FIFTH DIVISION
April 22, 2016

No. 1-14-0206

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.	)	Nos. 09 CR 6453
	)	09 CR 6459
	)	09 CR 6460
	)	
SEAN NELSON,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE Burke delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's order summarily dismissing defendant's petition for post-conviction relief is affirmed as defendant cannot make an arguable claim that he was prejudiced by defense counsel's alleged deficient representation. We amend the mittimus to properly indicate defendant was convicted of possession of a controlled substance with intent to deliver and vacate the $200 DNA fee.

¶ 2 Defendant Sean Nelson appeals from the circuit court's summary dismissal of his 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 trial counsel was ineffective for inaccurately informing him, prior to his entering his guilty plea, of the percentage of his sentence he would have to serve in prison. He also contends that the mittimus should be amended to correctly reflect the offense of which he was convicted and that his $200 DNA fee be vacated. We affirm as modified.

¶ 3 The record shows that on February 24, 2011, defendant entered negotiated guilty pleas in three separate cases. In case number 09 CR 6453, the trial court advised defendant that he was charged with delivering 400 grams or more but less than 900 grams of cocaine. It informed defendant that he faced a sentencing range of 12 to 45 years' imprisonment, to be served at 75%. Defendant indicated that he understood. The court then clarified that the sentencing range was 12 to 50 years' imprisonment, to be served at 75%. Defendant again indicated that he understood.

¶ 4 In case number 09 CR 6459, the trial court advised defendant that he was charged with delivering 15 grams or more but less than 100 grams of cocaine. It informed defendant that he was facing a sentencing range of 9 to 40 years' imprisonment, to be served at 75%. Defendant indicated that he understood. The court then clarified that the sentencing range was 6 to 30 years' imprisonment, to be served at 50%. Defendant again indicated that he understood.

¶ 5 In case number 09 CR 6460, the trial court advised defendant that he was charged with possession with intent to deliver 100 grams or more but less than 400 grams of cocaine. The court informed defendant that he faced a sentencing range of 6 to 30 years' imprisonment, to be served at 50%. It then clarified that the sentencing range was 9 to 40 years' imprisonment, to be served at 75%. Defendant indicated that he understood. Defendant also stated that he was pleading guilty of his own free will, no one had promised him "anything else" in exchange for his plea, and no one threatened him in any way.

¶ 6 The parties stipulated to the factual basis for each count. In case number 09 CR 6453, Officer Nelson would testify that he and defendant met in Dolton, Illinois, where defendant handed him a bag containing 500.2 grams of cocaine and 100 pills of suspected Ecstasy. In case number 09 CR 6459, Officer Wilson would testify that he and defendant met at 5401 South Wentworth Avenue where defendant gave him 62.4 grams of cocaine. In case number 09 CR 6460, Officer Knezevich would testify that a search warrant was obtained for defendant's residence where he recovered one bag of suspected heroin, one brick of suspected heroin, one plastic bag and one ziplock bag of suspected cannabis, two scales, and four bags containing 147 grams of cocaine.

¶ 7 The court found that defendant understood the charges against him and the possible penalties, and that he entered into his guilty pleas voluntarily. The court sentenced defendant to 12 years' in the Illinois Department of Correction (IDOC) in each case, to be served concurrently. Defendant did not file a motion to withdraw his guilty pleas, nor did he file a direct appeal.

¶ 8 On October 7, 2013, defendant, through private counsel, filed a postconviction petition, alleging that defense counsel was ineffective for failing to inform him that he would serve his sentence at 75% time. Defendant explained that, prior to his decision to plead guilty, counsel told him that he estimated he could get a negotiated guilty plea for eight years, and that defendant would only have to serve four years. After the plea conference was held, counsel told defendant that he was offered a 12-year prison term in exchange for pleading guilty. However, there was no further discussion regarding the percentage of time he would serve. Defendant asserted that, based on his previous discussion with counsel that he would serve 4 years of an 8-year prison

term, he was under the impression that he would serve 6 years in prison on a 12-year sentence.

