THIRD DIVISION
February 29, 2012

No. 1-10-1392

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. 07 CR 18717
	)	
DERRICK BARBER,	)	The Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

Held: Where record reflected that defendant was repeatedly admonished his sentence would be served in the Department of Corrections, post-conviction petition did not state an arguable claim of ineffective assistance of counsel for advising defendant his sentence could be served in a mental health facility; the summary dismissal of the defendant's post-conviction petition was affirmed.

¶ 1 Defendant Derrick Barber appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). Defendant contends on appeal that his petition presented an arguable claim that his counsel was ineffective for leading him to believe that he would be ordered to complete

his prison sentence in a mental institution or hospital, as opposed to a correctional facility. Defendant also argues he was improperly assessed several fines and fees and should receive a $5-per-day credit against his fines for his time spent in custody. We affirm the petition's summary dismissal and correct the amount of fines and fees to be assessed against defendant.

¶ 2 The record establishes that on August 9, 2007, defendant drove into an intersection against a red light and that his vehicle struck two other cars, killing one person. In December 2007, a fitness hearing was held at which Dr. Susan Messina of Forensic Clinical Services testified that defendant was fit to stand trial. Dr. Messina examined defendant and reviewed defendant's past medical records at two hospitals which showed no history of mental illness, although defendant told the doctor he had a previous "breakdown" related to substance abuse. Dr. Messina testified that in reviewing defendant's records, most of his hospitalizations were related to substance abuse, and the doctor also noted defendant's "reported history of schizophrenia." On cross-examination, Dr. Messina stated that defendant told her he "would be possibly getting time in jail" for the instant offenses. The court found defendant fit for trial.

¶ 3 On April 14, 2009, defendant agreed to plead guilty to two counts of aggravated driving under the influence and one count of reckless homicide. At the plea hearing, defense counsel reported to the court that it was defendant's "understanding [that] in return for a plea of guilty, he will be sentenced to 19 years in the Illinois Department of Corrections." The prosecutor then stated defendant's previous convictions required him to be sentenced as a Class X offender and the parties had agreed to a 19-year term in the Illinois Department of Corrections.

¶ 4 Before accepting defendant's plea, the court admonished him that the crimes to which he was pleading guilty are "what they call Class II offenses, and the sentencing range would

normally be 3 to 14 years in the Illinois Department of Corrections." The court further stated "any period of incarceration would be followed by a period of mandatory supervised release of three years following your discharge from the Department of Corrections." Defendant indicated he understood that admonishment.

¶ 5 After additional admonishments and the presentation of the factual basis for the plea, the State informed the court of defendant's previous convictions, both of which resulted in sentences in the Department of Corrections. In imposing sentence, the court stated defendant would receive "19 years in the Illinois Department of Corrections *** all the counts to run concurrent" and that defendant was being sentenced as a Class X offender. Defendant was sentenced to three concurrent terms of 19 years in prison and was assessed $2,045 in various fines and fees.

¶ 6 On September 3, 2009, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. In the motion, defendant asserted he was not examined for mental illness and his counsel was ineffective in failing to inform the court of his use of psychotropic medication. Defendant also denied that he caused the victim's death.

¶ 7 Also in the motion, defendant stated, in pertinent part: "My attorney promised me that he'd get me a 6 yr deal [*sic*] if I went along with his advise (during talks on 2 occassions) [*sic*]; that if not, I'd receive upwards of 20 to 40 years in prison if convicted. Not knowing that his motive was coersion [*sic*] I believed reasonably that this was my only recourse. I even told my attorney that I've been to different mental facilities on many occassions [*sic*] but he failed to follow up on them." On September 22, 2009, the court denied defendant's motion to withdraw his plea as untimely.

¶ 8 On February 5, 2010, defendant filed a *pro se* post-conviction petition alleging his

counsel was ineffective because "counsel lied or mislead [*sic*] defendant, with a promise of his guilty plea that he would be sentenced to a mental institution and/or hospital, in [lieu] of jail or prison." On April 16, 2010, the circuit court summarily dismissed defendant's petition, finding it frivolous and patently without merit. Defendant now appeals that ruling.

¶ 9 On appeal, defendant contends his petition set forth an arguable claim of the ineffectiveness of his counsel in that defendant did not receive the sentence he was told he would receive in exchange for his guilty plea. Defendant argues that, as alleged in his petition, counsel promised him his sentence would be served in "a mental institution and/or hospital," as opposed to being served in prison.

¶ 10 At the first stage of a post-conviction proceeding, the circuit court is concerned with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The court considers the substantive merit of a petition and may dismiss the petition if the allegations there, taken as true, render the petition "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008).

