2016 IL App (1st) 132520-U

SECOND DIVISION
May 17, 2016

No. 1-13-2520

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 18933
	)	
ANTHONY HALL,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's order summarily dismissing defendant's petition for post-conviction relief is reversed where defendant sufficiently pled that he would have accepted the State's plea offer if defense counsel had correctly informed him of the sentencing range he was subject to if convicted.

¶ 2 Anthony Hall, the defendant, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2012). On appeal, defendant contends that he stated an arguable claim that his defense counsel was

ineffective for failing to properly advise him that he was subject to a mandatory Class X sentence, and her failure to so advise caused him to reject a favorable plea offer from the State. We reverse and remand.

¶ 3 The record shows that defendant was charged with two counts of delivery of a controlled substance and two counts of possession of a controlled substance with intent to deliver after an August 2008 incident during which he sold cocaine to Michael Robertson, who is not a party to this appeal. During defendant's bond hearing prior to trial, the State informed the court, in the presence of defense counsel and defendant, that defendant was Class X eligible. Following a jury trial, defendant was convicted of delivery of a controlled substance within 1,000 feet of a school and sentenced to 15 years' imprisonment as a Class X offender.

¶ 4 At sentencing, the State informed the court, in the presence of defense counsel and defendant, that defendant was Class X mandatory based on his criminal history. In sentencing defendant to 15 years' imprisonment on the delivery of a controlled substance within 1,000 feet of a school, the court noted that defendant was Class X mandatory and stated it was "bound to sentence him within those mandatory guidelines." This court affirmed the trial court's judgment on direct appeal. *People v. Hall*, 2012 IL App (1st) 093509-U.

¶ 5 On January 15, 2013, defendant filed a *pro se* post-conviction petition, alleging, in pertinent part, that he was denied his right to effective assistance of counsel where his attorney failed to advise him "of the improbability of acquittal and benefit of plea bargain when defendant faced potential sentence almost four times as long as that offered under plea agreement." Defendant attached a verification affidavit to his petition.

¶ 6 While defendant's petition was pending, he filed a request for leave to amend his petition. On February 15, 2013, the circuit court dismissed defendant's post-conviction. In doing so, the court was not aware of defendant's request for leave to amend his post-conviction petition, and thus decided to stay its decision and writ defendant into court on March 19, 2013. On that date, the court granted defendant's request to amend his petition and asked him what issues he wanted to include. Defendant responded that his attorney "advised [him] not to take the plea bargain that was offered to me, because my attorney felt that they can beat the case at the time. Other than that, *** if she would have advised me correctly – had I known that I was going to be sentenced under the Class X guidelines, I would have took [*sic*] the plea that the State had offered me."

¶ 7 On April 1, 2013, defendant filed an amended *pro se* post-conviction petition, alleging, in pertinent part, that his trial counsel was ineffective "when she didn't inform [him] that he was facing [an] extended term sentence." Defendant attached a verification affidavit to his petition.

¶ 8 On June 14, 2013, the circuit court dismissed defendant's petition, finding, in part, that "[t]here is no indication whatsoever that a plea bargain was ever offered by the State." The court also ruled that even if trial counsel failed to inform defendant that he was subject to an extended term, she would not have been ineffective because it was unclear how this information would have changed the outcome of trial as there is no evidence a plea bargain was available to him. In addition, the court rejected defendant's claims because it believed they were conclusory and lacked factual support.

¶ 9 On appeal, defendant contends that he stated an arguable claim that his defense counsel was ineffective for failing to properly advise him that he was subject to a mandatory Class X sentence. Based on this omission, defendant maintains he rejected a favorable plea offer from the

State. He thus requests that the circuit court's summary dismissal be reversed and the cause remanded for second stage proceedings.

¶ 10 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122–1 (West 2012). At the first stage of a post-conviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges,* 234 Ill.2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Id*. at 11–12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill.2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an indisputably meritless legal theory is one that is completely contradicted by the record. *Id*. at 16–17. We review the summary dismissal of a post-conviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10. Thus, we review the trial court's judgment, rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 11 To state a claim of ineffective assistance of trial counsel in the plea bargain context, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). *People v. Hale*, 2013 IL 113140, ¶ 15. Thus, to survive the first stage of post-conviction proceedings, a petition claiming ineffective assistance of counsel must show "that it is arguable that counsel's performance fell below an objective standard of reasonableness and that it is arguable that the defendant was prejudiced by counsel's performance." *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 8.

¶ 12 As a threshold matter, the State maintains that summary dismissal was proper here where defendant failed to provide any evidence in support of his allegations, or explain why such evidence was absent. The general rule is that a defendant must support the allegations in his petition by attaching affidavits, records, or other evidence, or else explain the absence of such evidence, and that the unexplained absence of such evidence is fatal to the petition. *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002). However, "[f]ailure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005). To the extent the State argues defendant's petition should be dismissed for failing to explain why his attorney did not file an affidavit, we follow *Hall* and agree with defendant that he was not required to do so. We now turn to the merits of defendant's claim.

¶ 13 Here, it is arguable that trial counsel's performance was objectively unreasonable for allegedly failing to inform defendant that he was subject to a mandatory Class X sentence if convicted. It is well-settled that a defendant has a constitutional right to be reasonably informed of the direct consequences of accepting or rejecting a plea offer. *Hale*, 2013 IL 113140, ¶ 16. Under a correlative principle, both parties agree defense counsel must inform his client about the maximum and minimum sentences that can be imposed for the offenses which his client is charged. *People v. Harvey*, 366 Ill. App. 3d 910, 918 (2006); see also *Lafler v. Cooper*, _ U.S. _, 132 S. Ct. 1376, 1390-91 (2012) (holding that an attorney who rendered constitutionally deficient advice to reject a plea bargain was ineffective where his advice caused his client to reject the plea and go to trial, only to receive a much harsher sentence).

