2016 IL App (2d) 140391-U
No. 2-14-0391
Order filed February 5, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DANIEL T. CHARNESKI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 07-CF-354 Honorable Sharon L. Prather, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, as defendant did not show arguable prejudice from trial counsel's alleged failures to know the applicable sentencing ranges during plea negotiations, to challenge evidentiary objections, and to communicate with him before trial.

¶ 2 Defendant, Daniel T. Charneski, appeals from the summary dismissal of his *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq*. (West 2014)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 21, 2011, following a jury trial, defendant was found guilty of armed robbery (720 ILCS 5/18-2(a)(1) (West 2006)) and aggravated battery (720 ILCS 5/12-4(a) (West 2006)). The trial court sentenced him to 14 years in prison on the armed-robbery conviction and 4 years on the aggravated-battery conviction, to be served concurrently. Defendant timely appealed. On appeal, we vacated various fees and fines, granted credit against various fines, and remanded for the imposition of a refund, but we otherwise affirmed. See *People v. Charneski*, 2013 IL App (2d) 111155-U.

¶ 5 On February 28, 2014, defendant filed a *pro se* postconviction petition under the Act. See 725 ILCS 5/122-1 *et seq*. (West 2014). Defendant did not attach to his petition a verification affidavit (see 725 ILCS 5/122-1(b) (West 2014)) or any supporting affidavits, records, or other evidence (see 725 ILCS 5/122-2 (West 2014)). In his petition, defendant alleged that his "main concern" was that trial counsel was ineffective. More specifically, defendant claimed that counsel "failed to meet with [him] or communicate in any fashion in order to prepare for the trial. He hardly returned any calls and would not speak to [him] outside of the court house." Defendant further claimed that counsel "failed to interview [his] witnesses" prior to trial; "failed to call key witnesses"; "allowed the judge and the indictment to be changed the week before trial"; "failed to properly cross[-]examine and impeach multiple state witnesses who gave false testimonies at [his] trial"; failed to argue against "improper hearsay objections during the testimonies of Candice Vivaldo and [defendant]"; allowed a 25-year police veteran to be a juror; and failed to research sentencing guidelines and secure a proper plea. Defendant's "additional concerns" included that "the states [*sic*] attorney used questionable and *** unlawful practices"; that "the judge ruled incorrectly on multiple onjections [*sic*] made by the states [*sic*] attorney" and made defendant look bad; and that appellate counsel failed to raise any of defendant's issues

in the first appeal.

¶ 6 The trial court summarily dismissed defendant's petition, based on defendant's failure to attach supporting affidavits or explain their absence as required under section 122-2 of the Act.

¶ 7 Defendant timely appealed.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues that the trial court erred in dismissing his petition in its entirety for failure to comply with section 122-2 of the Act, because some of his allegations were supported by the record and others concerned trial counsel's ineffectiveness and thus, according to defendant, supporting documents were not required. The State responds that, notwithstanding defendant's argument, the petition was properly dismissed because defendant failed to state the gist of a constitutional claim. See *People v. Quigley*, 365 Ill. App. 3d 617, 619 (2006) (we may affirm the summary dismissal of a *pro se* postconviction petition on any proper ground). We agree with the State.

¶ 10 The Act "provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both." *People v. English*, 2013 IL 112890, ¶ 21. Proceedings under the Act can consist of three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the trial court must review the petition within 90 days of its filing and decide whether it is either frivolous or patently without merit. *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 37. If the court decides that it is either, it must dismiss the petition in a written order. *Carballido*, 2011 IL App (2d) 090340, ¶ 37.

¶ 11 A *pro se* postconviction petition is frivolous or patently without merit when it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition has

no basis in law when it is based on an indisputably meritless legal theory. *Hodges*, 234 Ill. 2d at 16. That means that the legal theory is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no factual basis when it is based on factual allegations that are either fantastic or delusional. *Hodges*, 234 Ill. 2d at 17.

¶ 12 Although the postconviction petition must identify the bases upon which the defendant's constitutional rights were violated, the threshold for first-stage survival is low. *Hodges*, 234 Ill. 2d at 9. The defendant must set forth only the gist of a constitutional claim, which means that the petition contains enough facts to make out an arguably constitutional claim. *Hodges*, 234 Ill. 2d at 9. We review *de novo* a trial court's first-stage dismissal. *Hodges*, 234 Ill. 2d at 9.