¶ 11 The State first responds that defendant's petition is insufficient because the petition is not accompanied by sworn affidavits or other documentation in support of defendant's claims. We do not find the lack of corroboration to be dispositive here, where the petition contains facts sufficient to aver that the only affidavit defendant could have provided, other than his own statement, is that of his own attorney, against whom his allegations are directed. See *People v. Hall*, 217 Ill. 2d 324, 332 (2005). Moreover, although defendant's petition is based on his representation of counsel's advice, which is not part of the record, defendant's assertion of his

counsel's advice must be taken as true because the State cannot contradict the facts presented in a petition at this initial stage of post-conviction proceedings. See *People v. Smith*, 326 Ill. App. 3d 831, 839 (2001).

¶ 12 A challenge to a guilty plea alleging ineffective assistance of counsel is resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Jones*, 144 Ill. 2d 242, 254 (1991). Under the two-prong test of *Strickland*, a defendant must show counsel's performance was deficient and that defendant suffered prejudice as a result. *Strickland*, 466 U.S. at 687; *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*).

¶ 13 A petition is frivolous and patently without merit if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," which encompasses assertions that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a post-conviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 14 In considering a claim of a defendant's discussion with counsel regarding a plea hearing, this court may summarily dismiss a post-conviction petition if the record establishes that the trial court, in its admonitions, addressed the issue being raised by the defendant. *People v. Ramirez*, 162 Ill. 2d 235, 240 (1994). In *Ramirez*, the defendant asserted in a post-conviction petition that he was denied the effective assistance of counsel because his attorney told him he had arranged a deal with the judge that he would be sentenced to two years of probation, and the defendant alleged that he relied on that advice in pleading guilty. *Ramirez*, 162 Ill. 2d at 238. The

defendant was sentenced to five years in prison. *Ramirez*, 162 Ill. 2d at 237. In affirming the trial court's summary dismissal of the petition, the supreme court held that, based on its review of the record of the defendant's plea hearing, the defendant's guilty plea was made knowingly, voluntarily and intelligently, and therefore, the defendant's post-conviction claims that he pled guilty in reliance upon his counsel's promise that he would receive probation were contradicted by the record. *Ramirez*, 162 Ill. 2d at 243.

¶ 15 In the case at bar, the record clearly contradicts defendant's assertion on appeal that "the trial court never explained to [him] that his sentence would be served in prison, and not a mental institution or hospital." The transcript of defendant's plea hearing reveals that the court advised defendant at least five times that the sentence to which he was agreeing would be served in the Department of Corrections. For example, upon first addressing the court at the plea hearing, defense counsel stated that it was defendant's "understanding [that] in return for a plea of guilty, he will be sentenced to 19 years in the Illinois Department of Corrections." Furthermore, defendant indicated he understood the court's admonitions each time he was asked. As one example, defendant affirmatively indicated he understood the court's admonition that "any period of incarceration" would be followed by a three-year period of mandatory supervised release "following your discharge from the Department of Corrections."

¶ 16 Nevertheless, defendant asserts on appeal that despite his two previous terms served in the Department of Corrections, those terms did not preclude the possibility that he could serve some or all of his sentence in this case in a mental health facility. We find the clear admonitions given by the court gave no basis for defendant to conclude that an alternative location was available for serving his sentence.

¶ 17 Defendant argues this case is comparable to *People v. Clark*, 386 Ill. App. 3d 673 (2008), in which defense counsel erroneously told the defendant he was eligible for an impact incarceration (boot camp) program, and the trial court advised the defendant he would have to serve eight years in prison if he was not accepted into or did not complete boot camp. *Clark*, 386 Ill. App. 3d at 674. When the defendant, upon arriving at prison, learned he was not eligible for boot camp and asked his counsel to withdraw his guilty plea, no motion to withdraw the plea was filed by the new attorney then representing the defendant. *Clark*, 386 Ill. App. 3d at 679-80 (finding the gist of a claim of ineffective assistance based on the failure to file a motion to withdraw the plea). This court reversed the trial court's summary dismissal of the petition and remanded for further post-conviction proceedings. *Clark*, 386 Ill. App. 3d at 678.

¶ 18 The circumstances in *Clark* are distinguishable from the facts here. In *Clark*, the defendant received advice from counsel based on counsel's misapprehension of the applicable facts and law, and the defendant sought to withdraw his plea immediately upon learning of his counsel's erroneous advice. Here, in contrast, the trial court's admonishments repeatedly referred to defendant's sentence "in the Department of Corrections" and made no reference to an alternative venue in which the sentence could be served. Moreover, unlike in *Clark*, defendant did not raise this assertion at his first opportunity, *i.e.*, in his motion to withdraw his guilty plea.

