SIXTH DIVISION
February 25, 2011

No. 1-09-2159

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. 03 CR 11710
	)	
DAVID O'BRIEN,	)	Honorable
	)	Colleen McSweeney-Moore,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

O R D E R

Following a bench trial, defendant David O'Brien was convicted of first degree murder and home invasion and sentenced to concurrent prison terms of natural life and 30 years. We affirmed on direct appeal. *People v. O'Brien*, No. 1-06-1275 (2007)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his *pro se* postconviction petition. He contends that he stated the gist of a meritorious claim that his jury waiver was not voluntary and knowing because neither the court nor defense counsel informed him of the nature of his right to a jury trial; specifically, that a conviction could result only from a

unanimous jury. We affirm.

Under section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 (West 2008)), the circuit court may examine the trial record and any action by this court in evaluating a postconviction petition within 90 days of its filing. The court must summarily dismiss the petition if it is frivolous or patently without merit. A *pro se* petition is frivolous or patently without merit only if it has no arguable basis in law or fact. A petition has no arguable basis if it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as one that is fantastic or delusional. *People v. Brown*, 236 Ill. 2d 175, 184-85 (2010). The summary dismissal of a postconviction petition is reviewed *de novo*. *Brown*, 236 Ill. 2d at 184.

Waiver of a constitutional right, including the right to trial by jury in criminal cases, must be voluntary and knowing. It must be an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *People v. Bannister*, 232 Ill. 2d 52, 65, 67-68 (2008). The validity of a waiver depends on the right being waived, and for waiver of a jury trial, "the pivotal knowledge that the defendant must understand–with its attendant consequences–is that the facts of the case will be determined by a judge and not a jury." *Bannister*, 232 Ill. 2d at 69.

Here, before trial and after defendant signed separate jury waivers for trial and sentencing, the court asked him if he understood "what a jury trial is" and "that by signing this document, you are waiving or giving up that right and that I will determine guilt or innocence." Defendant replied affirmatively to both questions, as he also did when the court asked if he "discussed [it] with [his] lawyer." The court then read the sentencing jury waiver to defendant, including the requirement that the verdict be unanimous, and defendant replied that he had read and signed the sentencing jury waiver. When the court asked defendant if it had said or done anything to cause him to believe that the court had a predisposition about the death penalty,

defendant first asked the court to restate the question and, after the restatement, replied "No."

Defendant claims that his waiver of his right to a jury trial was not voluntary and knowing because neither the court nor defense counsel explained to him that the verdict had to be unanimous to result in conviction, and that he would have asserted rather than waived that right had he known. This claim is refuted by the record, and so the court did not err in summarily dismissing his petition. First and foremost, defendant's knowledge of the unanimity requirement is not a prerequisite to a valid waiver of the right to a jury trial. The admonishments and inquiries deemed acceptable by our supreme court in *Bannister* did not mention unanimity. *Bannister*, 232 Ill. 2d at 70-71. Secondly, before trial commenced, defendant was informed by the court of the unanimity requirement. While that disclosure concerned the sentencing jury rather than the trial jury, the concept of jury unanimity was placed before defendant while he still had the opportunity to withdraw his waiver or at least ask a question of counsel or the court before proceeding.

Finally, defendant claims he was following the advice of counsel when he responded affirmatively to the questions testing his understanding of a jury waiver. His point is that the waiver was not knowingly made. His claim is refuted by the record, which shows that he asked the court for clarification on one question, then responded in the negative. The record supports the conclusion that defendant knowingly and voluntarily waived his right to a jury trial.

The judgment of the circuit court is affirmed.

Affirmed.