¶ 13 A postconviction claim of ineffective assistance of counsel is assessed under the standards articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Under the Act, the trial court may not summarily dismiss a petition alleging ineffective assistance of counsel if: (1) counsel's performance arguably fell below an objective standard of reasonableness and (2) the defendant was arguably prejudiced as a result. *Brown*, 236 Ill. 2d at 185. The failure to establish either prong of *Strickland* is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). If it is easier to dispose of such a claim on the basis that it lacks sufficient prejudice, then the court may proceed directly to the second prong and need not address whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 14 Defendant argues in his reply brief that he stated the gist of a constitutional claim in his postconviction petition as to at least three issues. We will address each in turn.

¶ 15 First, defendant points to his claim concerning counsel's failure to "put forth the smallest effort in securing [defendant] a proper plea deal." Defendant asserted that, prior to trial, the

State extended a plea offer on the charge of armed robbery of 15 years to be served at 85%. Defendant further asserted that the parties noted that defendant would be subject to consecutive sentences if he were convicted of both armed robbery and aggravated battery. The plea offer was rejected. After trial, during sentencing, the trial court and the parties agreed that defendant's sentences would run concurrently and that he would be entitled to day-for-day credit against his sentence.

¶ 16 While it is certainly arguable that counsel's failure to be aware of the applicable sentencing ranges at the time of the plea offer falls below an objective standard of reasonableness, we cannot conclude that it is arguable that defendant was prejudiced as a result of counsel's deficient performance. To establish prejudice, a defendant must show that there is a reasonable probability that he would have accepted a plea offer had counsel's performance not been deficient. See *People v. Hale*, 2013 IL 113140, ¶ 21. Reaching such a conclusion here would be nothing more than speculation. Defendant has neither alleged in his petition nor argued on appeal that, had the State made a different offer, he would have accepted it. More importantly, however, we have no way of knowing whether the State would have made a different and more favorable offer had counsel been aware of the applicable sentencing ranges. As a result, defendant's claim is too speculative upon which to base an arguable claim of a constitutional deprivation.

¶ 17 Next, defendant points to his claim in his petition concerning counsel's failure to challenge allegedly improper hearsay objections. In the petition, defendant claimed as follows regarding hearsay objections:

> "[Counsel] failed to counter improper hearsay objections during the testimonies of Candice Vivaldo and I. I stated above the objection in question related to Candice

> Vivaldo and believe it is not hearsay when it relates to knowledge that was first hand to Candice. She was asked about statements that she gave to the police and it was pertinent to my case that the jury heard the whole story, including the discrepancy in her statements. (The amount taken and the description of a black male) I believe this shows that she was dishonest and ruins the crediability [*sic*] of her testimony. When [counsel] failed to argue against a bogus hearsay objection during the testimony, I was not able to give the jury a full account of the events that occurred on the day of my arrest."

Defendant now claims on appeal that the trial court repeatedly sustained the State's objections to counsel's attempts to elicit certain testimony from defendant about what he was told during a conversation with Agent Richard Neumann prior to being interrogated by two other detectives. According to defendant, this prevented defendant from explaining why he confessed. He asserts: "It was obviously crucial for defendant to convince the jury that his confession was not truthful." However, this argument cannot be found in defendant's petition. Indeed, there is no reference to Agent Neumann or a false confession, and no objections can be found on the pages of the record cited by defendant. Defendant's failure to raise this claim in his petition forfeits it on review. See *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); *People v. Jones*, 213 Ill. 2d 498, 505 (2004); *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993). In any event, defendant has failed to establish that, had counsel challenged the objections and the court's rulings, the challenged testimony arguably would have been allowed and, moreover, that the result of the proceeding arguably would have been different.

¶ 18 Last, defendant argues that trial counsel was ineffective for failing to meet with him prior to trial to prepare a defense. In his petition, he claimed that he was not properly prepared for trial and had to be admonished by the trial court on how to answer questions. However,

defendant offers no discussion concerning how he was prejudiced by counsel's allegedly insufficient communication. Since this is a required component of a claim under *Strickland*, by failing to argue any prejudice, defendant's claim of ineffective assistance of counsel fails.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of McHenry County. As part of our judgment, per the State's request, we assess defendant $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 21 Affirmed.