2012 IL App (1st) 092249-U

FOURTH DIVISION
May 10, 2012

No. 1-09-2249

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. 04CR7326-30
	)	
NOLAN WATSON,	)	The Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concur in the judgment.

Held: Summary dismissal of *pro se* postconviction petition affirmed where defendant failed to state the gist of meritorious claim of ineffective assistance of trial counsel for failing to investigate and call a particular witness, failing to cross-examine an other-crimes witness, and failing to bring prior media coverage to the court's attention. Summary dismissal also affirmed where defendant failed to state the gist of a constitutional claim that trial counsel was ineffective during guilty plea negotiations on other cases pending against defendant.

¶ 1 **ORDER**

¶ 2 Defendant Nolan Watson appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122 *et seq*. (West 2010)). On appeal, defendant asserts that this court should remand his postconviction petition for second-stage proceedings where he set forth claims of ineffective assistance of trial counsel which had arguable bases in law and in fact. Specifically, defendant contends his trial counsel was ineffective for failing to: (1) investigate and call a witness to corroborate defendant's consent defense; (2) impeach the State's other-crimes/propensity witness; and (3) bring media coverage of defendant's arrest to the court's attention and/or request that the court admonish the jury regarding the impropriety of considering such media attention. Defendant also contends that his counsel was ineffective during the guilty plea stage of four related causes. For the following reasons, we affirm the summary dismissal of defendant's postconviction petition.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant Nolan Watson was convicted of four counts of aggravated criminal sexual assault and one count of kidnaping. At sentencing, the court merged two of the aggravated criminal sexual assault convictions and the kidnaping conviction into the two remaining convictions for aggravated criminal sexual assault, and sentenced defendant to two consecutive sentences of 20 years' imprisonment for both convictions to be served

consecutively to one another but to run concurrent to defendant's other sentences.[1]

¶ 5 At trial, victim M.A. testified that, in December 1999, she was an eighteen-year-old college student. Around 11:15 p.m. on December 14, 1999, M.A. was waiting at a bus stop near 71st Street and Lafayette Street on her way home from work. While she waited, defendant drove up in a brown, four-door car. He exited the car and walked around the car while looking at it. M.A. thought he was checking his tire pressure and she looked the other way. Almost immediately, defendant was at her side. M.A. testified that defendant held something that felt like a gun to her side and said, "Get in, Bitch." M.A. could not see the object because it was concealed beneath defendant's garment. Defendant walked M.A. to the front passenger side of the car, opened the door, and put M.A. in the car. He crossed over her, closed the door, and reached his right hand over her thighs to restrain her. M.A. thought defendant was going to kill her. Defendant began driving and M.A. saw a black gun between defendant's legs. M.A. cried and pleaded for her life.

¶ 6 M.A. testified that defendant drove to an alley near 75th and Normal. The area was dark, dirty, and surrounded by abandoned buildings. M.A. did not scream because no one was there to hear her. Defendant instructed M.A. to get in the back seat of the car. When she did so, she noticed that the rear doors had no handles for the doors or windows. Defendant exited the vehicle and walked around to her side of the car. The interior light of the car did not turn on. It was a cold day and M.A. was wearing a full body suit with extra padding for the cold. Defendant

[1]Upon being convicted for the assault on M.A., defendant pled guilty to and was sentenced for the sexual assaults of K.K., K.D., D.C., and T.C.

opened the rear passenger door, crawled in, and directed M.A. to perform oral sex. M.A. did so. Eventually, defendant told her to stop. He instructed her to undress and she did so. She asked him if he had a condom, and he said no. M.A. cried. Defendant forced M.A. to have vaginal intercourse and then ejaculated. During this time, the gun was in the front seat.

¶ 7 Then, defendant helped M.A. get into the front seat and he walked around to the driver's side "like nothing had happened." M.A. did not flee because she was afraid defendant would shoot her. Defendant was relaxed. He asked if he could take M.A. home and expressed that he was scared for her and wanted her to "be safe." Defendant left M.A. at the corner of 71 st and Lafayette, near the bus stop.

¶ 8 After defendant dropped her off, M.A. ran into the street. Her clothes were hanging off of her and she had tears and makeup down her face. Two women stopped in a car and asked if they could help her. She told them she had been raped. The women took her to the police station. She was later taken to Jackson Park Hospital and examined by a nurse and doctor. She identified defendant as her attacker during a lineup on March 3, 2004.

¶ 9 Cherry Uicoco testified that she was working as an emergency room nurse at Jackson Park Hospital in December 1999. Along with Dr. Bayola, she performed a rape kit on M.A., including a vaginal swab. Uicoco did not note any external injuries, but she did note a scrape or injury to M.A.'s vaginal wall.

¶ 10 Testing of the vaginal swab revealed the presence of semen. Analysts at Cellmark Orchid Laboratory identified a male DNA profile from the semen. Illinois State Police forensic scientist Karen Abbinanti testified that she put the male DNA profile into a database and received

information that the donor of the DNA was defendant. Illinois State Police forensic scientist Nicholas Richert testified that he received a buccal swab from defendant, and he determined that the DNA profile from defendant's buccal swab matched the male DNA profile from the vaginal swab collected from M.A. Richert testified that the particular DNA profile in question would be expected to occur in 1 in 2.2 quintillion African Americans, 1 in 590 quadrillion Caucasians, or 1 in 3 quintillion Hispanic unrelated individuals.

¶ 11 In accordance with the court's prior ruling on the State's motion to admit evidence of other sex offenses, T.C. testified that in the early morning hours of September 18, 2002, she was walking home from a friend's house. A man she identified in court as defendant approached her near 74th Street and Halsted Avenue and began talking to her. Defendant grabbed T.C. around her neck and held a knife to her back, stating "Bitch, if you scream, I'll kill you."