¶ 14 Defendant alleged in his initial petition that his trial counsel failed to advise him that he was subject to a sentence almost four times as long as the sentence the State was offering him in exchange for a plea of guilty on the charged offense. At the March 19, 2013 hearing, the court granted defendant's request to amend his petition and asked him what issues he wanted to include. Defendant responded that his counsel advised him not to enter into the plea agreement offered by the State and failed to advise him that he would be "sentenced under the Class X guidelines." Finally, in his amended petition, defendant asserted that his trial counsel failed to advise him that he was subject to an "extended term sentence." We find that counsel's alleged failure during plea negotiations to advise defendant about the sentencing range he would be subject to if convicted at trial was arguably deficient performance. See *People v. Barghouti*, 2013 IL App (1st) 112373, ¶¶ 15-16 (holding that the defendant stated the gist of an ineffective assistance of counsel claim where he alleged that he rejected the State's offer of a 12-year sentence in exchange for a guilty plea because trial counsel failed to inform him that he faced up to 60 years' imprisonment if found guilty at trial).

¶ 15 In so finding, we are not persuaded by the State's contention that defendant's claim has no arguable basis in fact because there was no evidence that the State ever offered him a plea agreement. The fact that there is no record of any plea offer does not contradict defendant's claim that one was made. See *People v. Coleman*, 183 Ill. 2d 366, 385 (1998) (unless "*positively* rebutted by the original trial record," the defendant's allegations are taken as true (emphasis added)). We are also not persuaded by the State's contention that defendant's claim is a broad, conclusory allegation insufficient to warrant post-conviction relief because defendant did not state the sentencing range his attorney told him would apply to his case, nor did he provide any details about the conversation that led to the alleged erroneous information. This case does not

turn on the specifics of the alleged incorrect sentencing information provided by trial counsel. Instead, it is significant that defendant told the court at the March 19, 2013 hearing that counsel advised him not to enter into the plea agreement offered by the State and failed to advise him he was subject to the Class X statutory guidelines, which caused him to reject the State's plea offer. The fact that defendant did not specifically refer to Class X sentencing in his initial and amended petitions is not dispositive where defendant provided sufficient detail in his petitions to support his claim that counsel failed to advise him of the sentencing range he faced if convicted. See *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996) (to survive summary dismissal, defendant need only present a modest amount of detail and does not need to make legal arguments or cite to legal authority).

¶ 16 We also find that defendant showed he was arguably prejudiced by his trial counsel's performance. Where a defendant claims counsel's deficient performance has prejudiced him by his rejection of a plea offer, our supreme court has held that a defendant must demonstrate a reasonable probability that he would have accepted the earlier plea offer had he been afforded effective assistance of counsel, the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, and 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. *Hale*, 2013 IL 113140, ¶ 19, citing *Missouri v. Frye*, __ U.S. __, 132 S. Ct. 1399 (2012). Defendant's showing of prejudice must encompass more than his own self-serving testimony. *Id*. ¶ 18. Rather, there must be objective confirmation that defendant's rejection of the plea offer was based on counsel's erroneous advice, and not on other considerations. *Id.*

¶ 17 Here, taking defendant's allegations as true at this first stage proceeding, defendant received a sentence "almost four times as long" as the State's plea offer, and defendant told the

court on March 19, 2013, that if he had known he was going to be sentenced under the Class X guidelines, he would have accepted the State's plea offer. We thus find that defendant stated an arguable claim, which was unrebutted by the record, that he was prejudiced by counsel's failure to inform him of the sentencing range that applied to him if convicted. We recognize that defendant has not made a showing that the plea agreement would have been accepted by the trial court, or that it would not have been canceled by the prosecution, as our supreme court required in *Hale*. However, *Hale* was not decided at the first stage of post-conviction proceedings, but instead following an evidentiary hearing on claims of ineffective assistance of counsel alleged in the defendant's motion for a new trial. *Hale*, 2013 IL 113140, ¶¶ 10-11. At the first stage, defendant need only present the gist of a constitutional claim, and we find his unrebutted claim that he rejected a plea offer for substantially less prison time than he received after trial because defense counsel did not inform him of the appropriate sentencing range he faced satisfied that standard.

¶ 18 Nevertheless, the State maintains defendant failed to demonstrate he was arguably prejudiced because he knew he was Class X eligible. The State points out that defendant knew his extensive criminal history, which included 14 felonies, and defendant was present at the bond hearing when the State told the court he was Class X eligible. However, the State's reliance on these facts does nothing to rebut defendant's allegation that trial counsel never advised him of the proper sentencing range to which he was subject if convicted, an admonishment counsel was required to confer on him. See *Harvey*, 366 Ill. App. 3d at 918.

¶ 19 We acknowledge, as the State highlights in its brief on appeal, that defendant also alleged in his petition that he did not accept the State's plea agreement because his attorney was confident they would "beat the case." We disagree with the State, however, that this alternative

argument suggests that defendant rejected the alleged plea offer because his attorney said they would win, and not because of any misinformation regarding sentencing. The two allegations are not mutually exclusive, and defendant's position is neither frivolous nor patently without merit, given that his allegation that trial counsel failed to properly admonish him of his sentencing range was unrebutted by the record.

¶ 20 For the foregoing reasons, we reverse the summary dismissal of defendant's post-conviction petition and remand the cause for a second stage proceeding.

¶ 21 Reversed and remanded.