¶ 19 Defendant's claim of ineffectiveness of trial counsel constitutes an indisputably meritless legal theory, because it is contradicted by the record of the trial court's repeated admonitions to defendant that his term would be served in the Department of Corrections. Therefore, we affirm the summary dismissal of defendant's post-conviction petition.

¶ 20 Defendant's remaining contentions on appeal involve the imposition of various fines and

fees, namely a $1,000 DUI Law Enforcement fine (625 ILCS 5/11-501.01(f) (West 2006)), a $100 Court System fee (55 ILCS 5/5-1101(d) (West 2006)) and a $30 Children's Advocacy Center assessment (55 ILCS 5/5-1101(f-5) (West 2008)). Defendant argues those charges should not have been assessed.

¶ 21 The State contends that defendant's claims of incorrectly assessed fines and fees are not cognizable in a post-conviction proceeding. A claim that a fine or fee was imposed without statutory authority, thus making the defendant's sentencing order void, can be raised at any time. See *People v. Marshall*, 242 Ill. 2d 285, 302 (2011) (a challenge to an alleged void order is not subject to forfeiture, and therefore defendant could raise issue of incorrectly imposed DNA analysis fee even when he failed to raise it before the court in a post-sentencing motion). We therefore consider the three charges raised by defendant.

¶ 22 First, defendant challenges the $1,000 DUI Law Enforcement fine. The relevant statute allows the assessment of a $500 charge for a first DUI offense and a $1,000 charge for a subsequent DUI offense. 625 ILCS 5/11-501.01(f) (West 2006). Because the instant conviction was defendant's first DUI, the State correctly agrees that the $1,000 fine was improperly assessed but contends that the $500 fine should apply in this case. Defendant acknowledges a $500 fine under this statute is correct. Therefore, the amount of the DUI Law Enforcement fine should be reduced from $1,000 to $500.

¶ 23 The remaining assessments challenged by defendant are the $100 Court System fee and the $30 Children's Advocacy Center assessment. The State correctly agrees that both of those charges should be vacated. The $100 Court System Fee (55 ILCS 5/5-1101(d) (West 2006)) is imposed for "second and subsequent violations" of the Illinois Vehicle Code, and this is

defendant's first violation of that sort. As to the $30 Children's Advocacy Center assessment (55 ILCS 5/5-1101(f-5) (West 2008)), that statute was not in effect when defendant was convicted in 2007. Accordingly, both of those charges are vacated.

¶ 24 Defendant further asserts that he should be awarded a credit of $5 per day toward his remaining fines for each of the 616 days he spent in custody prior to sentencing as allowed by section 110-14 of the Code of Civil Procedure of 1963 (725 ILCS 5/110-14 (West 2006)). Our supreme court has held that although a claim for *per diem* monetary credit under section 110-14 is statutory and is not cognizable as a separate issue on which post-conviction relief can be based, such a claim can be considered when raised for the first time on appeal in a post-conviction proceeding. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008); see also *People v. Williams*, 2011 IL App (3d) 100142; *People v. Neuberger*, 2011 IL App (2d) 100379.

¶ 25 The State correctly agrees that defendant is entitled to this credit; however, the State points out the credit can only be applied toward fines and not toward all types of assessments imposed against defendant. 725 ILCS 5/110-14 (West 2006). A credit of $5 per day for 616 days of pre-sentence custody totals $3,080.

¶ 26 After reducing the DUI Law Enforcement fine from $1,000 to $500, defendant was assessed a total of $565 in fines to which his credit for pre-sentence custody is applied. Along with the $500 DUI Law Enforcement fine, the additional $65 in fines imposed against defendant include the $25 Violent Crime Victim Assistance fine (725 ILCS 240/10(c)(1) (West 2006) (applicable to DUI)), the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2006)); the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2006)); the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2006)); and the $20 Serious Traffic Violation fine (625 ILCS

5/16-104d (West 2006)).

¶ 27 According to the fines and fees order included in the record, defendant was assessed $2,045 in fines, fees and other charges. We thereby order that the fines and fees amount be reduced from $2,045 to $850 to reflect: (1) the reduction of the DUI Law Enforcement fine from $1,000 to $500; (2) the vacating of the $100 Court System fee and the $30 Children's Advocacy Center assessment; and (3) the application of a $565 credit against all remaining fines imposed against defendant.

¶ 28 In conclusion, the summary dismissal of defendant's post-conviction petition is affirmed, and defendant's fines and fees order is corrected to reflect a total charge of $850.

¶ 29 Affirmed; fines and fees order corrected.