SECOND DIVISION
March 8, 2016

No. 1-13-3464

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. 09 CR 18426
	)	
MIGUEL BARRIERA,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's summary dismissal of defendant's postconviction petition affirmed where his allegation of ineffective assistance of counsel is rebutted by the record and thus did not meet the "arguable" *Strickland* test required for further proceedings.

¶ 2 Defendant Miguel Barriera appeals from an order of the circuit court of Cook County summarily dismissing his postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the court erred in dismissing his petition because he presented an

arguable claim that his trial counsel rendered ineffective assistance when he failed to inform him of a plea offer from the State.

¶ 3 Following a bench trial, defendant was convicted of aggravated battery with a firearm and unlawful use of a weapon by a felon, then sentenced to respective, concurrent terms of 20 and 10 years' imprisonment. On direct appeal, this court found no merit in defendant's claim that he was subject to double enhancement at sentencing, and affirmed his convictions and sentence. *People v. Barriera*, 2013 IL App (1st) 111561-U.

¶ 4 In May 2012, while his direct appeal was pending, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), alleging that he was never given a *Gerstein* hearing (*Gerstein v. Pugh*, 420 U.S. 103 (1975)), that his rights were violated when the State proceeded by way of indictment rather than a preliminary hearing, and that the grand jury indicted him on the basis of hearsay and perjured testimony. The circuit court dismissed the petition, and on appeal, this court allowed the State Appellate Defender to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed that judgment. *People v. Barriera*, 2013 IL App (1st) 123011-U.

¶ 5 On June 18, 2013, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), raising several allegations of ineffective assistance of trial counsel, including, *inter alia*, that counsel failed to inform him of any plea offers made by the State.[1] Defendant asserted that he would have considered any plea offer, and thus, there was a reasonable probability that the outcome of the

[1] Defendant simultaneously filed a separate motion for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2012)). The trial court addressed the DNA motion in a separate proceeding, and that motion is not at issue in this appeal.

case would have been different had counsel conveyed such offer. He further stated that he would have tried to negotiate a plea had he realized that he would receive a sentence of 20 years' imprisonment to be served at 85%.

¶ 6 Defendant attached to his petition an unsworn "affirmation" attesting to the veracity of the facts presented in his petition. He also attached several pages of the trial transcript in support of other allegations of ineffective assistance of counsel raised in his petition. He did not attach a sworn affidavit or any documentation in support of his claim that counsel failed to inform him of a plea offer, nor did he explain the absence of such documentation.

¶ 7 The circuit court found that defendant failed to provide any documentation to corroborate his claim and specifically pointed out that he did not even attach his own affidavit in support. The court further noted that defendant provided no explanation for his failure to attach supporting documentation, as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2012)). The court also found that there was no indication in the record that a conference pursuant to Supreme Court Rule 402 (eff. July 1, 1997) had been held, and thus, defendant's claim failed. The court concluded that all of the allegations raised in defendant's postconviction petition were frivolous and patently without merit, and summarily dismissed his petition.

¶ 8 On appeal, defendant solely contends that the circuit court erred when it dismissed his *pro se* postconviction petition because he presented an arguable claim that his trial counsel rendered ineffective assistance when he failed to inform him of a plea offer from the State, which he would have considered. In his opening brief, defendant asserts that "the record is silent as to the existence of any plea negotiations or offers by the State." Defendant acknowledges that he did not attach an affidavit or other documentation to his petition as required by the Act, but

argues that he should be excused under a narrow exception to that requirement because obtaining an affidavit from his allegedly ineffective trial counsel would be difficult or impossible.

¶ 9 The State responds that defendant's failure to provide documentation in support of his claim, or otherwise explain its absence, is fatal to his petition and justified the circuit court's summary dismissal. Alternatively, the State argues that the record rebuts defendant's claim where it shows that a few months before trial, counsel informed the trial court that an offer was made "which was just communicated to defendant today," and the court granted counsel's request for a continuance "for plea or reset" of the trial date. The State asserts that defendant's claim that the record is silent regarding the plea offer is patently untrue.

¶ 10 In his reply, defendant maintains that his failure to attach supporting documentation should be excused as an exception to the requirement due to the difficulty in obtaining an affidavit from his trial attorney acknowledging his own ineffectiveness. He then concedes that the State correctly noted that "there *is* affirmative evidence in the record that a plea offer was made by the State," and points out that it was not defense counsel, but another attorney acting on his behalf, who informed the court of the offer. Defendant argues that the colloquy between the court and the third party does not rebut his claim that his attorney never communicated the plea offer to him.

¶ 11 We review the circuit court's order summarily dismissing defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2012); *Coleman*, 183 Ill. 2d at 378-79. A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral

attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 124 (2007).