¶ 12 Defendant then walked T.C. through an alley to an abandoned building, where they went down an outer stairway leading to a basement. Defendant demanded that T.C. perform oral sex and then told her to remove her clothes and bend over. When defendant could not enter T.C. from behind, he said, "Bitch, lay down." After having vaginal intercourse for 10 minutes, defendant got up, and T.C. took her clothes and ran to the house of a relative who lived nearby. T.C. then proceeded to a hospital to be examined. T.C. identified defendant at a lineup.

¶ 13 The trial court then gave the following instruction to the jury regarding other-crimes evidence:

> "Evidence has been received that the defendant has been involved in an offense other than those charged in the

> indictment. This evidence has been received on the issues of the defendant's intent, motive, and propensity and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that offense and, if so, what weight should be given to this evidence on the issues of intent, motive and propensity."

That instruction was given again with the other jury instructions at the close of evidence.

¶ 14 The State did not present evidence of attacks against K.K., K.D., or D.C.

¶ 15 For the defense, Tommy Clark testified that defendant was his childhood friend. Clark said defendant brought a woman to Clark's house at about 10:15 p.m. on December 14, 1999, the same day M.A. was attacked. Clark described the woman as a "lady friend" of defendant, but said he had never seen her before. Defendant took the woman into the Clark's basement. At about 11:30 p.m., he and defendant drove the woman in defendant's car to the intersection of 71st Street and Vincennes, where they dropped her off.

¶ 16 Defendant then testified that he had sex with M.A. and T.C. on the dates specified, but asserted the encounters were consensual. He stated M.A. approached him at a gas station near 71st and Vincennes because she lacked the correct change for bus fare. He told her that he did not have change for her, but offered her a ride because "it's kind of dangerous in that neighborhood at that time of night." She agreed to go with him, and he took her to Clark's house. Defendant testified that he and M.A. smoked marijuana and had consensual sex in the Clark's basement. Initially, defendant wore a condom. M.A. complained that it was uncomfortable,

though, so defendant secretly took off the condom. After they had intercourse, M.A. saw the condom on the floor and realized that defendant had removed it. She got angry. She accused him of taking some money from her and told him he would regret having taken it. Defendant and Clark then drove M.A. to the intersection of 71st Street and Vincennes, where they dropped her off.

¶ 17 Defendant also testified that he was with T.C. in the early morning of September 18, 2002. Defendant denied having a weapon. T.C. was standing in front of a lounge in 74th Street, beneath an umbrella in the rain. When she saw him approach, she waved and began walking in his direction. She asked him if he wanted a date, and he responded affirmatively. He offered her $10 and she accepted. She said she wanted to purchase crack cocaine in the lounge. She went inside the lounge and, on her return, told him she knew a spot where they could go to get off the street. They went to a nearby alley and stopped in the back of a vacant house. Defendant gave her the $10 bill and they both used the crack cocaine. They began having sex. Defendant testified that, during sex, T.C. got jittery, nervous, and paranoid due to the crack cocaine she had used. Defendant demanded his money back because he was not enjoying himself, but she refused to return it. Defendant reached into T.C.'s pocket to retrieve the money. As they argued, somebody in the house next door threatened to shoot if they did not leave. T.C. ran, and defendant retrieved the money and crack when T.C.'s pocket tore.

¶ 18 At the close of evidence, the jury found defendant guilty of four counts of aggravated criminal sexual assault and kidnaping.

¶ 19 Prior to sentencing on this case, the trial court held a guilty plea hearing on defendant's

pending cases, 04CR7326, 04CR7328, 04CR7329, and 04CR7330. The factual bases for the guilty pleas are as follows.

¶ 20 In case 04CR7326, C.K. would testify that on October 27, 1999, at approximately 6:00 a.m., she was walking near 6800 S. May Street when defendant approached her and said, "I been watching you." She and defendant went to defendant's residence and she left and returned 20 minutes later. On her return, defendant offered her marijuana, which she refused. She then indicated to defendant that she wanted to leave. Defendant, however, pushed her down on the bed, removed her pants, and penetrated her vagina. C.K. left and called the police. Semen from a vaginal swab of the victim matched defendant's DNA profile.

¶ 21 In case 04CR7328, K.D. would testify that on September 30, 2001, at approximately 4:15 a.m., she was sitting on a curb at 87th Street and Union Avenue when defendant approached her. He sat down next to her and started speaking to her. She said she did not want to go home. Defendant asked her to go to his house, but she refused. Defendant told K.D. he had a gun, grabbed her by the jacket, and walked her toward the rear of a house. K.D. felt something sharp in her back. When she looked, she saw defendant holding a black-handled kitchen knife. Defendant led her to a grassy area between two garages and told her to get on the ground. He took off her shoes, told her to take off her pants, and penetrated her vaginally. When he finished, defendant ran through the alley. K.D. suffered a small puncture wound on her back. Semen from a vaginal swab of the victim matched defendant's DNA profile.

¶ 22 In case 04CR7329, D.C. would testify that on October 7, 2001, at approximately 2:45 a.m., she was selling CDs on the corner of 79th Street and Ashland Avenue. Defendant told D.C.

he wanted to buy some of her CDs. He instructed her to get into his car. She did so. Defendant drove to an alley near 77th Street and Laflin Avenue. When D.C. asked what was going on, defendant said he wanted to have sex with her. D.C. refused, and defendant struck her in the eye with a closed fist. D.C. attempted to exit the car, but the door would not open. Defendant removed D.C.'s pants. He struck her in the fact, causing swelling and bleeding. Defendant penetrated her vaginally. He then drove to 78th Street and Loomis Avenue, where he told D.C. to get out. The door would not open, so he told her to climb out the window. She saw a vehicle sticker as she exited the vehicle, and the police later learned that the sticker belonged to a 1992 Chevrolet owned by defendant's mother, Carolyn Watson. Semen from a vaginal swab of the victim matched defendant's DNA profile.

