

2018 IL App (1st) 152417-U

No. 1-15-2417

Order filed February 2, 2018

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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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|----------------------------------|---|-------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                  | ) | Circuit Court of  |
| Plaintiff-Appellee,              | ) | Cook County.      |
|                                  | ) |                   |
| v.                               | ) | No. 11 CR 12522   |
|                                  | ) |                   |
| JAMES SIMS,                      | ) | Honorable         |
|                                  | ) | Diane G. Cannon,  |
| Defendant-Appellant.             | ) | Judge, presiding. |

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the circuit court's summary dismissal of defendant's *pro se* petition for postconviction relief, alleging counsel's erroneous sentencing advice induced him to plead guilty, because defendant could not show that it would have been rational for him to reject the plea bargain he accepted.

¶ 2 Defendant James Sims appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the circuit court erred in dismissing his petition because he presented an arguable

claim of ineffective assistance of plea counsel where his counsel erroneously advised him that he would serve 50 percent of his 28-year sentence, despite the law requiring defendant to serve 85 percent of his sentence. We affirm.

¶ 3 Defendant was charged by information with six counts of attempt first degree murder (720 ILCS 5/9-1(a)(1) (West 2010); 720 ILCS 5/8-4(a) (West 2010)), one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), and three counts of aggravated battery (720 ILCS 5/12-4(a) (West 2010)).

¶ 4 After a 402 conference, held on July 23, 2012, defendant withdrew his plea of not guilty in exchange for the State's agreement to recommend a sentence of 28 years' imprisonment. See Ill. Sup. Ct. R. 402 (effective July 1, 1997). Defendant pled guilty to count three, alleging that he committed attempt first degree murder during which he personally discharged a firearm.

¶ 5 The State informed the court of the factual basis for defendant's conviction. The State proffered that, on October 7, 2010, at 10:30 p.m., Jeffery Anyagafu, a cab driver, was dispatched to 5700 South Perry Avenue to pick up some customers. While Anyagafu was waiting outside for the customers, defendant approached Anyagafu's vehicle with another man. Defendant entered the backseat of the cab through the driver's side rear passenger door, while the other man. "remained outside of the cab a distance away." Defendant then "mentioned something to Mr. Anyagafu about a cell phone charger and needing a cell phone from the other guy who was outside the cab." Anyagafu turned his attention toward the man outside, and defendant pulled out a gun and "mentioned something to the victim about being the police." Anyagafu shut the plastic partition, separating the rear passenger compartment from the driver, and started driving with defendant in the back seat. Defendant subsequently fired several shots at Anyagafu—eventually

reaching out of the rear passenger window to fire at Anyagafu through Anyagafu's open window. A bullet fired through Anyagafu's window hit Anyagafu in the neck. Anyagafu lost consciousness until the police arrived at his stopped vehicle and took him to the hospital.

¶ 6 In the back seat of Anyagafu's vehicle, police recovered a red cigarette lighter. An unknown DNA sample was obtained from the lighter, and was later revealed to match defendant's DNA. Police presented Anyagafu with a photo array featuring defendant, and Anyagafu identified defendant. When he did so, he said that he would need to view an in-person lineup to make a positive identification. Upon viewing a physical lineup, Anyagafu immediately recognized defendant and made a positive identification. An expert witness would testify that defendant's DNA was expected to appear, among unrelated individuals, in approximately 1 in 350 million black individuals, 1 in 590 million white individuals, and 1 in 2.1 billions Hispanic individuals.

¶ 7 Upon hearing the factual basis for defendant's conviction, the circuit court entered a finding of guilty. Defendant waived a presentence investigation, and at a separate hearing, held on August 16, 2012, he was sentenced to 28 years' imprisonment. Defendant did not file a direct appeal.

¶ 8 On November 2, 2012, defendant filed a motion to withdraw his plea of guilty and vacate judgment, arguing that "counsel misled [him] on the terms and conditions of pleading guilty by stating that [his] time will be calculated at 50% not 85%." The court denied defendant's motion as untimely on November 9, 2012. Defendant appealed the denial of his motion. However, defendant later filed a motion to dismiss his appeal, which we granted.

