trial counsel advised defendant that a bench trial would be the most beneficial way to proceed, "the decision to offer such advice has been held to be a matter of trial strategy," and declined to conclude that defendant's waiver of his right to a jury was not knowing and voluntary "as a consequence of trial counsel's advice." Rather, the circuit court concluded that defendant failed to show that trial counsel's representation fell below an objective standard of reasonableness and that the outcome of his trial would have been different but for trial counsel's deficient performance. Having determined that this claim of ineffective assistance of trial counsel "lacks support," the circuit court concluded that defendant's claim of ineffective assistance of appellate counsel "was likewise without merit." Defendant now appeals the dismissal, and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 9 ANALYSIS

¶ 10 In this court, defendant first contends that we must reverse the summary dismissal of his post-conviction petition and remand the cause for second-stage proceedings where he set forth, in his petition, an arguable claim of ineffective assistance of trial counsel for "misleading him about his right to a jury trial." Defendant argues that trial counsel's advice, that a bench trial and

a jury trial were the same thing, was objectively unreasonable because a bench trial is not the same thing as a jury trial and nothing in the record rebuts this showing of arguably deficient performance. He also argues that trial counsel's performance arguably prejudiced him where "the petition sets out a tenable position that Hernandez likely would have taken a jury trial, within a reasonable probability, had he been properly advised."

¶ 11 To survive the summary dismissal stage of post-conviction review, a *pro se* defendant need only present the gist of a constitutional claim. *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). The term "gist" describes what must be alleged at this stage and not the legal standard utilized by the circuit court to evaluate the petition under section 122-2.1 of the Act (725 ILCS 5/122-2.1 (West 2012)), which governs summary dismissals (*People v. Cooper*, 2015 IL App (1st) 132971, ¶ 9). *Hodges*, 234 Ill. 2d at 11. Rather, a *pro se* petition seeking post-conviction relief under the Act may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis either in law or in fact when it is based on an indisputably meritless legal theory, *e.g.*, one which is completely contradicted by the record, or a fanciful factual allegation, *e.g.*, one which is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17.

¶ 12 At the summary dismissal stage, a post-conviction petition alleging ineffective assistance of counsel is assessed, "as *Hodges* clearly indicated," under a "more lenient formulation" of the well-known two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *People v. Tate*, 2012 IL 112214, ¶ 19. Specifically, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and (2) it is *arguable* that defendant was prejudiced thereby. *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 13 Defendant argues that his petition presented an arguable claim that trial counsel's advice, that a bench trial and a jury trial were the same thing, was objectively unreasonable because a jury trial helps "protect the criminal defendant against potentially arbitrary judges" (*Apprendi v. New Jersey*, 530 U.S. 466, 547-48 (2000)), and there is "no jury at a bench trial—the trial judge is the trier of fact" (*People v. Johnson*, 333 Ill. App. 3d 935, 946 (2001) (Welch, J., dissenting). Defendant reasons that trial counsel's statement to the court that defendant wanted a bench trial does not shed light on defendant's understanding of this difference. Defendant further argues that his petition presented an arguable claim that trial counsel's erroneous advice prejudiced him because it went to the core of what was being waived by a jury waiver, and the court's colloquy with defendant during the jury waiver did not contradict trial counsel's erroneous advice.

¶ 14 The State responds that defendant's claim that trial counsel misadvised him that a bench trial and a jury trial "were the same thing" is positively rebutted by the record showing that defendant himself ultimately decided to waive his right to a jury trial. Specifically, the State cites defendant's signed jury waiver, his silence when trial counsel informed the court that he wanted a bench trial, the fact that defendant answered yes when the court asked if he knew what a jury trial is, and "regardless of what his attorney advised him," defendant was advised by the court of his right to a jury trial. The State further responds that defendant cannot establish that trial counsel was ineffective under the *Strickland* test, noting that assuming trial counsel advised defendant that a bench trial would be the most beneficial way to proceed, that advice is a matter of trial strategy and "virtually unchallengeable."

¶ 15 Initially, considering the "more lenient formulation" of the *Strickland* test applicable here, the circuit court's basis for summarily dismissing defendant's post-conviction petition was improper. *People v. Burns*, 2015 IL App (1st) 121928, ¶ 32; *Tate*, 2012 IL 112214, ¶ 19

(quoting *Hodges*, 234 Ill. 2d at 17). Although the circuit court found that "the decision to offer such advice has been held to be a matter of trial strategy," and declined to conclude that defendant's jury waiver was not knowing and voluntary "as a consequence of trial counsel's advice," we observe that this "strategy argument is inappropriate for the first stage" of post-conviction proceedings. *Tate*, 2012 IL 112214, ¶¶ 21-22; *Burns*, 2015 IL App (1st) 121928, ¶ 32. Because our review of the dismissal order entered by the circuit court is *de novo*, we may nonetheless affirm the summary dismissal of a post-conviction petition on any proper ground, notwithstanding the rationale provided by the circuit court. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

¶ 16 Section 122-2.1(c) of the Act (725 ILCS 5/122-2.1(c) (West 2012)) provides that in considering a petition at the summary dismissal stage, "the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." The court should examine these records to determine whether the allegations in the petition are positively rebutted by the record (*People v. Jones*, 399 Ill. App. 3d 341, 356-57 (2010) (and cases cited therein)), and the petition should be dismissed where the allegations are contradicted by the record (*People v. Torres*, 228 Ill. 2d 382, 394 (2008)).

