SECOND DIVISION
November 6, 2012

No. 1-10-2607

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. 04 CR 12849
	)	
JASON SMITH,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

O R D E R

¶ 1 *Held:* Court did not err in summarily dismissing defendant's post-conviction petition alleging ineffective assistance of appellate counsel for not raising a sufficiency of the evidence claim – in particular, that there was no evidence of a co-offender's intent to take the victim's truck – when a sufficiency claim was raised on direct appeal and when there was ample evidence of that intent.

¶ 2 Following a 2006 jury trial, defendant Jason Smith was convicted of attempted first degree murder and attempted aggravated vehicular hijacking and was sentenced in 2007 to consecutive prison terms of 20 and 15 years respectively. We affirmed on direct appeal. *People v. Smith*, No. 1-07-1325 (2009)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his 2010 *pro se* post-conviction petition, contending

that his petition stated an arguably meritorious claim of ineffective assistance of appellate counsel for not challenging on direct appeal the sufficiency of the evidence of attempted aggravated vehicular hijacking. Defendant also contends, and the State agrees, that the mittimus should be corrected to reflect the correct presentencing detention credit.

¶ 3 Defendant was charged with attempted first degree murder and aggravated battery with a firearm for allegedly shooting Willie Hoskins on or about April 13, 2004. He was also charged with attempted aggravated vehicular hijacking and attempted armed robbery for, on the same date and while armed with a firearm, allegedly entering Hoskins' vehicle and demanding the vehicle and his earrings. The indictment did not name a codefendant or otherwise indicate an co-offender, and it alleged that the aforementioned acts were committed by defendant himself.

¶ 4 At trial, Willie Hoskins testified that, on the day in question, he was sitting in the driver's seat of his truck at a car wash when he saw Johnny Brayboy pacing in front of the truck. He was at first unconcerned, but then Brayboy tapped on the driver's window and pointed a gun at him. Brayboy ordered him to slide over on the front seat, but he could not due to his size and the bucket seats so he asked Brayboy to let him exit the truck. Brayboy persisted that Hoskins should slide over, threatening to kill him if he did not. When Hoskins tried to open his door, Brayboy shot him twice; Hoskins and Brayboy struggled for the gun between the two shots. Immediately after the second shot, defendant opened the front passenger door and sat next to Hoskins. Brayboy told defendant to take Hoskins' diamond earrings, but Hoskins struck defendant one blow; defendant then repeatedly struck Hoskins on the head. The truck then somehow rolled forward, not under Hoskins' control, with Brayboy running alongside shooting at it. Defendant kicked the dashboard, which Hoskins believed to be an attempt to shift the truck into "park" gear. The truck slowed to a stop, and defendant leapt out and fled.

¶ 5 Hoskins viewed lineups from which he identified Brayboy as the shooter and defendant as the man he struggled with inside his truck. Defendant's wallet, containing his identification, was found in the truck, and his fingerprints were found on the front passenger-side door.

¶ 6 Defendant testified that he went to Hoskins on the day in question to buy a half-pound of marijuana for $2,500 on behalf of a friend. Defendant had never met Hoskins before that day. When defendant sat down in the front seat of Hoskins' truck, Hoskins was conversing with someone that defendant could not see, who walked away. A man then approached the truck and demanded that Hoskins open the door. When Hoskins asked what the man was doing, a gunshot followed. Defendant ducked to the floor and tried to put the truck in "drive" gear to escape the shooting. A second shot was fired, and defendant curled up on the truck floor. The truck started to move, followed by a third gunshot, and Hoskins drove the truck onto the street. When defendant sat up in the seat again, Hoskins confronted him, asking why Brayboy and defendant were attacking him. Defendant replied that he did not know what Hoskins was talking about and asked Hoskins to let him out of the truck. Instead, Hoskins grabbed his arm and told him that he was not leaving. Defendant broke from Hoskins' grip, kicked the truck into "park," jumped from the truck, and fled. Defendant denied knowing Brayboy. He explained his earlier false statement to police that he knew nothing about the events in question as reluctance to implicate himself in the marijuana purchase.

¶ 7 Following closing arguments, the jury was instructed on the aforementioned offenses on a direct and accountability basis. Following deliberations, the jury found defendant guilty of attempted first degree murder, aggravated battery with a firearm, and attempted aggravated vehicular hijacking while finding him not guilty of attempted armed robbery.

¶ 8 In his unsuccessful post-trial motion, defendant alleged in relevant part that the charges had not been proven beyond a reasonable doubt. Defendant was sentenced as stated above on March 27, 2007, with the mittimus reflecting 1046 days of presentencing detention credit.

¶ 9 On direct appeal, appellate counsel contended that there was insufficient evidence to convict defendant, and specifically no evidence that he intentionally acted as Brayboy's accomplice in taking Hoskins' truck or in shooting him, so that defendant's convictions for attempted murder and attempted aggravated vehicular hijacking should be reversed. Counsel argued that the evidence showed that defendant was merely present in Hoskins' truck to buy marijuana when Brayboy committed his offenses. Counsel also contended that the trial court erred in sentencing defendant to the maximum sentence for the attempted hijacking offense when he was unarmed and convicted on an accountability basis.

