2017 IL App (1st) 153316-U

No. 1-15-3316

Order filed September 8, 2017

Sixth Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 07 CR 2594
	)	07 CR 5009
ANDRE PATTERSON,	)	07 CR 10312
	)	
Defendant-Appellant.	)	
	)	Honorable
	)	Thaddeus L. Wilson,
	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

Held: We affirm the circuit court's dismissal of defendant's first-stage postconviction petition where defendant is unable to show he was arguably prejudiced by plea counsel's allegedly deficient performance.

¶ 1 Defendant Andre Patterson appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 *et seq.* (West 2014)). Petitioner argues that his petition raised an arguable claim of ineffective assistance of counsel where he alleged plea counsel misled him into believing that his presentence incarceration credit would apply to each of the three consecutive sentences he received rather than just one. For the reasons set forth below, we affirm.

¶ 2 The record shows that, on November 29, 2007, defendant pleaded guilty in three separate cases: in 07 CR 2594 to attempted aggravated arson, in 07 CR 5009 to aggravated battery, and 07 CR 10312 to aggravated battery. At the plea hearing, the assistant State's attorney stated, "I will stand by these offers. There is no reducing." The parties then went off the record. The following exchange occurred when back on the record:

"[DEFENSE COUNSEL]: Just so it's clear, it's my understanding, and I did review the law, and [defendant] is concerned about this, as well as he should be, that these are 50 percent cases, and I have checked that out, and it's my belief also.

THE COURT: All right.

***

THE COURT: [Defendant], is that your understanding of the agreement here?

[DEFENDANT]: As far as the four years, 50.

THE COURT: You got four years on the attempt aggravated arson.

You got three years on the other two, and you have to serve them separately.

So you have to do four, three, and three. You can't serve them all at the same time.

[DEFENDANT]: They are supposed to be 50 percent each one.

THE COURT: As far as I know, they are 50 percent.

State?

[ASSISTANT STATE'S ATTORNEY]: As far as I know. I didn't look into it.

[DEFENSE COUNSEL]: I did look into it. I looked up the law. And my reading of the law is it's 50 percent cases.

[DEFENDANT]: I understand all of it."

¶ 3 The parties stipulated to a factual basis for the guilty plea in case number 07 CR 2594, attempted aggravated arson, which provided that, on January 19, 2007, defendant was an inmate in Cook County jail, housed alone in cell number 1029. He placed toilet paper against an exposed light bulb, creating a flame that he used to ignite a foam mattress. Defendant then placed the burning mattress against his cell door. Deputies observed flames coming from underneath defendant's cell door and extinguished the flames. The fire charred the cell door and damaged the mattress, which had a value of $150. The incident was captured on videotape.

¶ 4 The parties stipulated to a factual basis for the guilty plea in 07 CR 5009, aggravated battery, which provided that, on February 15, 2007, defendant was in custody at Cook County jail when deputies ordered him to return to his cell. Defendant refused and, while being escorted to his cell, threatened to set fire to his cell again. Deputy William Skinner, who was in uniform and performing his authorized duties, went to search defendant for any kind of equipment that may be used to start a fire. As Skinner approached defendant, defendant punched him in the face, causing a black eye or bruising around Skinner's left eye.

¶ 5 The parties further stipulated to a factual basis for a guilty plea in case number 07 CR 10312, aggravated battery, which provided that, on April 23, 2007, defendant was housed in Cook County jail. While Deputy Christopher Frankenfield transported defendant, defendant

punched Frankenfield in the nose, causing bruising and swelling. Frankenfield was in uniform and performing his official duties.

¶ 6 The trial court accepted defendant's guilty pleas in all three cases: 07 CR 2594, 07 CR 5009, and 07 CR 10312, and imposed consecutive prison terms of four years, three years, and three years, respectively. The following exchange occurred:

"THE COURT: On 2594, counsel, he gets credit for 330 days.

[DEFENSE COUNSEL]: From the arrest date of January 4, '07.

THE COURT: On the other one?

[DEFENSE COUNSEL]: On 5009, that was February 15, '07, with 288 days up until today.