¶ 23 In case 04CR7330, the State presented a stipulation as to T.C.'s testimony, who had testified as to evidence of other crimes at defendant's trial. Semen from a vaginal swab of the victim matched defendant's DNA profile.

¶ 24 The State informed the court that defendant had agreed to plead guilty in case numbers 04CR7326, 04CR7328, 04CR7329, and 04CR7330. The State explained to the court that in two cases, 04CR7326 and 04CR7328, defendant had agreed to plead guilty to one count of aggravated criminal sexual assault each in exchange for 30 year prison sentences. As for case 04CR7329, the State informed the court that defendant agreed to plead guilty to one count of aggravated criminal sexual assault and one count of aggravated kidnaping in exchange for consecutive terms of 30 and 10 years' imprisonment. Lastly, as to case 04CR7330, the State explained that defendant was pleading guilty to two counts of aggravated criminal sexual assault

in exchange for two consecutive terms of 20 years' imprisonment.

¶ 25 The trial court asked defendant if this was his understanding of the plea agreements, and defendant indicated some misunderstanding of the agreements. The court repeated the plea agreements, stating that all of the sentences would run concurrently with defendant's sentence in his jury trial case, case 04CR7330. Defendant stated that he understood.

¶ 26 Defendant plead guilty to the following offenses: (1) in case number 04CR7326, defendant pleaded guilty to the aggravated criminal sexual assault of K.K. in exchange for a sentence of 30 years' imprisonment; (2) in case number 04CR7328, defendant pleaded guilty to the aggravated criminal sexual assault of K.D. in exchange for a sentence of 30 years' imprisonment; (3) in case number 04CR7329, defendant pleaded guilty to the aggravated criminal sexual assault and aggravated kidnaping of D.C. in exchange for consecutive terms of 30 and 10 years' imprisonment; and (4) in case number 04CR7330, defendant pleaded guilty to two counts of aggravated criminal sexual assault against T.C. in exchange for consecutive sentences of 20 years' imprisonment. The sentences for all of the cases were to run concurrently.

¶ 27 The court then admonished defendant as to his right to appeal his guilty pleas. It informed defendant that, if his pleas were withdrawn, the State could reinstate the dismissed charges. Defendant did not seek to withdraw his guilty pleas.

¶ 28 The court then held a sentencing hearing on defendant's jury trial case. After arguments in aggravation and mitigation, the court merged all of the counts into two counts of aggravated criminal sexual assault and imposed two consecutive sentences of twenty years' imprisonment. The sentences for all of the cases were to run concurrently.

¶ 29 Defendant appealed, contending that the trial court abused its discretion in admitting evidence of a separate sexual assault to demonstrate his propensity to commit sexual offenses. *People v. Watson*, 2011 IL App (1st) 08315-U (2011) (unpublished order under Supreme Court Rule 23). We disagreed, and found no abuse of discretion in admitting evidence of a previous sexual assault against another victim who identified defendant as her attacker as probative of defendant's propensity to commit sex crimes. *People v. Watson*, 2011 IL App (1st) 08315-U (2011) (unpublished order under Supreme Court Rule 23).

¶ 30 Defendant also filed a *pro se* postconviction petition alleging, *inter alia*, that trial counsel provided ineffective assistance for failing to: (1) call a witness to corroborate defendant's consent defense; (2) impeach T.C. with information found in a police report; (3) bring media coverage of defendant's arrest to the court's attention and/or request that the court admonish the jury regarding the impropriety of considering such media attention; and (4) properly communicate the State's offers during plea negotiations.

¶ 31 In support of his claims, defendant attached various documents, including a letter from his attorney addressed to the Attorney Registration and Disciplinary Commission in which his attorney discusses defendant's case; various police reports; affidavits from his mother and Eddie Price, and copies of three newspaper articles which reported that defendant had been arrested after he was found to be a DNA match in five unsolved rape cases.

¶ 32 In his affidavit, Price attested that he was with defendant at a gas station on the night of the alleged offense against M.A. when a woman approached defendant. Price watched as defendant and the woman drove away together.

¶ 33 Defendant also attached a copy of the police report documenting the sexual assault on T.C. The report does not reflect that T.C.'s assailant used a weapon.

¶ 34 In July 2009, after a hearing on the petition, the trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 35 Defendant appeals.

¶ 36 II. ANALYSIS

¶ 37 I. Ineffective Assistance of Trial Counsel

¶ 38 Defendant first contends that the trial court erred in summarily dismissing his postconviction petition where his trial counsel failed to provide effective assistance. Specifically, defendant argues that he was denied the effective assistance of trial counsel where counsel: (1) failed to call Eddie Price to corroborate defendant's consent defense; (2) failed to cross-examine the State's propensity witness with impeaching information from a police report; and (3) failed to bring media coverage of defendant's arrest to the trial court's attention and/or request that the court admonish the jury about the impropriety of considering such information. We disagree.

¶ 39 The Post-Conviction Hearing Act provides a remedy for defendants whose constitutional rights were substantially violated in their original trial or sentencing hearing when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

¶ 40 The summary dismissal of a postconviction petition is appropriate at the first stage of postconviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is low threshold. *Hodges*, 234 Ill. 2d at 9-10. This standard requires only that a defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The summary dismissal of a postconviction petition is a legal question which we review *de novo*. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). "Although the trial court's reasons for dismissing [the] petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment." *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 41 To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d

849, 859 (2003). To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Specifically, the defendant must show that counsel's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Easley*, 192 Ill. 2d at 317-18. A court reviewing the summary dismissal of a postconviction petition which alleges the ineffective assistance of counsel must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 42 a. Failure to Investigate and Present Eddie Price as a Witness

¶ 43 We first consider defendant's contention that counsel's failure to call Eddie Price as a witness during trial rises to the level of a constitutional violation of defendant's right to the effective assistance of counsel. Defendant argues that, where defendant presented a consent defense, trial counsel was ineffective for failing to investigate and failing to call Price to testify that, contrary to the victim's testimony, the victim willingly approached defendant and accompanied defendant in his car. Specifically, defendant asserts that, had counsel called Price to testify, the result of the trial would have been different. We disagree.