¶ 9 Defendant acknowledged in his petition that the court had informed him that he would serve 75% on two of the cases, but averred "that moment was the first time anyone" had informed him that he would serve more than 50% of his sentence in any of the cases. He averred his counsel had never mentioned that he would serve 75% of his sentence. Defendant claimed he was "dumbfounded and reluctant" to say anything because counsel had advised him simply to respond affirmatively to the court's statements. Defendant feared that if he did not respond affirmatively, the court and State would be "cross with him," he would not receive the benefit of any bargain, and he would be punished more harshly. Defendant averred that he was prejudiced by defense counsel's failure to explain the proper sentences to him as, had counsel correctly explained them, he would not have entered the plea.

¶ 10 In support of his petition, defendant attached an affidavit averring only that he had read and understood the petition and that all the facts presented therein were true and correct to the best of his recollection. He also attached a memorandum in which, citing to *People v. Curry*, 178 Ill. 2d 509 (1997), he argued defense counsel had an obligation to inform him of the maximum and minimum sentences. Defendant lastly attached to his petition the transcript of the guilty plea hearing, and a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) signed by postconviction counsel.

¶ 11 On December 13, 2013, the circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. The court held that defendant's claim was based on a fanciful factual allegation and had no arguable basis in law or fact.

¶ 12 Defendant raises three arguments on appeal. He first contends the circuit court erred in summarily dismissing his postconviction petition as he stated an arguable claim that his defense

counsel was ineffective for incorrectly informing him regarding the percentage of his sentence he would have to serve in prison. Defendant maintains that he would not have entered the plea of guilty had the correct sentence been explained to him by counsel. He requests that the court's summary dismissal be reversed and the cause remanded for second stage proceedings.

¶ 13 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 postconviction 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 [at the first stage 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 postconviction 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).

¶ 14 To state a claim of ineffective assistance of trial counsel in the context of a guilty plea, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, deficiency and prejudice. *People v. Hall*, 217 Ill.2d 324, 334–35 (2005). Thus, to survive the first stage of postconviction proceedings, a petition claiming ineffective assistance of counsel need only demonstrate (1) that it is *arguable* counsel's representation fell below an

objective standard of reasonableness and (2) that it is *arguable* defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17. (Emphasis added.) However, if a defendant fails to show he was arguably prejudiced by his counsel's actions, then we can dispose of the ineffective claim on this prong alone. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 46. Here, defendant has not presented an arguable claim of prejudice.

¶ 15 Counsel performs inadequately where he fails to ensure the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. Prejudice exists if there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Id.*; *People v. Jones*, 144 Ill. 2d 242, 254 (1991). A bare allegation that the defendant would have pleaded not guilty and insisted on a trial is not enough to show prejudice. *Hall*, 217 Ill. 2d 335 (citing *People v. Rissley*, 206 Ill. 2d 403, 458-59 (2003)). Instead, "the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335-36 (citing *Rissley*, 206 Ill. 2d at 459-60).

¶ 16 In defendant's petition, he asserted that defense counsel never told him he would have to serve his sentence at 75% time. Instead, based on a discussion he had with counsel before he decided to plead guilty, defendant maintained he was under the impression he would only have to serve his sentence at 50% time. Defendant acknowledged that the court admonished him that he would have to serve two of his convictions at 75%. He maintained, however, that he did not want to "say anything at that moment" as counsel had advised him to respond affirmatively to the court's statements. Defendant claimed he feared that, if he did not respond affirmatively, he would receive a harsher sentence and not the benefit of his bargain. Finally, defendant averred that, had defense counsel explained how much time he would have to serve, he would not have

pleaded guilty.