THE COURT: And the other one?

[DEFENSE COUNSEL]: On 07 CR 10312, the arrest date of 4/23/07, 221 days."

¶ 7 On February 28, 2014, defendant filed a *pro se* postconviction petition raising numerous claims of error pertaining to the three cases in which he had pleaded guilty. Relevant here, defendant alleged plea counsel was ineffective where counsel "mislead [*sic*] petitioner to believe the sentencing credits hed [*sic*] receive to each case # 07CR0500901 288 days, # 07CR0259401 330 days, # 07CR103201 221 days would be credited by the I.D.O.C. as time served toward the respective sentences if he plead [*sic*] guilty when in fact they have not been." He further stated "counsel should have known that they would not have been due to the language of the statutes and had counsel not been deficient in performance petitioner would not have plead [*sic*] guilty but would have took the cases to trial and there is a reasonable likelihood would have been found not guilty of all charges."

¶ 8 On May 23, 2014, the circuit court of Cook County, in a written order, rejected defendant's claims as frivolous and patently without merit. Specifically, with respect to defendant's ineffective assistance of counsel claim regarding erroneous advice as to sentencing credit, the circuit court found it failed because credit for time served is not a direct consequence of a guilty plea. Further, it analogized the facts to *People v. Powers*, 2011 IL App (2d) 090292, where the reviewing court found the defendant could not establish ineffective assistance of counsel for erroneous advice regarding good conduct credit because that factor was collateral to the guilty plea. Lastly, the circuit court noted defendant failed to set forth sufficient facts showing that he would not have pleaded guilty if he had been given correct advice.

¶ 9 Defendant was never notified of the May 23, 2014 dismissal. Believing the petition had not been ruled on, he sent a duplicate copy of his postconviction petition to the clerk of the circuit court and it was filed on May 29, 2015. On September 18, 2015, the trial court noted it had previously dismissed the petition and treated the duplicate as a successive postconviction petition before denying it. Defendant mailed a notice of appeal on October 13, 2015. However, because defendant was never notified of the earlier dismissal, our supreme court issued a supervisory order directing this court to treat the notice of appeal as a properly perfected appeal of the circuit court's May 23, 2014, order dismissing defendant's postconviction petition.

¶ 10 On appeal, defendant contends his petition stated the gist of an arguable claim that he pleaded guilty in reliance on his plea counsel's erroneous advice that he would receive presentence incarceration credit against each of his three consecutive sentences. He argues he was therefore denied the effective assistance of counsel, which rendered his guilty plea unknowing.

¶ 11 The Post-Conviction Hearing Act provides a procedural mechanism for a defendant to assert a substantial denial of his constitutional rights in the underlying proceedings which gave rise to his conviction. 725 ILCS 5/122-1 (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. At the first stage of the proceedings, the trial court examines 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). If the petition has no arguable basis in either law or fact, it should be summarily dismissed as frivolous or patently without merit. *Tate*, 2012 IL 112214, ¶ 9. A petition lacks an arguable basis in law or fact when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Allegations are fanciful when they are "fantastic or delusional," while an indisputably meritless legal theory is one that is completely contradicted by the record. *Id.* at 16-17.

¶ 12 An attorney's duty to provide effective assistance extends to all critical stages of the criminal proceeding, including the plea stage. *People v. Hughes*, 2012 IL 112817, ¶ 44. To state a claim for ineffective assistance of counsel, the defendant must show both that counsel's performance was objectively unreasonable and that he was prejudiced as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In order to prevail on his ineffective assistance of counsel claim, the defendant must establish both prongs. *People v. Randall*, 2016 IL App (1st) 143371, ¶ 58. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 13 With respect to a first-stage postconviction proceeding, the petition 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. The summary dismissal of a postconviction petition is reviewed de novo. *Tate*, 2012 IL 112214, ¶ 9.