¶ 17 Here, the record directly contradicts defendant's allegation that trial counsel interfered with his right to a jury trial. "When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand—with its attendant consequences—is that the facts of the case will be determined by a judge and not a jury." *People v. Bannister*, 232 Ill. 2d 52, 69 (2008). In addition to the facts and circumstances cited by the State to support a finding that defendant appreciated the difference between a bench trial and a jury trial, defendant's

March 2009, behavioral clinical examination[1] finding him fit to stand trial, revealed in pertinent part:

> "The defendant was asked with what he has been charged. He replied, 'First degree…murder.' The defendant was asked whether his charges were considered a felony or misdemeanor. He replied, 'A felony. This is a death charge.' The defendant was asked whether a felony or misdemeanor was associated with more severe penalties. He replied, "Felony." The defendant was asked to define the role of a judge. He replied, 'A judge is the one that sentences for the charges.' The defendant was able to voice correct understanding that the judge could determine guilt or innocence during a bench trial as well. The defendant was asked to define a jury. He replied, '12 people that listen to the charges and decide if I'm guilty or not.' The defendant was asked to define public defender. He replied, 'Lawyer that the state [*sic*] give you when you don't have the money to pay for one.' The defendant was asked to define a States [*sic*] Attorney. He replied, 'The accuser, looks for evidence against me.' The defendant was asked to define a witness. He replied, 'Witness are people that saw what happened.' Lastly, the defendant was asked to define evidence. He replied, 'Evidence are the things they find that show a crime committed.' The defendant was able to voice correct understanding of evidence.
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> The defendant was able to voice correct understanding of proper courtroom behavior. *** The defendant was asked if he trusted his public defender. He replied, 'I don't have a public defender I have a paid attorney.' The defendant was asked if he trusted his private

[1] The examination was conducted with the assistance of a court-appointed Spanish interpreter.

> attorney. He replied, 'Yes.' The defendant was asked if he had a question in court, who could he ask. He replied, 'My lawyer.' Lastly, the defendant was asked if he believed the judge in this case would attempt to be fair. He replied, 'I think so.' "

Considering defendant's signed jury waiver, his silence when trial counsel informed the court that he wanted a bench trial, the fact that he answered affirmatively when the court asked if he understood the nature of a jury trial, and the behavioral clinical examination showing his understanding of the attendant consequences of waiving his right to a jury trial, we conclude that defendant's allegation that trial counsel was ineffective for "misleading him about his right to a jury trial" is positively rebutted by the record and subjected defendant's post-conviction petition to summary dismissal. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Put another way, defendant failed to set forth an arguable claim of ineffective assistance of trial counsel to survive summary dismissal because the record directly contradicts that claim. *People v. Deloney*, 341 Ill. App. 3d 621, 629 (2003).

¶ 18 Defendant next contends that the circuit court erred by failing to examine the entirety of his post-conviction petition within 90 days (725 ILCS 5/122-2.1(a) (West 2012)) as required by statute because, in its written dismissal order, the court failed to address "the claim raised—that appellate counsel should have briefed the argument that [his] conviction be reduced to second degree murder," and the court "did not review the exhibits [attached] to [his] petition with any level of scrutiny." Under these circumstances, he argues that the case should be remanded for second-stage proceedings under the Act.

¶ 19 The State responds, and we agree, that the court is not required to give a written response to each claim presented in a post-conviction petition and such absence does not mean that the court failed to consider all the claims raised in, or the exhibits attached to, defendant's petition.

People v. Maclin, 2014 IL App (1st) 110342, ¶¶ 27-28. Moreover, we construe the wording of the dismissal order to reflect the intent of the court to dismiss defendant's *entire* petition because doing otherwise is inconsistent with the principle that we construe a judgment to uphold its validity where reasonably possible, and partial summary dismissals are not permitted under the Act. (Emphasis added.) *Lee*, 344 Ill. App. 3d at 855 (2003) (citing *In re Marriage of Plymale*, 172 Ill. App. 3d 455, 459 (1988)); *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

¶ 20 CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

¶ 22 Affirmed.