¶ 44 Decisions that counsel makes regarding matters of trial strategy are " 'virtually unchallengeable.' " *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *Palmer*, 162 Ill. 2d at 476. In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's

conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

¶ 45 Generally, counsel's decision regarding whether to present a particular witness is a matter of trial strategy, which enjoys a strong presumption that it is the product of sound trial strategy and not incompetence, and will not support a claim of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 378. The decision as to whether "to call a witness is a tactical and strategic decision in which defense counsel is given wide latitude in making decisions." *People v. Davis*, 228 Ill. App. 3d 123, 130 (1992). However, counsel may be deemed ineffective for failure to call a witness who could corroborate an otherwise uncorroborated defense. *People v. Brown*, 336 Ill. App. 3d 711, 718 (2002) (although counsel's decision whether to present a particular witness is generally not subject to an ineffective assistance claim, "counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense.").

¶ 46 In Price's affidavit, he attested:

> "On Dec 14, 1999, Nolan and me, Eddie Price, were working in the basement of Mrs. Watson doing remodeling. We finished for the day about 9:00 pm. As usual, we worked five hours everyday. Nolan was suppose [*sic*] to drop me off at the Dan Ryan El on 69th Street and Lafayette. Nolan stopped to get some gas for his mother's car. It was a blue 2-door [G]eo [S]torm hatchback. Everything on the

> car worked. When we left, Mrs. Watson house, all I had on me was the money order Mrs. Watson paid me, Eddie Price. We left me and Nolan about 9:35 pm, we got to the gas station. Nolan gave me Eddie Price exact money to pay for the gas. It added up to be about $25.00 even. I was standing in line to pay for the gas, when I noticed a female approach Nolan mother's car. She approach Nolan mother's car, from the direction of Vincennes and Lafayette. She was wearing a winter coverall suit with Timberland boots on. She appeared to be about 6 feet tall, with braids in her hair. I was only 2 feet away from the car. I saw Nolan and the female drive on west down 71st towards Racine. It was about 9:50 because when I Eddie Price got on the El platform, it was 10:00 pm."

¶ 47 Here, defendant fails to overcome the presumption that counsel's actions were a product of sound trial strategy. See *Enis*, 194 Ill. 2d at 378. Defendant asserts that counsel should have called Eddie Price to testify in order to corroborate a portion of defendant's consent defense. Specifically, defendant claims Price would have testified that, contrary to the victim's testimony that defendant abducted her at gunpoint, the victim "willingly approached [defendant] and accompanied [defendant] to his car." We find counsel's representation reasonable where, as the record shows, after interviewing Price, he chose not to present his testimony at trial.

¶ 48 We first note that, although defendant argues that counsel failed to investigate Price, our review of the record shows that counsel did, in fact, investigate him. Defendant admits in his postconviction petition that his mother located Eddie Price and brought him to counsel's office. Counsel interviewed him. Then, in counsel's letter to the ARDC, also attached to defendant's petition, counsel recalled that defendant's mother brought two potential witnesses to counsel's office, where counsel interviewed them. He remembered that one of the witnesses "stated he had no knowledge of any of the incidents [defendant] was involved in. The other witness said that he had seen [defendant] with women, but he didn't remember any dates, or names, or times." From the combination of defendant's description of his mother bringing Price to counsel's office and counsel's description of his interviewing the witness brought by defendant's mother, it is reasonable to presume that counsel investigated and interviewed potential witness Eddie Price and that, as a result of the interview, he thought Price had no useful testimony to offer. Accordingly, it can be assumed that counsel made the strategic decision not to call Price to testify. On this record, defendant is unable to overcome the presumption that counsel's decision not to call Price to testify was sound trial strategy. See *Enis*, 194 Ill. 2d at 378.

¶ 49 Moreover, it was reasonable for counsel not to call Price at trial where Price's affidavit contradicts defendant's trial testimony on key points. At trial, defendant testified in detail regarding his actions on the night of December 14, 1999. He detailed to the court that he was at the house he shared with his mother until about 10:35 p.m. At that time, he left the house to fill up his mother's car with gas. He explained that he drove to the gas station at 71st and Vincennes. He gave a detailed account of what occurred at the gas station:

"[DEFENSE COUNSEL:] Now, you say you went to the gas station. What happened while you were at the gas station?

[DEFENDANT:] While I was at the gas station pumping the gas, [the victim] approached me, informed me she had just dropped off by a friend of hers - - I don't know who- - she was continuing to get on a bus and she didn't have exact change. So she asked me to give her change, she was fifteen cents short. I told her I didn't have change but I'd be willing to drop her off if she needed, because it's kind of dangerous in that neighborhood at that time of night.

Q: Well, where are you when this happens?

A: At the gas station.

Q: You are having this conversation with [the victim]?

A: Yes.

Q: How long did the conversation go on?

A: Say about, all in all, maybe about four or five minutes at the most. I don't know.

Q: What happened at the end of that conversation?