¶ 9 On April 21, 2015, defendant filed a *pro se* petition for post-conviction relief pursuant to the Act. In the petition, defendant alleged that “his trial attorney rendered ineffective assistance by advising him, prior to the entry to the guilty plea, that he would only be required to served 50% (14 years) of the 28-year prison sentence he received in exchange for pleading guilty to attempt murder, when in fact the Illinois Department of Corrections requires him to serve at least 85% (23 years, 9 months) of his sentence.” In a supporting affidavit, defendant averred that he would not have entered a guilty plea, and would have insisted on a trial, if counsel had correctly advised him that he would have to serve 85% of the sentence. On June 25, 2015, the court denied defendant’s post-conviction petition, finding frivolous and patently without merit.

¶ 10 On appeal, defendant contends that the circuit court erred in denying his postconviction petition because he made an arguable claim of a constitutional violation based on trial counsel’s erroneous advice.

¶ 11 A postconviction proceeding is not an appeal of the underlying judgment; rather, it is a collateral proceeding where the defendant may challenge a conviction or sentence for violations of constitutional rights. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 9. In a noncapital case, a postconviction proceeding contains three stages. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether “ ‘the petition is frivolous or is patently without merit.’ ” *Id* (quoting *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); 725 ILCS 5/122-2.1(a)(2) (West 2010)). A petition is frivolous or patently without merit if the petition has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or fanciful factual allegation. *Id*. An

example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Id.* If the petition is frivolous or patently without merit, the circuit court must dismiss it. *Applewhite*, 2016 IL App (1st) 142330, ¶ 9.

¶ 12 We review *de novo* a circuit court's first-stage dismissal of a postconviction petition. *Applewhite*, 2016 IL App (1st) 142330, ¶ 9. Because most petitions are drafted at the first stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 34. However, applying a liberal construction does not mean that we distort reality. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32.

¶ 13 The sixth amendment guarantees a defendant the right to effective assistance of counsel at all critical stages of the criminal proceedings, which includes the entry of a guilty plea. *People v. Hughes*, 2012 IL 112817, ¶ 44. To establish a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was objectively unreasonable under prevailing professional norms and such deficient performance prejudiced defendant. *People v. Brown*, 2017 IL 121681, ¶¶ 25-26.

¶ 14 To establish prejudice, in the plea context, defendant must show that “ ‘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.’ ” *Brown*, 2017 IL 121681, ¶ 26 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). A conclusory allegation that a defendant would not have pled guilty and would have demanded a trial is insufficient to establish prejudice for purposes of an ineffectiveness claim. *Id.* Rather, a guilt-plea defendant must convince the court that a decision to reject the plea would have been rational under the circumstances. *Id.* at ¶ 48. This requires a

consideration of the specific circumstances of each case. *Id.* at ¶ 41. In determining whether there was prejudice, it is appropriate to compare the consequences of a defendant's conviction following a trial to the consequences of the defendant entering the guilty plea. *Id.* at ¶ 36.

¶ 15 Here, defendant was not prejudiced by counsel's advice because he cannot show that it would have been rational for him to reject the State's plea bargain. Looking to the circumstances of this case, defendant was positively identified by Anyagafu as the man who shot him, and there was DNA evidence linking defendant to the scene of the shooting. Therefore, it was more probable that had defendant's case gone to trial, he would have been found guilty of attempt first degree murder, a Class X felony (720 ILCS 5/8-4(c)(1) (West 2010)) with a sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2010)). Moreover, because this evidence also establishes that defendant personally discharged a firearm while attempting to commit first degree murder, he would be subject to a mandatory 20-year sentencing enhancement. 720 ILCS 5/8-4(c)(1)(c) (West 2010). As such, if convicted at trial, defendant faced a minimum of 26 years' imprisonment, and a maximum of 50 years' imprisonment. The record shows that, defendant has prior felony convictions for possession of a stolen motor vehicle, aggravated assault, unlawful use or possession of weapon by a felon, and aggravated robbery. Given this record, had defendant not pled guilty, it is entirely possible that he would have received a sentence closer to the maximum. See *Brown*, 2017 IL 121681, ¶¶ 49-50 (finding that, had defendant pled not guilty, he would have faced a higher sentence because of the nature of his crime and his criminal history).

¶ 16 However, by pleading guilty, defendant received a sentence that was two years above the statutory minimum. Under these circumstances, we cannot say that it would have been rational

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for defendant to reject the plea bargain. As such, defendant cannot show that he was prejudiced by counsel's erroneous advice, and therefore has failed to establish his claim of ineffective assistance of counsel. Accordingly, the circuit court did not err in finding his petition frivolous and patently without merit, and summarily dismissing it.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.