¶ 14 Defendant argues plea counsel was ineffective because he provided defendant with erroneous advice that his presentence incarceration credit would apply to each of his three consecutive sentences, rather than just one. Specifically, defendant alleges that he received credit for 330 days served, 509 days fewer than he anticipated. In the postconviction petition, defendant states counsel "mislead [*sic*] petitioner to believe the sentencing credits hed [*sic*] receive to each case # 07CR0500901 288 days, # 07CR0259401 330 days, # 07CR103201 221 days would be credited by the I.D.O.C. as time served toward the respective sentences if he plead [*sic*] guilty when in fact they have not been." This, according to defendant, establishes deficient performance by counsel.

¶ 15 A defendant is entitled to credit for any part of a day spent in custody up to, but excluding, the day of sentencing. See 730 ILCS 5/5-8-7(b) (West 2006); *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Section 5-8-4(e)(4) of the Unified Code of Corrections states that the Department of Corrections must treat consecutive sentences as a "single term" of imprisonment. 730 ILCS 5/5-8-4(e)(4) (West 2006). A defendant is awarded credit "against the aggregate *** term of imprisonment for all time served in an institution since the commission of the offense or offenses as a consequence thereof ***." *Id.* Therefore, because "consecutive sentences are to be treated as a single term of imprisonment, it necessarily follows that defendants so sentenced should receive but one credit for each day actually spent in custody as a result of the offense or

offenses for which they are ultimately sentenced." *People v. Latona*, 184 Ill. 2d 260, 271 (1998). Our supreme court in *Latona* held:

> "[t]o the extent that an offender sentenced to consecutive sentences had been incarcerated prior thereto on more than one offense simultaneously, he should be given credit only once for actual days served. To the extent that he spent *additional*, nonsimultaneous time in presentence custody on one offense or the other, he should be afforded a single credit for that time as well. Defendants must be given credit for all the days they actually served, but no more." (Emphasis in original.) *Id.* at 271-72.

We find the trial court did not err in summarily dismissing the petition because defendant cannot show prejudice and therefore we need not determine whether counsel's performance was deficient. See *Graham*, 206 Ill. 2d at 476.

¶ 16 "To establish prejudice in the guilty plea context, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *People v. Valdez*, 2016 IL 119860, ¶ 29 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). However, "a conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice." *Id.* Rather, the allegation must contain "either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *People v. Hall*, 217 Ill. 2d 324, 335-36 (2005) (citing *People v. Rissley*, 206 Ill. 2d 403, 459-60 (2003)). Although *Hall* considered a second-stage dismissal under the Act, we have applied its reasoning with respect to dismissals at the first stage. See, *e.g.*, *People v. McCoy*, 2014 IL App (2d) 100424-B, ¶ 16.

¶ 17 More recently the Supreme Court has applied another standard when a conviction might result in deportation or other serious consequences beyond imprisonment. Under that standard, in order to show prejudice, the defendant " 'must convince the court a decision to reject the plea bargain would have been rational under the circumstances.' " *Hughes*, 2012 IL 112817, ¶ 65 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). This inquiry requires a "case-by-case examination of the totality of the evidence." (Internal quotation marks omitted.) *Lee v. United States*, 582 U.S. __, 137 S. Ct. 1958 (June 23, 2017). However, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee*, 582 U.S. __, 137 S. Ct. at 1967. Districts of the Illinois Appellate Court have acknowledged a split of authority regarding whether, in order to establish prejudice, a defendant must meet the requirement of *Hall* or a different standard set forth under *Padilla*. See generally *People v. Unzueta*, 2017 IL App (1st) 131306-B, ¶¶ 19-25. However, defendant fails to establish prejudice under either standard.

¶ 18 Defendant contends that he received credit for 330 days served, 509 days fewer than he anticipated. In the postconviction petition, defendant states "had counsel not been deficient petitioner would not have plead [*sic*] guilty but would have took the cases to trial and there is a reasonable likelihood would have been found not guilty of all charges."

¶ 19 This allegation is conclusory and insufficient to establish prejudice. See *Valdez*, 2016 IL 119860, ¶ 29. It lacks "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);

see also *Hughes*, 2012 IL 112817, ¶ 64. Defendant cannot show prejudice and his ineffective assistance of counsel claim fails.

