

FIRST DIVISION
April 18, 2016

No. 1-14-1205

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 11 CR 1037
)	
BRIAN BLACK,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition affirmed over his contention that his guilty plea was involuntary and that he was denied effective assistance of trial counsel where defendant's claim was rebutted by the record and he did not adequately allege prejudice.

¶ 2 Defendant, Brian Black, appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he stated the gist of a constitutional claim that his guilty plea was involuntary. He further contends that he presented an arguable claim that trial counsel failed to provide him effective assistance regarding his decision to enter a guilty plea.

¶ 3 The record shows that defendant, the Deputy Chief of Police of the Maywood Police Department, was charged by indictment with one count of disorderly conduct and four counts of obstruction of justice. On July 2, 2013, defendant pleaded guilty to one count of obstruction of justice in exchange for the State's recommendation of a sentence of 12 months of non-reporting probation. Prior to entering his plea, the court admonished defendant regarding the nature of the charge, the minimum and maximum penalties, his right to plead not guilty and demand a trial, and the consequences of entering a guilty plea, including that he would be waiving his right to a trial of any kind, to confront witnesses, and present evidence on his behalf. Defendant confirmed that he understood the court's admonitions. The court also established that defendant was pleading guilty of his own free will free of any force or threats:

"THE COURT: Now, aside from what the prosecution agreed to do here, take this on a lesser charge and recommend this 12 months of nonreporting probation, has anyone promised to do anything else to get you to plead guilty?

DEFENDANT: No, sir.

THE COURT: Has anyone threatened you in any way to get you to plead guilty?

DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of your own free will?

DEFENDANT: Yes, sir."

¶ 4 The State provided a factual basis for defendant's plea stating that defendant and Cordero Berry got involved in a physical altercation during which defendant hit Berry twice on the top of the head with his service handgun. Following the altercation, defendant and Berry fled in opposite directions, defendant concealed the weapon, and both he and Berry called police. When the officers arrived, they asked defendant where his service weapon was, and defendant stated that Berry had taken it and fled the scene. Berry was later arrested. Defendant stipulated to the facts as provided by the State and the court found that defendant understood "the nature of the charge against him, the possible penalties. He understands his rights under the law. His plea has been made freely and voluntarily, a factual basis exists for his plea. His plea will be accepted."

¶ 5 Defendant then waived his right to a presentence investigation report and the court sentenced him to 12 months of non-reporting probation as recommended by the State. The court then advised defendant of his appeal rights, including the fact that in order to appeal, he would first have to file a written motion asking the court to vacate his guilty plea. Defendant did not file a motion to withdraw his plea and did not file a direct appeal.

¶ 6 On December 27, 2013, defendant filed, through counsel, the postconviction petition at bar, alleging that his guilty plea was involuntary because he believed that new charges would be levied against him if he did not plead guilty, but, in fact, no such new charges would have been filed. He also contended that his trial counsel provided ineffective assistance by advising him to plead guilty based upon false threats of new charges. He maintained that there was a "reasonable probability that absent counsel's errors, [he] would not have plead guilty."

¶ 7 On March 19, 2014, the circuit court dismissed defendant's petition in a written order. In addressing his involuntary plea claim, the court stated that defendant did not file a motion to

withdraw his plea, and was sufficiently admonished by the trial court. The court concluded that defendant's claim was, therefore, rebutted by the record. In rejecting defendant's ineffective assistance claim, the court stated that defendant failed to establish that the information counsel purportedly provided to him regarding new charges was not true and that he failed to claim that he was actually innocent of the charged offense or articulate a potential defense. The court concluded that defendant failed to establish that he was prejudiced by any alleged ineffectiveness of his counsel.