A: She agreed to go, because she, I didn't have the change for her to get on the bus, she didn't have the change to get

> on the bus, she didn't want to stay out there, it was getting kind of rough in that neighborhood.
>
> Q: Okay. Then what happened?
>
> A: Okay. I told her I'd drop her off. She agreed for me to drop her off. She got in the passenger car, I meant the passenger's seat of the car. I finished pumping the gas.
>
> * * *
>
> After she told me where she lived, I asked her, well, if she not in a rush to go home, would she like to smoke some weed with me. And I did, too, marijuana. And so she said, as long as I get her home by twelve o'clock, it will be okay, because she had to get up and go to school the next day."

Although Price claims in his affidavit that he left defendant's home with defendant and went to the gas station together, in defendant's detailed testimony about his actions that evening, defendant fails to mention Price at all. Furthermore, Price claims he finished work on defendant's mother's house at 9:00 pm, after working the usual five hours, and then left the house with defendant at 9:35 pm. Defendant testified that defendant left the house at 10:35 pm. Moreover, Price claimed that defendant was supposed to drop him off at the Dan Ryan el stop on 69th Street, but that defendant instead left him at a gas station near Vincennes and Lafayette and 71st Streets, driving off with the victim without a word of explanation to Price. In light of the many contradictions between Price's version of the evening and defendant's version, trial

counsel's decision not to call Price as a witness at trial was objectively reasonable.

¶ 50 Even assuming trial counsel's failure to call Price to testify fell below an objective standard of reasonableness, we are unable to discern that defendant suffered any prejudice where Price's affidavit is insufficient and unsupportive of defendant's consent defense. First, as noted above, Price's purported testimony was inconsistent with defendant's testimony and would not have helped defendant's case. Second, M.A. testified that she was abducted at gunpoint by defendant, but that the gun was hidden beneath defendant's garment. Price does not mention seeing a gun. Had Price testified, the jury may have believed Price merely failed to see defendant's hidden gun. Moreover, Price did not see what happened after defendant drove away with M.A., and could not testify regarding the crux of defendant's consent defense, that is, as to whether their intercourse was forced or consensual.

¶ 51 Third, the evidence against defendant was not closely balanced. The State presented detailed testimony from M.A., as well as substantial corroboration in the form of DNA evidence and an internal injury to M.A.'s vagina. T.C. also testified regarding a separate sexual assault, which testimony rebutted defendant's consent defense. Defendant's witness, Tommy Clark, was unable to verify that the woman he saw defendant with that night was M.A. Defendant's testimony lacked credibility, as well, where he testified that, although he was concerned about M.A. being in a dangerous neighborhood, he dropped her off in the same bad neighborhood after they had intercourse. The record fails to demonstrate a reasonable probability that the result of trial would have been different had Price testified. We find no error in the circuit court's denial of relief on this component of defendant's petition, as it clearly lacks any arguable basis in law or

in fact.

¶ 52 b. Failure to Impeach the Other-Crimes Witness

¶ 53 Next, defendant contends that his petition sufficiently alleged a claim of ineffective assistance of counsel for failing to impeach other crimes witness T.C. Specifically, defendant argues that defense counsel's representation was insufficient where he failed to impeach T.C. with information "readily available" in the police report regarding the incident. Defendant contends that counsel should have cross-examined T.C. regarding the fact that the police report states that the offender punched her in the side of her face and dragged her into an alley, as well as threatened to kill her. In contrast, argues defendant, counsel should have attacked T.C.'s credibility because T.C. testified at trial that defendant used a knife to force her down the alley and failed to mention that defendant threatened to kill her if she did not remain quiet. We disagree that this argument rises to the level of a constitutional violation of defendant's right to the effective assistance of counsel.

¶ 54 The police report in question, which was attached to defendant's petition, includes the following summary of the incident, in pertinent part:

> "[T]he offender punched [the victim] in the side of the face and dragged her into the alley and raped her. R/O conducted further investigation and found that the victim was raped in a vacant lot. Further interview revealed that the offender took the victim to the back of an abandoned house and under the back porch where the victim

> performed oral sex. The offender then told the victim not to say a word or he would kill her at which point he told her to take off her clothes and she did. The offender then had the victim bend over, but was unable to penetrate her vagina. The victim then was told to turn over at which point the offender put his penis in her vagina and ejaculated in her. When the offender attempted to wipe himself off the victim grabbed her pants and fled the scene to her aunt's house."

¶ 55 Initially, we note that defendant is incorrect in his claim that T.C. never mentioned at trial that defendant threatened to kill her if she did not stay quiet. In fact, the record reflects that T.C. did, in fact, testify to that threat:

> "[STATE'S ATTORNEY:] What did [defendant] say when he grabbed you around your neck and poked you in the back with this knife?
>
> [WITNESS T.C.:] Say exactly what he say? [*sic*]
>
> [STATE'S ATTORNEY:] Yes.
>
> A: Bitch, if you scream I'll kill you."

Because defendant's claim that T.C. could have been impeached on this point is refuted by the record, it is indisputably meritless. See *Hodges*, 234 Ill. 2d at 16 (an example of an indisputably meritless legal theory is one which is completely contradicted by the record).

¶ 56 Defendant's remaining arguments on this issue fail because, even if we were to find counsel's representation ineffective, defendant would still be unable to show resulting prejudice. See *Palmer*, 162 Ill. 2d at 475-76 (failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim). After defense counsel cross-examined T.C., the jury was left with the clear impression that T.C. had not told the police immediately after the assault that defendant had used a weapon. Although she testified on direct examination that defendant grabbed her and held a knife to her back, she admitted on cross-examination that she did not remember whether she told the police she saw a weapon or whether his only weapons were his hands and feet. T.C. testified on cross-examination to the following:

> "[DEFENSE COUNSEL:] And then when [defendant] grabbed you, he forced you to go in a direction that you had not originally been going, right?
>
> [WITNESS T.C.] A: Yes.
>
> Q: And as a matter of fact, he was like dragging you in a direction?
>
> A: No, he didn't drag me. He was up on me with the knife.
>
> Q: Now, you saw the knife at this time?
>
> A: Yes.
>
> Q: Was the knife in your back?
>
> A: Yes.
>
> Q: And that was the first time you had felt anything in your

back?

