

SECOND DIVISION
MAY 29, 2012

No. 1-10-2930

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 05 CR 3177
)	
ANTHONY TOLIVER,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal of defendant's post-conviction petition was proper where his claim—that direct appeal counsel rendered ineffective assistance by not raising an excessive-sentence claim—was not of arguable merit. The severity of the instant offenses, their commission in defiance of an order of protection, defendant's history of domestic violence, and his utter lack of remorse at sentencing amply support the sentences imposed.

¶ 2 Following a 2007 bench trial, defendant Anthony Toliver (also known as Tolliver) was convicted of attempted first-degree murder, home invasion, aggravated criminal sexual assault, and unlawful restraint. Defendant was sentenced to 25 years of imprisonment for aggravated criminal

sexual assault, to be served consecutively to concurrent prison terms of 25 years each for attempted murder and home invasion and one year for unlawful restraint. Defendant now appeals from the summary dismissal of his post-conviction petition, contending that he stated a claim of arguable merit: that counsel rendered ineffective assistance by not raising on direct appeal an arguably meritorious claim that his sentence was excessive. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 The evidence adduced at trial was that Regine S. had been in a relationship with defendant for about four years and that he had resided in her home until mid-November of 2004. After Regine asked defendant to leave her home, she obtained an emergency order of protection against him on November 30, 2004. On December 3, defendant went to Regine's home, but left when Regine called the police and showed the order of protection to the responding officers, who in turn showed the order to defendant and explained it to him. Later that same day, defendant kicked open the locked back door of Regine's apartment, tore a telephone from the wall, and beat her with it. He dragged her through the apartment by her hair as he punched her in the face and told her she was "going to die tonight," after which he forced her to perform a sexual act upon him, and again struck her face repeatedly. When the police arrived, summoned by neighbors in response to screams and loud noises from Regine's apartment, defendant jumped on Regine's back and ignored officers' commands to get off her back. Consequently, police officers had to pry him away from Regine before arresting him. As a result of defendant's attack, Regine had blood clots in and swelling around both eyes, a swollen and bloody nose, chunks of hair torn out, and was generally bruised and sore.

¶ 4 Defendant testified that Regine invited him to her apartment to take drugs together, where

they had consensual sex without any violence. However, a neighbor testified to the noise and screaming from Regine's apartment that prompted her to telephone the police. A police officer testified to the earlier incident during which defendant was shown and explained the order of protection, and another officer testified to defendant's continued attack on Regine and the broken back door and telephone.

¶ 5 At sentencing, defendant's criminal history included convictions for battery, theft, and possession of drug paraphernalia, a 1996 conviction for aggravated battery and a 1999 conviction for domestic battery. The State explained that the aggravated battery conviction was, as with the instant case, "a prior relationship that he had that he forced himself on her as well, forced oral sex on her." Defense counsel noted defendant's military service in the 1970s and 1980s, after which he was diagnosed and treated for post-traumatic stress disorder, and noted defendant's leg injury for which he was receiving disability insurance benefits. When defendant addressed the court, he maintained his innocence and alleged that "crooked" police fabricated the evidence against him. While he denied any sexual assault in the 1996 incident, he admitted that "I assaulted her, yes, physically." The trial court then sentenced defendant to a total of 50 years of imprisonment for attempted murder, home invasion, and aggravated criminal sexual assault.

¶ 6 Defendant's convictions were affirmed on direct appeal, and this court rejected defendant's contention that there was insufficient evidence of his intent to kill. *People v. Tolliver*, No. 1-07-3466 (2009) (unpublished order under Supreme Court Rule 23). Redundant counts of aggravated criminal sexual assault and home invasion were vacated, and the case was remanded for a "one-act, one-crime" determination regarding certain unsentenced convictions, including one count of unlawful

restraint. On remand, the trial court imposed a one-year sentence for unlawful restraint, which is also now pending before this court. *People v. Toliver*, No. 1-11-0095.

¶7 In the instant *pro se* post-conviction petition, filed in June 2010, defendant alleged in relevant part that counsel had been ineffective for not raising various issues on direct appeal, including an excessive-sentence claim. On August 26, 2010, the trial court summarily dismissed the petition, and this appeal followed.

¶8 On appeal, defendant contends that the summary dismissal of his post-conviction petition was erroneous as he stated a claim of arguable merit: that direct appeal counsel was ineffective for not raising an arguably meritorious claim that his sentence was excessive.

¶9 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, including against appellate counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him. In other words, counsel was ineffective if his performance was objectively unreasonable under prevailing professional norms and that there was 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.

¶ 10 Attempted first-degree murder, home invasion, and aggravated criminal sexual assault are Class X felonies punishable by 6 to 30 years of imprisonment. 720 ILCS 5/8-4(c)(1), 12-11(c)), 12-14(d)(1); 730 ILCS 5/5-4.5-25(a) (West 2010). Unlawful restraint is a Class 4 felony punishable by one to three years of imprisonment. 720 ILCS 5/10-3(b); 730 ILCS 5/5-4.5-45(a) (West 2010). Consecutive sentencing is mandatory for aggravated criminal sexual assault. 730 ILCS 5/5-8-4(d)(2) (West 2010).

¶ 11 A sentence within statutory limits is reviewed on an abuse of discretion standard, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). So long as the trial court does not consider incompetent evidence or improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable statutory range. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Alexander*, 239 Ill. 2d at 212-13.

¶ 12 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Id.* at 213. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor,

character, mental capacity, social environment, and habits. *Id.* at 213. The trial court does not need to expressly outline its reasoning for sentencing, and we presume that it considered all mitigating factors on the record, absent some affirmative indication to the contrary other than the sentence itself. *Perkins*, 408 Ill. App. 3d at 763. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Alexander*, 239 Ill. 2d at 214; *People v. Flores*, 404 Ill. App. 3d 155, 158-59 (2010).

¶ 13 Here, we conclude that defendant's excessive-sentence claim has no arguable basis in law as it is completely contradicted by the record. Thus, counsel's performance did not arguably fall below the objective standard of reasonableness, nor was defendant arguably prejudiced, by the absence of an excessive-sentence 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.

¶ 14 Defendant was convicted of offenses punishable by up to 30 years of imprisonment and received 25-year sentences. He also received the minimum one-year prison sentence for his unlawful restraint conviction. First and foremost, the nature and severity of the crimes amply support these sentences. As this court stated on direct appeal, this case involved an attack with murderous intent in the victim's home where "defendant and the victim had known each other for four years and shared a relationship," and where "[a]lthough the victim in this case did not suffer life-threatening injuries, *** her injuries were extensive [citations], and the defendant's lethal acts towards her were

foiled only by the fortuitous arrival of the police." *Tolliver*, No. 1-07-3466, at 7. The severity of the offenses was exacerbated by the fact that defendant committed them in clear defiance – if not mockery – of an order of protection.

¶ 15 The sentences are also well-supported by defendant's criminal history, including convictions in 1996 for aggravated battery against a woman with whom he had a relationship and in 1999 for domestic battery. Lastly, in his sentencing allocution, far from showing the slightest remorse for the instant offenses, he portrayed himself as the victim. Such a criminal history and allocution establish that the instant offenses were not anomalous or abnormal for defendant—that is a court could readily conclude that defendant has a propensity for domestic violence which he has little prospect of overcoming. Under such circumstances, an excessive-sentence claim was not of arguable merit and the court did not err in summarily dismissing defendant's post-conviction petition.

¶ 16 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 17 Affirmed.