¶ 20 Even excusing defendant's failure to make a claim of innocence or articulate a plausible defense as required by *Hall*, defendant still cannot show the "decision to reject the plea bargain would have been rational under the circumstances." See *Hughes*, 2012 IL 112817, ¶ 65 (quoting *Padilla*, 559 U.S. at 372); see also *Lee*, 137 S. Ct. at 1968-69. Defendant argues that it would have been rational under the circumstances to reject a plea that involved a sentence 509 days longer than he believed it to be. He reasons that had he known his sentence would have been 509 days longer, he could have negotiated with the State for a new deal that was 509 days shorter. He further contends going to trial could have resulted in an acquittal of one of the three charged offenses resulting in a sentence three or more years less than what the plea bargain called for.

¶ 21 First, defendant's contention is pure speculation as there is nothing in the record to support defendant's assertion the prosecutor would have agreed to less time or to a reduction in the class of the offense. Indeed, during the plea hearing the assistant State's Attorney asserted, "I will stand by these offers. There is no reducing." Second, in each of the three cases defendant pleaded guilty, he received the minimum sentence allowed under the law. At the time of defendant's plea, attempted aggravated arson was a Class 1 felony, punishable by 4 to 15 years' imprisonment. 720 ILCS 5/8-4(a), 20-1.1(a)(1) (West 2006); 730 ILCS 5/5-8-1(a)(4) (West 2006) and aggravated battery was a Class 2 felony, punishable by 3 to 7 years' imprisonment. 720 ILCS 5/12-4(b)(18) (West 2006); 730 ILCS 5/5-8-1(a)(5) (West 2006). Defendant was offered the minimum total sentence of 10 years in prison, and he cannot show that it would be rational under the circumstances to reject this plea over his mistaken belief regarding 509 days of

presentence credit. Because defendant cannot show that a decision to reject the guilty plea and proceed to trial would be rational under the circumstances, he cannot show arguable prejudice.

¶ 22 Defendant cites the recent decision by the United States Supreme Court in *Lee v. United States,* 582 U.S. __, 137 S. Ct. 1958, 2017 WL 2694701 (June 23, 2017) . In *Lee,* the defendant, a lawful permanent resident who had lived in the United States for 35 years, was charged with possession of ecstasy with intent to distribute. *Lee,* 137 S. Ct. at 1963. During the plea process, the defendant asked his attorney numerous times whether he would be deported for pleading guilty. *Id.* His attorney assured him that he would not be deported. *Id.* Based on that advice, defendant pleaded guilty and received a sentence of one year and one day in prison. *Id.* However, the charge to which defendant pleaded guilty was defined as an "aggravated felony" and, pursuant to federal law, subjected him to mandatory deportation. *Id.* Defendant filed a motion to withdraw his plea, and a magistrate judge recommended the plea be set aside. *Id.* at 1963-64. However, the district court denied relief and the circuit court affirmed the denial of relief. *Id.* at 1964.

¶ 23 On appeal, the United States Supreme Court declined to adopt "a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial." *Id.* at 1966. Rather, the court found that a defendant assesses the consequences of conviction after trial and by plea when deciding whether to plead guilty. *Id.* The court noted, "[w]hen those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.* Cautioning against disturbing guilty pleas simply "because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," the court stated that trial courts should look to contemporaneous

evidence showing a defendant's preferences. *Id.* at 1967. The court noted that deportation is a "particularly severe penalty" (*Padilla*, 559 U.S. at 371) and "[t]here was no reason to doubt the paramount importance [the defendant] placed on avoiding deportation." *Id.* 1968. It found that, in "the unusual circumstances of this case," the defendant showed a reasonable probability that he would have rejected the plea deal if had known it would result in mandatory deportation. *Id.* at 1967.