A: Yes.

Q: You said he had his hand in your back with the knife, but you were able to see that?

A: I seen the knife when I was in the basement.

Q: After this on ordeal [*sic*] was over, you talked to the police, is that correct?

A; Yes.

Q: You did not tell the police about seeing any weapons at all, did you?

A: I don't remember.

Q: Do you remember telling the police that the only weapons used was his hands and his feet?

A: No.

Q: You don't remember?

A: I don't remember what I told the police that night because I was in a state of shock."

Then, on redirect examination, T.C. stated she only spoke to the first police officers that came to the hospital for five minutes.

¶ 57 Additionally, defense counsel impeached T.C. on various other points, including having her admit that she was "a little intoxicated" on the night of the assault, that she could not

remember what she was wearing, and that, contrary to her testimony, she told the police she escaped when defendant attempted to clean himself off after ejaculating. In view of the record before us, including the cross-examination conducted by trial counsel, the result of the trial would not have been different had the complained-of police report been introduced to impeach T.C. on a point of which the jury was already aware, that is, the manner of force alleged to have been used by defendant when assaulting T.C. We find no error in the circuit court's denial of relief on this component of defendant's petition, as it clearly lacks any arguable basis in law or in fact.

¶ 58 c. Failure to Bring Media Coverage to Court's Attention

¶ 59 Next, defendant contends that he sufficiently stated a claim of ineffective assistance of trial counsel where counsel failed to inform the court of three short articles published over two years before trial, precluding the court from admonishing the jury regarding the impropriety of considering the media information. Accordingly, argues defendant, there was a reasonable probability that the jury "couldn't impartially judge the defendant solely on the evidence presented at trial." We disagree.

¶ 60 In *People v. Kirchner*, our supreme court stated:

> "Exposure to publicity about a case is not enough to demonstrate prejudice because jurors need not be totally ignorant of the facts and issues involved in a case. *People v. Sutherland*, 155 Ill. 2d 1, 15-16 (1992), citing *Irvin v. Dowd*, 366 U.S. 717 (1961). This court has previously recognized that '[c]rimes, especially heinous

> crimes, are of great public interest and are extensively reported. It is unreasonable to expect that individuals of average intelligence and at least average interest in their community would not have heard of any of the cases which they are called upon to judge in court.' *People v. Taylor*, 101 Ill. 2d 377, 386 (1984). A juror must, however, be capable of disregarding his or her impressions or opinions and decide the case based solely upon the evidence presented in court. *People v. Coleman*, 168 Ill. 2d 509, 547 (1995)." *People v. Kirchner*, 194 Ill. 2d 502, 529 (2000).

Accordingly, "the relevant inquiry on appeal is not how much pretrial publicity occurred, but whether the defendant received a fair and impartial trial. *People v. Little*, 335 Ill. App. 3d 1046, 1052 (2003), citing *People v. Lucas*, 132 Ill. 2d 399, 422 (1989); *People v. Britz*, 185 Ill. App. 3d 191, 200 (1989) ("In Illinois, the determination to be made is whether the jury is fair and impartial and will decide the case based on the evidence presented during the trial, and not on the basis of information received from outside sources.").

¶ 61 In *Britz*, the court considered the effect of media publicity on the outcome of a trial. In that case, 36 newspaper articles had been written about the case, 4 of which were written during the defendant's second trial, which ended in a mistrial over eight months prior to the trial at issue. The court noted that "periods of four and six months between questioned publicity and trial have been held a sufficient period of time to dissipate any unfavorable effect from the publicity or to reduce it to unimportance." *Britz*, 185 Ill. App. 3d at 200.

¶ 62 Here, even assuming defense counsel's representation was deficient, defendant fails to state the gist of a claim of ineffective assistance of counsel where he is unable to show resulting prejudice. First, more than two years elapsed between the time the articles were published and the day the jury was selected. The articles he complains of are three short articles which were published on March 5, 6, and 12, 2004. Defendant's jury was not selected until over two years later, on July 17, 2006. So much time elapsed between the publication of these articles that they had little to no impact on the jurors, a fact illustrated by the venire's unanimous indication when questioned by the court that it did not know defendant.

¶ 63 Second, the record shows that the jury that heard defendant's case was fair and impartial, as the trial court ensured that the jury would only consider the evidence before it. Initially, the court instructed the venire that the evidence would consist only of sworn testimony from the witness stand and properly admitted exhibits:

> "[THE COURT:] The law does not allow you to infer anything against the Defendant simply because he's been charged with an offense or because an indictment has been filed against him. The evidence in this case will come by way of sworn testimony from the witness stand and exhibits which are properly introduced into evidence and only that is what the jury's verdict in this case must be based on."

The court reinforced this concept a short time later, instructing the venire:

> "[THE COURT:] My job here is to tell you what evidence you may

> hear and consider. I'm the judge of the law. You are the judge of the fact. You are to determine the facts only from the evidence presented to you during the trial. You are not to speculate or guess what might have happened outside the evidence. You are to make your decision based only on the evidence you received."

¶ 64 Then, the court requested that the members of the venire "look around the courtroom" to see "whether anybody thinks they might know somebody they see in this courtroom or have seen in this courtroom," including defendant.

¶ 65 The court also reminded the venire of the presumption of innocence:

> "[THE COURT:] The Defendant in this case and in all criminal cases is presumed innocent of the charge or charges against him. That presumption remains with him throughout every stage of the trial and during your deliberation. This presumption is only overcome if from all the evidence you hear you are convinced beyond a reasonable doubt he is guilty."