¶ 8 In this appeal from that judgment, defendant contends that the circuit erred in dismissing his petition where he stated the gist of a constitutional violation. He maintains that his guilty plea was involuntary because he relied on counsel's misrepresentations in deciding to plead guilty. He further contends that he stated an arguable claim of ineffective assistance where counsel threatened defendant "with new charges and with an increase in his bond on the current charge if he did not plead guilty." The State responds that defendant forfeited his claim that his guilty plea was involuntary where he did not raise this issue on direct appeal and failed to file a motion to withdraw his plea, and in any event, the record shows that defendant made his plea knowingly and voluntarily. The State also contends that defendant failed to establish that his counsel's alleged ineffectiveness prejudiced him where he did not assert a claim of actual innocence or articulate a plausible defense that he could have raised at trial.

¶ 9 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2012); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2012); *People v. Jones*, 213 Ill. 2d

498, 503 (2004). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 9, 16 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 10 Initially, we must address defendant's claim that the trial court applied the improper standard of review and the contention in his reply brief that "[t]his court can and should reverse because of the use of the wrong standard." He contends that the circuit court examined his petition under the more demanding standard of review for granting an evidentiary hearing, instead of the standard applicable for first-stage proceedings.

¶ 11 In dismissing defendant's petition, the circuit court identified the standard necessary for granting an evidentiary hearing, but also noted that a petition may be dismissed at the first stage of proceedings if it fails to present the gist of a valid constitutional claim. Moreover, in rejecting defendant's claims, the court applied the first-stage standard, finding that his petition was frivolous and patently without merit. The court's mere mention of the evidentiary hearing standard in its written order, therefore, is not improper where the court did not apply that standard in dismissing defendant's petition.

¶ 12 We next address whether defendant has waived for review the claim that his guilty plea was involuntary. The State contends that defendant has forfeited this claim because he did not file the requisite motion in the trial court under Illinois Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Jan. 1, 2013)), asking to withdraw his guilty plea, and did not raise this issue on direct appeal. However, the record shows that defendant did not file a direct appeal in this case. We, therefore, agree with defendant that "the general rule that issues which could have been

raised on direct appeal but were not are forfeited, does not apply where no direct appeal has been filed." See *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007). Moreover, this court has found that waiver under Supreme Court Rule 604(d) does not apply in postconviction proceedings. *People v. Miranda*, 329 Ill. App. 3d 837, 841 (2002). Nonetheless, we find that defendant's claims are rebutted by the record.

¶ 13 Due process requires that all pleas be knowing and voluntary. *People v. Whitfield*, 217 Ill. 2d 177, 200 (2005). Illinois Supreme Court Rule 402 requires that before accepting the plea, the court must admonish defendant regarding the nature of the charge, the minimum and maximum sentence, the right to plead not guilty, and the waiver of his right to a trial. Ill. S. Ct. R. 402(a) (eff. July 1, 2012); *People v. Marshall*, 381 Ill. App. 3d 724, 732 (2008). The court must also determine that the plea is voluntary by stating the terms of the plea agreement and defendant must accept those terms in open court. Ill. S. Ct. R. 402(b) (eff. July 1, 2012); *Marshall*, 381 Ill. App. 3d at 732. "Where the trial record refutes [a] defendant's assertions that his plea was not knowingly and voluntarily entered, courts may properly dismiss or deny a defendant's [postconviction] petition." *Marshall*, 381 Ill. App. 3d at 732, quoting *People v. Fern*, 240 Ill. App. 3d 1031, 1041 (1993).

¶ 14 Here, the record shows that the trial court admonished defendant as required by Rule 402. The trial court informed defendant of the nature of the charge and the minimum and maximum penalty. The court also informed defendant that he had the right to plead not guilty, and that by pleading guilty he was waiving his right to a trial of any kind. The court informed defendant of the terms of the plea agreement and confirmed that defendant was accepting the plea freely and voluntarily. Notably, defendant answered "No, sir," when asked if anyone had promised him anything to get him to plead guilty or threatened him to plead guilty. Defendant also answer

"Yes, sir," when asked if he was pleading guilty of his own free will. The court confirmed defendant's understanding of each of its admonishments and found that defendant's plea had been made freely and voluntarily. The record thus rebuts defendant's contention that his plea was involuntary. *Marshall*, 381 Ill. App. 3d at 732.