¶ 10 In affirming defendant's convictions and sentence, this court found that there was evidence that defendant participated in Brayboy's scheme to hijack Hoskins' truck, by entering the truck immediately after the first two gunshots and when Brayboy told defendant to take Hoskins' earrings. We expressly found sufficient evidence of a common criminal design. As to the sentencing issue, we noted that defendant not only entered the truck but struck Hoskins repeatedly and tried to stop the truck and thus found that his participation in the attempted hijacking justified the sentence.

¶ 11 In May 2010, defendant filed the instant *pro se* post-conviction petition alleging in relevant part that there was insufficient evidence to convict him of attempted aggravated vehicular hijacking in that the State failed to show Brayboy's intent to take Hoskins' truck, and indeed evidence – from the fact that he would not let Hoskins simply vacate the truck – that he intended to victimize Hoskins personally in some manner. He also claimed that appellate counsel was ineffective for not contending the same on direct appeal.

¶ 12 On July 22, 2010, the court summarily dismissed the petition, finding that there was sufficient trial evidence to convict defendant, and specifically sufficient evidence that Brayboy had the requisite intent for the offense of attempted aggravated vehicular hijacking. Therefore, appellate counsel was not ineffective for not raising a meritless issue. This appeal followed.

¶ 13 On appeal, defendant contends that the summary dismissal of his petition was erroneous because he stated an arguably meritorious claim that appellate counsel rendered ineffective assistance by not contending on direct appeal that there was insufficient evidence to convict defendant of attempted aggravated vehicular hijacking. Specifically, he contends that there was insufficient evidence of Brayboy's intent to commit that offense, and indeed evidence that the goal of Brayboy's actions was instead some kind of harm to Hoskins personally in that he would not allow Hoskins to exit the truck.

¶ 14 Under section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 (West 2010)), the circuit court may examine the trial record and any action by this court in evaluating a post-conviction petition within 90 days of its filing, and 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; that is, 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. Petrenko*, 237 Ill. 2d 490, 496 (2010). On a claim of ineffective assistance of counsel, whether trial or appellate, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him; in other words, that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *Id.* at 496-97. A petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Id.* at 497. The summary dismissal of a post-conviction petition is reviewed *de novo*. *Id*. at 496.

¶ 15 A person commits aggravated vehicular hijacking when he takes a motor vehicle from the person or immediate presence of another by force or threat of the imminent use of force and,

while doing so, is armed with a firearm. 720 ILCS 5/18-3(a), 18-4(a)(4) (West 2010). A person attempts an offense when "with intent to commit a specific offense, he *** does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2010).

¶ 16 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* at 8. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 17 Here, we conclude that defendant's sufficiency claim has no arguable basis in law as it is completely contradicted by the record. Thus, appellate counsel did not arguably fall below the objective standard of reasonableness, nor was defendant arguably prejudiced, by the absence of this particular claim on direct appeal. It is central to our analysis that inherently there is no evidence or issue *dehors* the trial record where the contention is that counsel should have raised a claim on direct appeal based upon the trial record.

¶ 18 First and foremost, appellate counsel did challenge the sufficiency of the evidence for both sentenced offenses. While he did not specifically argue that the State failed to prove

Brayboy's intent regarding the attempted hijacking, he argued that there was no evidence that defendant intentionally acted as Brayboy's accomplice. Moreover, it is implicit in our finding that defendant was in a common criminal design with Brayboy that there was evidence of Brayboy's intent to commit the hijacking offense.

¶ 19 That said, we find that there was ample evidence of Brayboy's intent to take Hoskins' truck by force or threat of force from the evidence that he demanded at gunpoint on threat of death that Hoskins yield the driver's seat. It is inherent in Hoskins vacating the driver's seat that he would lose physical control of his truck. Moreover, it is eminently reasonable to infer that Brayboy wanted Hoskins out of the driver's seat so Brayboy himself could sit in it, so that not only would Hoskins lose control of the truck but Brayboy would have said control and thereby have taken the truck from Hoskins. We need not, and shall not, elevate the possibility that Brayboy had an intent towards Hoskins *in addition to* the intent to take his truck to reasonable doubt in that he had some other intent *to the exclusion of* an intent to take the truck. Thus, the petition did not state a claim of arguable merit and its summary dismissal was proper.

¶ 20 Defendant also contends that his mittimus should reflect a presentencing detention credit of 1049 days rather than the 1046 days now stated on the mittimus. The State agrees, and the record supports the contention: defendant was in custody from his arrest on May 12, 2004, to sentencing on March 27, 2007, or 1049 days.

¶ 21 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the mittimus to reflect that defendant is entitled to 1049 days' credit for presentencing detention. The judgment of the circuit court is affirmed in all other respects.

¶ 22 Affirmed; mittimus corrected.