The court further instructed the venire:

> "[THE COURT:] It is essential that you keep an open mind and not form any conclusions until you heard all the evidence in the case, the argument and the instructions on the law."

The court then ensured that the veniremembers understood and accepted these concepts.

¶ 66 Once the jury was sworn in, court instructed the members of the jury:

> "[THE COURT:] You should give careful attention to the testimony and evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you heard all the evidence, the closing arguments of the attorneys and instructions from the Court when you retire to deliberate."

¶ 67 At the end of the second day of trial, the court again admonished the jury:

> "[THE COURT:] Don't discuss the case or allow anyone to discuss it in your presence. Keep an open mind until you've heard all the evidence, the arguments of counsel, the instructions on the law."

¶ 68 At the end of the case, the court instructed the jury to only consider the testimony of witnesses and admitted exhibits:

> "[THE COURT:] It is your duty to determine the facts and to determine them only from the evidence in this case."

And:

> "[THE COURT:] The evidence which you should consider consists only of the testimony of the witnesses and the exhibits which the court has received."

The court again instructed the jury regarding the presumption of innocence.

¶ 69 The record fails to demonstrate a reasonable probability that the result of trial would have

been different had counsel notified the court of these three articles published more than two years prior to trial where the court fully admonished the jury regarding defendant's rights, the presumption of innocence, and the proper evidence to consider in its deliberations. We find no error in the circuit court's denial of relief on this component of defendant's petition, as it clearly lacks any arguable basis in law or in fact.

¶ 70 II. Ineffective Assistance During Plea Negotiations

¶ 71 Finally, defendant contends that the trial court erred in summarily dismissing his postconviction petition where his trial counsel failed to provide effective assistance during the plea negotiations in case numbers 04CR7326, 04CR7328, 04CR7329, and 04CR7330. Specifically, defendant argues that he was denied the effective assistance of trial counsel where counsel led him to believe his sentence would not exceed thirty years' imprisonment, but the court eventually sentenced him to forty years' imprisonment. We disagree.

¶ 72 Defendant's specific allegations in this regard are that his trial counsel told him the State offered him plea deals on his four pending cases in which all of the sentences would run concurrent to one another and that no possible configuration of sentences defendant would receive would exceed a total of 30 years' imprisonment. This conversation took place prior to sentencing on case 04CR7327. Defendant alleges in his petition that counsel told him:

> "The offer consisted of the defendant receiving 30 years for case 04CR7327, which he was found guilty of by a jury. Provided he accepted a plea for 30 years each of the four pending cases

> 04CR7326, 04CR732[8], 04CR7329, 04CR7330. Where all five cases were to run concurrent and the defendant's total time would not exceed 30 years in any sentence configuration he received. Counsel also told defendant that the State would recommend 60 years if he didn't accept the plea offer. The defendant accepted."

However, he contends, when the State and trial counsel presented the stipulated agreed terms to the court, the sentences were not what defendant expected. At that time, he "felt rushed" when the trial court asked if these were the terms to which he had agreed. As a consequence, defendant claims he was unaware of the terms of the guilty pleas he was entering, as well as the full consequences of those pleas.

¶ 73 In support of this claim, defendant attached an affidavit from his mother, Carolyn Watson, in which she attested:

> "[A] week prior to my son Nolan Watson's sentence hearing at a status proceeding in court, [defendant's attorney] informed me that my son accepted a plea offer from the prosecution, which was to consist of all my son's five case sentences together, were not to exceed over 30 years. Provided he pleaded guilty to the four remaining untried cases. Later that day I received confirmation via a phone call from the Cook County Jail from my son stating that he agreed to accept the pleas due to [his attorney's]

> misrepresentation on the case he was tried on. My son stated he had no confidence in his attorney or the court due to biasness. On October 5, 2006, during sentence proceedings the plea offer was altered during the proceedings. My son informed the court that the plea being offered was not the plea he agreed to. [The judge] never asked my son what promises was offered. [Defendant's attorney] never consulted with my son about altered plea bargain."

¶ 74 Defendant maintains that he set forth claims of ineffective assistance of counsel warranting further proceedings under the Act. As indicated above, the issue of whether counsel provided effective assistance is evaluated in accordance with the two-prong test set forth in *Strickland*. Specifically, to establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Second, defendant must show that counsel's deficient performance resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), *i.e.*, a reasonable probability that, but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on proceeding to trial (*People v. Manning*, 227 Ill. 2d 403, 418 (2008)). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 75 With respect to the prejudice prong, the supreme court has noted that a bare assertion that

defendant would have pleaded not guilty and insisted on a trial absent counsel's deficient performance is insufficient to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, defendant must accompany his assertion with a claim of innocence or articulate a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. The question of whether counsel's deficient performance caused defendant to plead guilty thus largely depends on predicting the likelihood of defendant succeeding at trial. *Hall*, 217 Ill. 2d at 336.

¶ 76 For the reasons that follow, we find that even if defendant were able to show that counsel's performance fell below the objective standard of reasonableness, he cannot establish the requisite prejudice necessary to entitle him to proceed to the second stage of postconviction proceedings.

¶ 77 First, the record of the plea proceedings refutes defendant's claim that he was misled. Rather, it is clear that defendant was informed of the procedure and the process as the hearing went along. First, the prosecutor enumerated the terms of the agreement as to all four cases, including the sentence in each individual case. Specifically, the prosecutor told the court the sentence on case 26 would be 30 years' imprisonment; the sentence on case 28 would be 30 years; the sentence on case 29 would be 40 years, consisting of a 30-year sentence consecutive to a 10-year sentence for aggravated kidnaping; and the sentence on case 30 would be 40 years, consisting of 2 consecutive 20-year sentences for aggravated criminal sexual assault.

