FIFTH DIVISION
March 4, 2016

No. 1-14-3131

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. 10 CR 16176
	)	
DANI QUISPE,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition was proper where he failed to make an arguable claim of ineffective assistance of counsel.

¶ 2 Defendant Dani Quispe, who pleaded guilty to delivery of a controlled substance in exchange for a sentence of 11 years in prison, appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2014). On appeal, defendant contends that the trial court erred in dismissing his petition, as it stated a gist of a claim that trial counsel was ineffective for misadvising him that he would be required to

serve only 50% of the sentence to which he agreed as part of his negotiated guilty plea, when in fact, he was required to serve at least 75%. Defendant asserts that had he not received erroneous and misleading advice from his attorney, he would have sought the minimum nine-year sentence. He concludes that due to counsel's erroneous and misleading advice, his guilty plea was not knowingly and voluntarily made.

¶ 3 For the reasons that follow, we affirm.

¶ 4 In 2010, defendant was charged with delivery of a controlled substance under section 401(a)(2)(D) of the of the Illinois Controlled Substances Act (the Act), a charge which carried a sentence of 15 to 60 years' imprisonment for the manufacture or delivery of 900 grams or more of cocaine. 720 ILCS 570/401(a)(2)(D) (West 2010). Pursuant to a negotiated plea agreement, the State amended the charge to one count of delivery of a controlled substance under section 401(a)(2)(B) of the Act, a charge which carried a sentence of 9 to 40 years' imprisonment for the manufacture or delivery of between 100 and 400 grams of cocaine. 720 ILCS 570/401(a)(2)(B) (West 2010). On May 7, 2012, defendant pleaded guilty and the trial court sentenced him to 11 years in prison pursuant to the negotiated plea agreement.

¶ 5 Defendant did not file a motion to withdraw his guilty plea and did not file a direct appeal.

¶ 6 On February 6, 2013, defendant filed a pleading titled "Petition for Relief from Judgment Pursuant to Petitioner Indictment," citing section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2012). Among other things, defendant argued in his petition that he did not receive the benefit of his bargain because the Illinois Department of Corrections was requiring him to serve 75% of his sentence rather than 50%, and the trial court did not properly admonish

him regarding good-conduct credit. On March 15, 2013, the trial court dismissed the petition. In rejecting defendant's argument regarding good conduct credit, the trial court noted that defendant had not established that he was ever promised day-for-day good conduct credit, and that in any case, the court was not required to admonish defendant before accepting his guilty plea regarding the good conduct credit he would receive.

¶ 7 On May 8, 2013, defendant filed a *pro se* pleading titled "Motion to Dismiss Pursuant to Petitioner Indictment Is Void *Ab Initio*," in which he claimed the indictment against him was void because it cited a void statute and therefore, the court had no jurisdiction. On June 13, 2013, the trial court found that defendant's claims were without merit and denied the motion to dismiss the indictment.

¶ 8 On November 21, 2013, defendant filed, though an attorney, a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2012). In the petition, defendant alleged that his trial counsel was ineffective in that he erroneously advised defendant that he would only have to complete 50% of his sentence, rather than the 85% that was actually required. Defendant eventually withdrew this section 2-1401 petition.

¶ 9 On June 16, 2014, defendant filed the postconviction petition at issue in the instant case. In the petition, which was drafted by an attorney, defendant alleged that he received ineffective assistance of trial counsel where his attorney erroneously and repeatedly advised him that he would receive day-for-day credit against his sentence, when in fact, he would be required to complete 75% of his sentence. Defendant asserted that his guilty plea was involuntary "as his trial counsel made affirmative representations that were clearly erroneous and misleading and

which [defendant] relied on when entering his guilty plea." In support of his petition, defendant attached an affidavit executed by his wife, Olga Alvarado, in which she stated that she heard trial counsel tell defendant three or four times that he would only serve 50% of his sentence because he would receive day-for-day credit.

¶ 10 On August 20, 2014, the trial court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals from that dismissal.

¶ 11 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 12 A petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16; see *People v. Tate*, 2012 IL 112214, ¶¶ 9-12 (holding that the first-stage standards for *pro se* petitions set out in *Hodges* also apply to petitions prepared by counsel). A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 13 On appeal, defendant contends that the trial court erred in summarily dismissing his petition because it presented an arguable claim that trial counsel was ineffective for misadvising him that he would be required to serve only 50% of the sentence to which he agreed as part of his negotiated guilty plea, when in fact, he was required to serve at least 75%. Defendant asserts that had he not received erroneous and misleading advice from his attorney, he would have sought the minimum nine-year sentence. He concludes that due to counsel's erroneous and misleading advice, his guilty plea was not knowingly and voluntarily made.

¶ 14 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 15 In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, an attorney's conduct is considered deficient if the attorney failed to ensure that the 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, the defendant would have pleaded not guilty and insisted on going to trial. *People v. Hughes*, 2012 IL 112817, ¶ 63; *Hall*, 217 Ill. 2d at 335. A bare allegation that the defendant would have pleaded not guilty

and insisted on trial is not enough to establish prejudice. *Hughes,* 2012 IL 112817, ¶ 64; *Hall,* 217 Ill. 2d at 335. Rather, such a claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hughes*, 2012 IL 112817, ¶ 64; *Hall,* 217 Ill. 2d at 335-36.

¶ 16 In the instant case, we need not determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness. This is because defendant has not presented an arguable claim of prejudice. *People v. Salas,* 2011 IL App (1st) 091880, ¶ 91 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, this court is not required to address whether counsel's performance was objectively reasonable). Here, defendant asserts in his brief that had he not received erroneous and misleading advice from his attorney, he "would have clearly sought the minimum nine-year sentence." However, defendant has not claimed that had counsel not been deficient, he would not have pleaded guilty. Additionally, defendant has not claimed that he is innocent of the charges brought against him or articulated any kind of defense that could have been put forth at a trial. Therefore, he has failed to show that it is arguable he suffered prejudice as a result of counsel's alleged deficiencies. *Hughes*, 2012 IL 112817, ¶¶ 63-66 (affirming denial of motion to withdraw guilty plea where defendant failed to articulate any prejudice beyond stating that "had he known of the possibility for civil commitment he would not have pled guilty because he thought that it would resolve the matter"); see also *People v. McCoy*, 2014 IL App (2d) 100424-B, ¶ 18 (affirming summary dismissal of postconviction petition where defendant failed to allege that he would have pleaded not guilty and insisted on going to trial).

¶ 17 Based on the allegations raised in the petition, it is not arguable that defendant was prejudiced by his attorney's performance. While defendant is not required to conclusively establish prejudice at first-stage postconviction proceedings, his petition was insufficient to establish arguable prejudice where it lacks an allegation, accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial, that absent counsel's errors, he would not have pleaded guilty. Accordingly, summary dismissal of the petition was proper.

¶ 18 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 19 Affirmed.