¶ 17 However, a bare allegation that defendant would have pleaded differently and gone to trial had his counsel not been deficient during plea discussions is not sufficient to show prejudice. *Rissley*, 206 Ill. 2d at 458. Instead, as explained by our supreme court in *Jones*, 144 Ill. 2d at 254, defendant must prove there is a reasonable probability that he would have insisted on going to trial. In order accomplish this, our supreme court in *Rissley* detailed that a defendant's statement that he would have gone to trial must be accompanied by either a claim of innocence or plausible defense that he could have raised at trial. *Rissley*, 206 Ill. 2d at 459-60. Otherwise, such an allegation is subjective and self-serving, and thus insufficient to satisfy the *Strickland* prejudice prong. *Id*. Even at the first stage of postconviction proceedings, the defendant must present more than a bare allegation that he would have pleaded not guilty and insisted on trial. See *Hodges*, 234 Ill. 2d at 10 (stating that even the low threshold at the first stage does not excuse the petitioner from providing any factual support for his claims). Defendant, in this case, provides absolutely no factual support for his self-serving claim that had the proper sentence been explained, he would not have entered the plea and presumably insisted on going to trial.

¶ 18 Here, the record rebuts defendant's allegation that he would have insisted on going to trial had counsel told him he would have to serve his sentence at 75% time. The trial court thoroughly admonished defendant about the consequences of entering a guilty plea, including that two of his sentences would be served at 75% time. Defendant acknowledged his understanding of the court's admonishments and that no promises or agreements had been made as to his sentencing. Defendant's allegation that he feared that, if he did not respond affirmatively to the court's admonishments, the court and State would be "cross with him," is insufficient to show he would have rejected the plea had counsel properly instructed him as to the amount of time he would

have to serve where the court properly instructed him twice. See *People v. Ramirez*, 162 Ill. 2d 235, 243 (1994) (affirming the circuit court's judgment summarily dismissing the defendant's petition as his "responses on the record contradict[ed] the assertions raised in his postconviction petition that he pled guilty in reliance upon his counsel's promise that he would receive probation").

¶ 19 In addition, nowhere in defendant's petition or his cursory affidavit attached thereto did he allege that he had a defense to offer at trial, nor did he allege that he likely would have succeeded at trial. Moreover, there is nothing in the record that would lend support to an allegation of innocence. The stipulated factual bases for case Nos. 09 CR 6453 and 09 CR 6459 showed that defendant sold police officers large amounts of cocaine and case No. 09 CR 6460 showed that police recovered large amounts of cocaine from his residence after executing a search warrant. Given the evidence against defendant, there is no plausible defense that could have rebutted the State's evidence or shown defendant's innocence. Therefore, defendant's petition failed to make a showing that it is *arguable* he suffered prejudice as a result of counsel's alleged deficiencies.

¶ 20 Defendant, nevertheless, contends that *Jones* and *Rissley* are distinguishable from the case at bar because they involved appeals from third stage evidentiary hearings. Defendant asserts that he should not be held to the same standards that applied to the defendants in *Jones* and *Rissley*, *i.e.*, that in order to establish prejudice he had to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial, and alleged a claim of actual innocence or articulated a plausible defense. He is correct. However, we are not holding him to this standard. We do not require defendant to conclusively show he was prejudiced by counsel's alleged deficient performance. Instead, his petition is only required

to state an *arguable* claim that he was prejudiced by counsel's alleged error. As discussed above, his petition does not state even such an arguable claim.

¶ 21 Relying on *People v. Stewart*, 381 Ill. App. 3d 200 (2008), defendant argues that his petition is sufficient to survive summary dismissal. We disagree as *Stewart* is distinguishable from the case at bar. In *Stewart*, the defendant alleged in his postconviction petition that he pleaded guilty because his counsel erroneously advised him that he would be given day-for-day good conduct credit and would have to serve 50% of his sentence when, in fact, he was actually required to serve 85%. *Id*. at 201. The appellate court held that the defendant's allegation that counsel gave him wrong advice and that he relied on the advice was sufficient to entitle him to an evidentiary hearing. *Id*. at 206. However, unlike in the case at bar, in *Stewart* there was no indication that the defendant had been correctly admonished by the trial court regarding the sentence.

