2019 IL App (1st) 162557-U

No. 1-16-2557

Order filed on June 28, 2019.

Second Division

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.	)	No. 10 CR 22191
	)	
ANTHONY THOMAS,	)	The Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition affirmed where his allegation of ineffective assistance of counsel is without arguable merit.

¶ 2 Defendant Anthony Thomas appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the court erred in dismissing his petition because he

presented an arguable claim that his plea counsel rendered ineffective assistance when counsel erroneously advised him that he would be required to serve 50% of his sentence rather than 100%. We affirm.

¶ 3 Defendant, together with William Nellem, Quinten Weakliss and Alfred Weakliss, was charged with four counts of first degree murder and two counts of armed robbery for his participation in the armed robbery of Nathaniel Maxon and Levie Luke, during which Maxon was fatally shot.[1] All of the counts alleged that the offenses were committed while the offenders were armed with a firearm.

¶ 4 On Friday, March 28, 2014, the parties appeared in court for a hearing on the State's motion to present proof of other crimes evidence against defendant at his bench trial, which was scheduled to begin on Monday. The trial court noted that one of the codefendants had pled guilty earlier that week. The State requested that the record reflect that it had also made an offer to defendant several weeks earlier that was less than the mandatory minimum term he would receive if he were found guilty. Defense counsel acknowledged that an offer was made to defendant. The prosecutor stated that she offered defendant a term of 25 years' imprisonment in exchange for his guilty plea. She explained that the mandatory minimum term defendant faced if he went to trial on the murder charge was 35 years, which was comprised of 20 years for the murder, plus a 15-year sentencing enhancement because a firearm was used during the offense.

¶ 5 The trial court asked defendant if he understood that the State offered him less than what the court could sentence him to at trial, which would be a minimum of 35 years' imprisonment. Defendant replied "[y]es." The following colloquy then occurred:

[1]Quinten Weakliss was charged with numerous additional counts of both offenses.

"THE COURT: So that's at 100 percent. So that's an additional ten hard years that are, that the State has offered you because they have the ability to do that.

If you're found guilty at trial as charged, I don't have that ability. Do you understand that?

[DEFENDANT]: Yes.

THE COURT: You spoke to your attorney about the State's offer?

[DEFENDANT]: Yes.

THE COURT: And you rejected the State's offer?

[DEFENDANT]: Yes."

¶ 6 The trial court granted the State's motion to use proof of other crimes evidence against defendant at his trial. The court passed the case so defense counsel could explain to defendant what had happened. When the case was recalled, defense counsel stated "I did during the course of the break have [a] conversation with Mr. Thomas. Regarding the offer that was conveyed by the State." Counsel further stated that he explained to defendant that if he were found guilty of the armed robbery, he could be sentenced to an additional 21 years that could run consecutive to the murder sentence. The trial court admonished defendant that if he were found guilty at trial of both the murder and the armed robbery, the minimum term he could be sentenced to was 56 years' imprisonment. The court asked defendant if he understood that the State had offered him 25 years' imprisonment. Defendant replied "[y]es." The court asked defendant if he was still rejecting the State's offer, and he replied "[y]es."

¶ 7 Three days later, on Monday, March 31, 2014, defendant's case was called for a bench trial. Defense counsel then stated:

> "I have talked to the state and I have talked at length to Mr. Thomas regarding this matter, and pursuant to our conferences and conferences with the state, the state has indicated that upon a plea of guilty to an amended Count 3 in this case, they would recommend to your Honor that the defendant be sentenced to 24 years Illinois Department of Corrections, with credit for 1,475 days actually served. I have related that to Mr. Thomas, discussed the matters fully with him, and he at this time wishes to accept that offer and withdraw his previously entered plea of not guilty and enter a plea of guilty to amended Count 3."

Defendant confirmed that counsel was correct. The State indicated that it would strike the words "shot" and "while armed with a firearm" from count III, a murder charge. As part of the plea, the State nol-prossed all of the remaining counts against defendant.

¶ 8 The trial court admonished defendant about the amended murder charge and the possible penalties he faced. Defendant confirmed that he understood the charge and entered a plea of guilty. Defendant also confirmed that he understood that he was waiving his right to a trial. Defendant denied that anyone had threatened him or promised him anything in exchange for his guilty plea, and confirmed that he was pleading guilty of his own free will.