¶ 15 Defendant next contends that he was denied his right to the effective assistance of counsel with regard to his plea because counsel made misrepresentations regarding new charges that would be brought against him if he did not plead guilty. Because this claim involves alleged conversations *de hors* the record, it is not rebutted by defendant's responses to the trial court's admonishments. See *People v. Newbolds*, 364 Ill. App. 3d 672, 675-76 (2006). To survive summary dismissal, defendant was required to allege that his counsel's performance was arguably deficient, and that he was arguably prejudiced by the deficiency. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, counsel's conduct is considered deficient if he failed to ensure that defendant's guilty plea was entered voluntarily and intelligently. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Prejudice exists if there is a reasonable probability that, absent counsel's errors, defendant would have pleaded not guilty and insisted on going to trial. *Id.* However, a bare allegation that defendant would have pleaded not guilty and insisted on trial is not enough to establish prejudice if the contention is not accompanied by a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Id.* at 335-36. We note that although the court in *Hall* considered a second-stage dismissal, this court has applied its reasoning to first-stage dismissals. See *e.g.*, *People v. McCoy*, 2014 IL App (2d) 100424-B.

¶ 16 In this case, defendant has failed to allege a claim of actual innocence or a plausible defense that could have been raised at trial; nor is there anything in the record that would support

such an allegation. Defendant's "bare allegation," that he would not have pled guilty, therefore, is insufficient to establish prejudice. See *Hall*, 217 Ill. 2d at 335-36.

¶ 17 Defendant contends, however, that he was not required to allege actual innocence because he was "threatened with an illegal, and legally false threat of immediate incarceration." In support of this contention, defendant relies on a portion of a concurring opinion in *People v. Guzman*, 2014 IL App (3d) 090464. In *Guzman*, defendant claimed that he was unaware of the risk of deportation when he accepted the State's plea deal, and that, had he known the risk, it would have been reasonable for him to plead not guilty. *Id.* ¶ 34. The court found that defendant was prejudiced by counsel's failure to advise him of the risk of deportation. *Id.* ¶ 36. In the concurring opinion cited by defendant, Justice McDade stated that "inherent prejudice [] arises for a defendant attempting to decide whether or not to accept a plea offer when counsel fails to inform of mandatory/guaranteed immigration consequences." *Id.* ¶ 53 (McDade, J., concurring).

¶ 18 We find nothing in the cited concurring opinion that supports defendant's claim that he was not required to state a claim of actual innocence or a plausible defense. In fact, Justice McDade acknowledged that the defendant in *Guzman* did raise a plausible defense. *Id.* ¶ 49 (McDade, J., concurring) ("whether defendant was actually in possession of the stolen firearms"). In contrast, here defendant merely asserted the "bare allegation" that he would not have pled guilty. Moreover, this court has recognized that prejudice in cases where defendant faces deportation as a result of his guilty plea is subject to a different standard than when defendant does not face deportation. See, e.g., *People v. Deltoro*, 2015 IL App (3d) 130381, ¶ 24. In such cases, defendant must merely show that he has family ties and bonds to the United States (See, e.g., *Guzman*, 2014 IL App (3d) 090464, ¶¶ 35-36; *People v. Lopez*, 2015 IL App (1st) 142260, ¶¶ 38-39), and that his decision to reject the plea bargain would have been "rational

under the circumstances" (*Deltoro*, 2015 IL App (3d) 130381, ¶ 24, citing *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010)). In this case, defendant was not facing deportation as the result of his plea and was, therefore, required to assert a claim of actual innocence or a plausible defense that he could have presented at trial. *Hall*, 217 Ill. 2d at 335-36. Defendant has failed to do either and, accordingly, we find that he has failed to state an arguable claim of ineffective assistance where he did not show prejudice.

¶ 19 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.