¶ 22 In contrast, here, the court specifically told defendant that two of his three convictions were to be served at 75% time and defendant responded, multiple times, that he understood. Moreover, it is noteworthy that the defendant in *Stewart* attached a letter from his attorney wherein the attorney admitted he was not aware that the defendant would have to serve 85% of his sentence. *Id*. at 201. Here, defendant only attached his own affidavit, averring that the facts in the petition were true. In addition, the *Stewart* opinion contains no discussion of prejudice. Here, as set forth above, it is clear that defendant cannot show he was even arguably prejudiced by counsel's alleged deficient representation.

¶ 23 Defendant next contends that the mittimus in case number 09 CR 6460 must be corrected to properly reflect his conviction for possession of 100 grams or more but less than 400 grams of cocaine with intent to deliver. The mittimus misidentifies the offense as "MFG/DEL 100<400

GR COCA/ANLG" (manufacturing/delivering a controlled substance). Although both offenses arise from the same statute (720 ILCS 570/401(a)(2)(B) (West 2008)), the State does not object to amending the mittimus. Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Apr. 1, 2015), we correct the mittimus to reflect defendant's conviction of possession with intent to deliver 100 or more grams, but less than 400 grams of cocaine. *People v. Magee*, 374 Ill. App. 3d 1024, 1035-36 (2007).

¶ 24 Defendant finally claims that the $200 DNA analysis fee imposed should be vacated as he already submitted a DNA sample in conjunction with a prior felony conviction. The DNA analysis fee may not be imposed if defendant's DNA has already been taken. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011). Where a defendant was convicted of prior felonies after 1998, we presume this mandatory requirement was imposed following at least one of the defendant's prior convictions. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Here, the record indicates that defendant had two prior felony convictions for aggravated unlawful use of a weapon in 2001 and 2002, leading to the presumption that the DNA analysis fee had already been imposed.

¶ 25 Defendant challenges the fee as void, asserting that it can be stricken at any time as a void order is not subject to forfeiture. *Marshall*, 242 Ill. 2d at 302. In light of *People v. Castleberry*, 2015 IL 116916, ¶ 19, this rule no longer applies. However, the State concedes that the DNA analysis fee should not have been imposed and that we may modify the fines and fees order without remanding the case back to the circuit court.

¶ 26 Arguably, as correction of a fines and fees order does not raise a constitutional challenge, we cannot consider it here for the first time on appeal in the context of a postconviction proceeding. As our supreme court explained in *People v. Caballero*, 228 Ill. 2d 79, 88 (2008), in the context of a claim for monetary credit under section 110-14 of the Code of Criminal

Procedure of 1963 (725 ILCS 5/110-14 (West 2002)), the defendant's claim was a statutory claim and thus not cognizable under the Post-Conviction Hearing Act. Nevertheless, the court held that the claim may be considered as an "application of the defendant" made under statute and may be raised at any time, including on appeal in a postconviction proceeding. *Id*. Furthermore, if the basis for granting the application is clear from the record, "the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested." *Id*.

¶ 27 Accordingly, although defendant's claim that his $200 DNA analysis fee should be vacated is not cognizable under the Act, in the interests of an orderly administration of justice, we grant him the requested relief. See Ill. S. Ct. R. 615(b)(1) (eff. Apr. 1, 2015) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections"). We vacate the $200 DNA analysis fee and correct the fines and fees order.

¶ 28 For the foregoing reasons, we vacate the $200 DNA analysis fee, correct defendant's mittimus to accurately reflect that he was convicted of possession of cocaine with intent to deliver, and affirm the judgment of the circuit court in all other respects.

¶ 29 Affirmed as modified.