¶ 9 The State provided the factual basis for the plea, stating that on February 25, 2010, defendant and codefendants decided to rob a drug dealer to get money so they could get high. They drove a stolen van to the area where they saw the two victims standing outside. Codefendant Quinten Weakliss took money and a cell phone from Maxon, while defendant took money and a cell phone from Luke. Weakliss was armed with a dangerous weapon. Maxon, who was 15 years old, died from injuries inflicted by Weakliss during the armed robbery. Two eyewitnesses would be able to identify defendant in court as the man who robbed Luke while

Weakliss robbed Maxon. Defense counsel stipulated to the factual basis and noted that there were over 275 pages of defendant's statement wherein he admitted his accountability in this case, which was enough evidence to find him accountable, and defendant understood that he was responsible for the offense. Counsel also stated that defendant understood that by pleading guilty, they would not be proceeding with the motions to suppress his statements that had been filed.

¶ 10 The trial court found that defendant understood the nature of the charge and possible penalties, and that his plea was given freely and voluntarily. The court accepted defendant's plea and entered a finding of guilty to the charge of first degree murder. Defendant waived his right to a presentence investigation. The parties stood on the agreement without further argument. Defense counsel indicated that defendant's family was present in court. Counsel stated "[h]e's had occasion to communicate with his mother regarding the offer. I have discussed the matters fully with all member of the family, and they are in accordance with his decision." The court then imposed the agreed-upon term of 24 years' imprisonment.

¶ 11 On June 4, 2014, defendant filed a *pro se* motion to withdraw his guilty plea alleging that defense counsel failed to communicate with him and forced him to plead guilty because he would not be able to beat the case and did not want to "look bad" at trial. Defendant alleged that he was unsatisfied with the outcome of the "whole ordeal." He also claimed that two of his codefendants agreed to sign affidavits and wanted to return to court to tell their side of the story about what really happened. Defendant stated that he felt that a trial would be "the most appropriate procedure." The trial court denied defendant's motion as being untimely filed.

¶ 12 On February 17, 2016, defendant filed a second *pro se* motion to withdraw his guilty plea alleging that his plea was involuntary and the result of force and coercion. He alleged that

counsel rendered ineffective assistance and told him to plead guilty because he did not want a loss on his record. Defendant further stated that counsel did not file motions that he asked him to file, and did not visit defendant to discuss the case. Defendant claimed that counsel told him he would file a "notice" to withdraw his guilty plea, but never did. Defendant also asserted that his plea was not voluntary due to his lack of education and mental health. The trial court denied the untimely motion due to lack of jurisdiction.

¶ 13 On May 9, 2016, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) seeking to vacate his guilty plea. Defendant alleged that defense counsel rendered ineffective assistance when he erroneously informed defendant that he would serve his 24-year sentence at a rate of 50%, spending 12 years in prison, rather than the mandatory 100%. Defendant claimed that counsel's "inaccurate advice" rendered his plea involuntary. Defendant argued that he was prejudiced by counsel's "misleading representation" because, but for counsel's erroneous advice, he would not have pled guilty.

¶ 14 In support of his allegation, defendant attached his own affidavit to his petition. Defendant stated that the facts in his affidavit relate to private consultation between him and defense counsel during plea negotiations with the State. Defendant averred "I was never told that my sentence upon my plea of guilty was statutorily required to be served at a rate of 100%." Defendant again stated that but for counsel's erroneous advice that his 24-year sentence would be served at 50% and he would be out of prison in 12 years, he would not have pled guilty.

¶ 15 On July 29, 2016, the circuit court found that defendant's claim failed for two reasons. First, the court found that incorrect advice about good conduct credit does not support a claim of ineffective assistance because such credit is a collateral consequence of a guilty plea and is

beyond the control of the trial court. Second, the court found that defendant failed to establish that he suffered prejudice because a "bare allegation" that he would not have pled guilty but for counsel's error is insufficient to establish prejudice. Accordingly, the circuit court found that defendant's claim was frivolous and patently without merit, and summarily dismissed his postconviction petition.

¶ 16 On appeal, defendant contends that the circuit court erred when it dismissed his petition because he presented an arguable claim that his plea counsel rendered ineffective assistance when counsel erroneously advised him that he would be required to serve 50% of his sentence rather than 100%. In his opening brief, defendant asserts that his allegation is not contradicted by the record because there was no mention of good conduct credit during the plea hearing. Defendant argues that his assertion that he would not have pled guilty but for counsel's erroneous advice is supported by the fact that he attempted to withdraw his guilty plea twice, asserting that his plea was coerced by counsel who did not want a loss on his record.

¶ 17 The State responds that defendant's allegation is rebutted by the record which shows that on March 28, when defendant rejected the State's offer of 25 years, the court admonished defendant that his sentence would be served "at 100 percent" and that he would have to serve "an additional ten hard years" if he did not accept the State's offer. The State points out that defendant affirmed that he understood the court's admonishment. The State further argues that defendant did not make an arguable claim that he suffered prejudice because his conclusory statement that he would not have pled guilty is not sufficient. The State contends that defendant failed to establish that it would have been rational for him to reject the plea bargain, and asserts that the evidence against him was overwhelming, and that any sentence he would have received at trial would have been greater than 24 years.