¶ 12 Pursuant to section 122-2 of the Act, defendant is required to 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 this requirement is for defendant to show that the allegations in his postconviction petition are capable of objective or independent corroboration. *People v. Hall*, 217 Ill. 2d 324, 333 (2005), citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Our supreme court has held, however, that "[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." *Id*., citing *Collins*, 202 Ill. 2d at 68.

¶ 13 Here, defendant attached to his postconviction petition several pages of the trial transcript covering opening statements and testimony from the victim in support of other allegations raised in his petition which are not at issue on appeal. He did not attach any documentation in support of his claim that his trial counsel failed to inform him of the State's plea offer, nor did he explain the absence of such documentation as required by section 122-2 of the Act. He now asserts, however, that he could not provide such documentation because it would have been difficult or impossible to obtain an affidavit from his trial counsel attesting to his own ineffectiveness. The State asserts that defendant's oversight should not be excused because the record contradicts his claim, but that assertion applies to the substantive virtue of defendant's claim rather than his procedural compliance with the Act.

¶ 14 In initially reading defendant's petition, and taking the allegations therein as true (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), the only documentation he could have provided to corroborate his claim that counsel failed to inform him of the State's plea offer, other than his own affidavit, would have been an affidavit from his trial counsel. Defendant did provide corroborating documentation for the other allegations in his petition, which are not at issue on appeal. Under these circumstances, defendant's failure to provide documentation in support of his allegation regarding the plea offer is excused. *Hall*, 217 Ill. 2d at 333.

¶ 15 Turning to the circuit court's ruling on defendant's petition, our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id*. A legal theory that is completely contradicted by the record is indisputably meritless. *Id*.

¶ 16 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Graham*, 206 Ill. 2d at 476. However, at the first stage of postconviction proceedings, allegations of ineffective assistance of counsel are judged by a lower pleading standard, and a petition raising such claims

may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶¶ 19-20.

¶ 17 In this case, defendant's allegation that his trial counsel failed to inform him about the plea offer from the State is directly contradicted by the record. The report of proceedings shows that at a pretrial status hearing on November 10, 2010, the following colloquy occurred:

"[DEFENSE COUNSEL]: Michael Vahey, V-a-h-e-y, stepping up for David Wiener, the attorney of record, for Mr. Barriera. Your Honor, this was set for trial, however an offer has been made in the case, which was just communicated to Mr. Barriera today. I would be requesting a short status date for him to consider that.

[ASSISTANT STATE'S ATTORNEY (ASA)]: Yes, your Honor. For the record, I spoke to Mr. Wiener last night (Inaudible).

THE COURT: So the State was answering ready?

[ASA]: Yes. Your Honor, one of our witnesses is in custody, and I ask they be subpoenaed for the next court date.

THE COURT: Where is Mr. Wiener?

[DEFENSE COUNSEL]: He's on trial in Maywood, Judge.

THE COURT: State answers ready. Motion defendant for a plea or to reset. What date?

[DEFENSE COUNSEL]: Judge, could we have 12/23, just for a plea or reset.

THE COURT: No, that's a month.

[DEFENSE COUNSEL]: I'm sorry, 11/23, I was looking at (Inaudible).

THE COURT: November 23, for plea or reset."

On the next court date, November 23, 2010, defense counsel David Wiener informed the court that the case was being set for a bench trial, that the parties agreed on a date in January, and the court continued the case to that date for the bench trial.

¶ 18 The record therefore expressly shows that the State's plea offer was "communicated" to defendant on November 23, 2010, and that he was given two weeks to consider whether he wanted to accept that offer. It is of no import that the plea offer was communicated to defendant by another attorney, Michael Vahey, who was standing in for defense counsel, David Weiner. Vahey was representing defendant on behalf of Weiner that day in court, and consequently, was serving as defendant's trial counsel on that date. Furthermore, the record shows that defense counsel Weiner was aware of the plea offer because the ASA had discussed it with him the previous night.

¶ 19 The record thus directly contradicts defendant's allegation that counsel failed to inform him about the plea offer from the State. As a result, defendant's claim that counsel was ineffective for failing to convey the plea offer provides no arguable basis that counsel's performance fell below an objective standard of reasonableness, or that he was prejudiced thereby (*Tate*, 2012 IL 112214, ¶¶ 19-20) and subjected his petition to summary dismissal (*People v. Deloney*, 341 Ill. App. 3d 621, 626 (2003), citing 725 ILCS 5/122-2.1(c) (West 1998), and *People v. Rogers*, 197 Ill. 2d 216, 222 (2001)).

¶ 20 For these reasons, we conclude that defendant's allegation of ineffective assistance of counsel had no arguable basis is law or fact, that the summary dismissal of his postconviction petition was proper, and we affirm the order of the circuit court of Cook County to that affect.

¶ 21 Affirmed.