¶ 78 The court asked defendant if that was his understanding, and defendant responded:

> "[DEFENDANT:] I agree but - - what's stipulated but it's not what you stipulated the first - -"

The court then explained to defendant that the agreement did not depend on the court's approval and that the court would approve it if the parties were in agreement:

> "[THE COURT:] This isn't an agreement that's being presented to me that I'm either going to approve or not. If this is what you're agreeing to, then I'm going to approve it. If it's not, then I'm not going to proceed. We'll proceed to sentencing on the one case and do whatever we have to do on the next one so - -
>
> [DEFENSE COUNSEL:] Do you understand what the Court is saying?
>
> [DEFENDANT:] Yes.
>
> [DEFENSE COUNSEL:] Do you?
>
> [DEFENDANT:] Yes."

The court then re-stated the terms of the agreement, and defendant agreed that he understood the terms:

> "[THE COURT:] There are four cases. The State is indicating that you're going to plead on one count in two of them and be sentenced to 30 years on - - on the one count in each of those cases and in the other two cases you're going to plead guilty to two counts. In one case you're going to get 30 on one count and ten on the other count and the other case you're gong to get 20 on one and 20 on the other count and those sentences are all going to run concurrent with

> whatever sentence you're given in case number 04-07327, do you understand?
>
> [DEFENDANT:] Yes, sir."

The court admonished defendant:

> "[THE COURT:] Now, you have the right to plead not guilty and have a trial in any one or all of these cases and the right to force the State to prove any one or all of these cases against you beyond a reasonable doubt, the right to confront, cross examine witnesses and the right to present evidence and to testify in your own behalf. By pleading guilty in these cases you would be giving up all those rights, do you understand that?
>
> [DEFENDANT:] Yes."

The court then proceeded to go through each of the four cases individually, asking defendant each time whether anyone forced or threatened him to get him to plead guilty and whether he was pleading guilty freely and voluntarily. Each time, defendant denied that anyone had forced or threatened him to get him to plead guilty, and agreed that he was pleading guilty freely and voluntarily. Defendant asserted that he was pleading guilty in each one of the cases.

¶ 79 Defendant was informed twice in open court of the exact terms of the agreement regarding all four cases. He could have rejected the tendered agreement and proceeded to trial, but instead consciously and deliberately chose to accept the plea agreement, knowing what the terms were.

¶ 80 Moreover, the record belies defendant's contention that there was an agreement as to the sentences in all five of defendant's cases. Sentencing in the case for which defendant was tried did not occur until after the guilty plea proceedings were over. When explaining the terms of the agreement to defendant at the guilty plea hearing, the trial court specifically explained that the sentences in the cases to which he pled guilty would "run concurrent with whatever sentence you're given in case number 04-07327." Furthermore, at the sentencing hearing for case 27, the case that went to trial, the State entered a victim impact statement, referred to defendant's prior convictions, and argued in aggravation, and the defense argued in mitigation. Even if counsel gave mistaken or misleading advice out of court to defendant, and even if defendant relied on this advice when heading into the plea hearing, defendant cannot show prejudice where the trial court clearly admonished defendant in open court and on the record, and the express statement of the terms of the agreement were read to and agreed to by defendant.

¶ 81 Finally, defendant has not shown a reasonable probability that, but for counsel’s deficient performance, defendant would not have pleaded guilty and would have insisted on proceeding to trial. See *Manning*, 227 Ill. 2d at 418; see also *Hall*, 217 Ill. 2d at 335-36 (with respect to the prejudice prong, a bare assertion that a defendant would have pleaded not guilty and insisted on a trial absent counsel's deficient performance is insufficient to establish prejudice; rather, a defendant must accompany his assertion with a claim of innocence or articulate a plausible defense that could have been raised at trial. The question of whether counsel's deficient performance caused defendant to plead guilty thus largely depends on predicting the likelihood of defendant succeeding at trial). We acknowledge that defendant, in his petition, alludes to the

idea that he considered proceeding to trial, stating:

> "The defendant elected to go to trial on the first case 04CR7327 because he believed in the provisions of the constitution and his sixth amendment right to effective assistance. After counsel and the court destroyed defendant's belief in fundamental fairness. [*sic*] The defendant no longer trusted the actions of the court to uphold provisions enunciated by the constitution. The defendant intended to proceed to trial on all his cases, but dared not to with inadequate representation and a biased court, which forced him into pleading guilty to the four pending cases unaware of the penalties, which were imposed upon conviction."

Nonetheless, defendant cannot demonstrate that he would have pled guilty and would have instead proceeded to trial because, as shown above, he persisted in pleading guilty even after he was twice informed in open court of the precise terms of the plea agreement.

¶ 82 Moreover, defendant cannot show any reasonable probability that he would have succeeded at trial, had he chosen to go to trial on the four plea cases. See *Hall*, 217 Ill. 2d at 335-36 (the question of whether counsel's deficient performance caused defendant to plead guilty thus largely depends on predicting the likelihood of defendant succeeding at trial). Defendant's DNA was found in the vaginas of each of the four women, each of whom complained that he sexually assaulted them. See *People v. Church*, 334 Ill. App. 3d 607, 615-16 (2002) (The defendant alleged the ineffective assistance of counsel after entering a guilty plea to reckless

homicide. The court found that the defendant was unable to show prejudice where, had he rejected the plea agreement and gone to trial, it was "sheer fantasy" for him to maintain that he would have succeeded.). Consequently, because defendant clearly fails to allege the prejudice prong of *Strickland*, we find that he has failed to state the gist of a meritorious claim of ineffective representation by counsel.

¶ 83 III. CONCLUSION

¶ 84 For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 85 Affirmed.