¶ 24 We find that this case does not contain the "unusual circumstances" that were present in *Lee*. *Lee* involved deportation, which the court found was the determinative issue, after the defendant had spent 35 years in the United States. Here, by contrast, defendant has not shown the consequences of his guilty plea were similarly dire such that proceeding to trial with minimal chance of success would be an attractive option. Defendant faced a maximum, non-extended aggregate term of 29 years' imprisonment. He received the minimum sentence of 10 years' imprisonment after pleading guilty, was not subject to deportation, and only now makes a "*post hoc* assertion" that he would not have pleaded guilty over 509 days he thought he would be credited. The consequences here are not "similarly dire" that proceeding to trial with a minimal chance of success and facing a possible non-extended maximum-term of 29 years' imprisonment would be an attractive option. We further cannot say that avoiding a sentence 509 days longer than defendant thought equates to the "paramount importance" the defendant in *Lee* placed on avoiding deportation from a country he had lived in for 35 years.

¶ 25 Defendant also argues that, because he expressed concern about discretionary day-for-day good conduct, he would have attached the same level of importance to presentence incarceration credit. This, according to defendant, is "contemporaneous evidence" that he would

not have accepted the plea bargain had he known it called for a sentence 509 days more than he believed it to be. See *Lee*, 137 S. Ct. at 1967. However, we reject defendant's argument that his concern over day-for-day good conduct credit is contemporaneous evidence that he would not have accepted a plea bargain with a sentence 509 days longer than he believed. Here, while defendant was concerned that about the day-for-day good conduct credit, there is no indication that, had this credit not been available, he would have rejected the plea bargain. More importantly, defendant never raised any concern about the presentence incarceration credit like he did with the day-for-day good conduct credit. His concern with day-for-day good conduct is not contemporaneous evidence defendant would have rejected the plea bargain over the 509 days he thought he would be credited. Defendant's reliance on *Lee* is therefore misplaced.

¶ 26 In defendant's brief, which was filed before the Supreme Court's decision in *Lee*, defendant relies on *People v. Young*, 355 Ill. App. 3d 317 (2005), *People v. Stewart*, 381 Ill. App. 3d 200 (2008), and *People v. Kitchell*, 2015 IL App (5th) 120548, for the proposition that a defendant's mere allegation he pleaded guilty based on erroneous advice from counsel is sufficient under the Act. However, in *People v. Brown*, 2016 IL App (4th) 140760, *appeal pending*, No. 121681 (Mar. 29, 2017), the court rejected the defendant's reliance on *Stewart*, which adopted the reasoning of *Young*, and *Kitchell* because they are irreconcilable with our supreme court's decision in *Rissley*. See *Brown*, 2016 IL App (4th) 140760, ¶ 11. It held a bare allegation that, but for counsel's bad advice, a defendant would have not pleaded guilty but would have proceeded to trial is insufficient to show prejudice. *Id.* ¶ 25. Instead, a defendant must claim he is innocent or articulate a plausible defense to the charges. *Id.*

¶ 27 Specifically, with respect to *Rissley*'s discussion of the prejudice prong, the court in *Brown* stated:

> "The defendant's naked assertion that, but for plea counsel's bad advice, he would not have pleaded guilty—'*unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial*'—failed to show prejudice. (Emphasis in original and internal quotation marks omitted.) [*Rissley*, 206 Ill. 2d at 459]. The defendant in *Rissley* never claimed he was innocent of the charges, nor had he identified a plausible defense to the charges; therefore, he had failed to establish prejudice as required under *Strickland*. [*Rissley*, 206 Ill. 2d at 460]." *Brown*, 2016 IL App (4th) 140760, ¶ 24.

To the extent defendant continues to argue *Young*, *Stewart*, and *Kitchell* accurately address the prejudice prong in the plea context, we nevertheless agree with the analysis in *Brown.* Defendant therefore has failed to raise an arguable claim of ineffective assistance of counsel.

¶ 28 Finally, defendant provides a lengthy argument challenging the circuit court's reasoning contained in its order dismissing defendant's postconviction petition. However, "it is well settled that we review the judgment of the trial court, not its reasoning." *People v. Rajagopal*, 381 Ill. App. 3d. 326, 329 (2008). Further, we may affirm the circuit court's judgment on any basis supported by the record. *Id.* Accordingly, defendant's arguments attacking the circuit court's reasoning do not need to be addressed and do not affect our disposition of this case.

¶ 29 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.