¶ 18 In reply, defendant argues that his claim is not contradicted by the record because the trial court's admonishment three days earlier was for a different offer, and it is arguable that counsel told him something different off the record. Defendant also argues that he does not have to establish that it would have been rational for him to reject the plea at the first stage of postconviction proceedings.

¶ 19 We review the circuit court's summary dismissal of defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2016); *Coleman*, 183 Ill. 2d at 378-79. Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 20 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Brown*, 2017 IL 121681, ¶ 25. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair proceeding. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Valdez*, 2016 IL 119860, ¶ 14. However, at the first stage of postconviction proceedings, allegations of ineffective assistance of counsel are judged by a lower pleading standard, and a

petition raising such claims may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶¶ 19-20.

¶ 21 Here, defendant alleges that defense counsel erroneously advised him that his sentence would be served at 50% rather than the required 100%. In his affidavit, defendant averred "I was never told that my sentence upon my plea of guilty was statutorily required to be served at a rate of 100%." We find that assertion is contradicted by the record.

¶ 22 The record shows that on March 28, defense counsel acknowledged that the State had made defendant an offer of 25 years' imprisonment in exchange for his guilty plea. The prosecutor explained that the minimum term defendant faced if convicted of the murder at trial was 35 years. The trial court asked defendant if he understood that the State's offer was less than what the court could sentence him to at trial. Defendant affirmed that he understood. The following colloquy then occurred:

> "THE COURT: So that's at 100 percent. So that's an additional ten hard years that are, that the State has offered you because they have the ability to do that.
>
> If you're found guilty at trial as charged, I don't have that ability. Do you understand that?
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> [DEFENDANT]: Yes.
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> THE COURT: You spoke to your attorney about the State's offer?
>
> [DEFENDANT]: Yes.
>
> THE COURT: And you rejected the State's offer?
>
> [DEFENDANT]: Yes."

¶ 23 The record thus shows that defendant was admonished, and understood, that he would have to serve 100% of the sentence. Defendant also confirmed that he had spoken with defense counsel about the State's offer. The record further shows that after a short recess, when the case was recalled, defense counsel stated "I did during the course of the break have conversation with Mr. Thomas. Regarding the offer that was conveyed by the State." Based on this record, defendant's assertion that he was misinformed that he would have to serve only 50% of the sentence has no arguable basis in fact.

¶ 24 Moreover, the record shows that defendant failed to present an arguable claim that he was prejudiced. To establish prejudice in the plea context, 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.' " *Brown*, 2017 IL 121681, ¶ 26 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Our supreme court has repeatedly held that " '[a] conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice' for purposes of an ineffective assistance claim." *Brown*, 2017 IL 121681, ¶ 26 (quoting *Valdez*, 2016 IL 119860, ¶ 29 (and cases cited therein)). To obtain relief on a claim that he relied on defense counsel's erroneous advice about a consequence of his plea, defendant must convince the court that a decision to reject the plea offer would have been rational under the circumstances in his case. *Brown*, 2017 IL 121681, ¶ 48. To determine if defendant was prejudiced, it is appropriate to compare the consequences of his conviction following a trial to the consequences of him entering the guilty plea. *Id.* ¶ 36.

¶ 25 Here, in his petition, defendant alleged, in a conclusory statement, that he was prejudiced by counsel's "misleading representation" because, but for counsel's erroneous advice, he would

not have pled guilty. This conclusory statement was insufficient for defendant to present an arguable claim that he was prejudiced. *Brown*, 2017 IL 121681, ¶ 26.

¶ 26 Furthermore, our review of the record reveals that defendant was not prejudiced by any allegedly erroneous advice because he cannot demonstrate that it would have been rational for him to reject the State's plea offer. Looking at the circumstances in this case, it is likely that had defendant gone to trial, he would have been found guilty of both murder and armed robbery. The factual basis at the plea hearing revealed that two eyewitnesses would identify defendant in court as the man who robbed Luke while codefendant Weakliss robbed Maxon, who was fatally shot during the offense. Most damaging, there were over 275 pages of defendant's statement wherein he admitted his accountability in this case, which counsel acknowledged was enough evidence to find him accountable for the murder.

¶ 27 Following trial, defendant would have faced a minimum sentence of 56 years' imprisonment. By pleading guilty, defendant received a sentence of 24 years' imprisonment – less than half of what he would have received following a trial. Under these circumstances, we cannot say that it would have been rational for defendant to reject the State's plea offer. As such, defendant cannot show that he was prejudiced by counsel's advice, and therefore, he has failed to establish a claim of ineffective assistance of counsel. Accordingly, the circuit court's summary dismissal of defendant's postconviction petition as frivolous and patently without merit was proper.

¶ 28 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.